Robert F. Schopp
Richard L. Wiener
Brian H. Bornstein
Steven L. Willborn

Mental Disorder and Criminal Law

Responsibility, Punishment and Competence

Springer

Mental Disorder and Criminal Law

Robert F. Schopp • Richard L. Wiener
Brian H. Bornstein • Steven L. Willborn
Editors

Mental Disorder and Criminal Law

Responsibility, Punishment and Competence

Springer

Editors
Robert F. Schopp
College of Law
University of Nebraska-Lincoln
1875 North 42nd Street
Lincoln, NE 68583-0902
rschopp1@unl.edu

Richard L. Wiener
Dept. of Psychology
College of Law
University of Nebraska-Lincoln
335 Burnett Hall
Lincoln, NE 68588-0308
rwiener2@unl.edu

Brian H. Bornstein
Dept. of Psychology
University of Nebraska-Lincoln
335 Burnett Hall
Lincoln, NE 68588-0308
bbornstein2@unl.edu

Steven L. Willborn
College of Law
University of Nebraska-Lincoln
42nd and Fair Streets
Lincoln, NE 68583-0902
swillborn1@unl.edu

ISBN: 978-0-387-84844-0 e-ISBN: 978-0-387-84845-7
DOI 10.1007/978-0-387-84845-7

Library of Congress Control Number: 2007934921

© Springer Science+Business Media, LLC 2009
All rights reserved. This work may not be translated or copied in whole or in part without the written permission of the publisher (Springer Science+Business Media, LLC, 233 Spring Street, New York, NY 10013, USA), except for brief excerpts in connection with reviews or scholarly analysis. Use in connection with any form of information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed is forbidden.
The use in this publication of trade names, trademarks, service marks, and similar terms, even if they are not identified as such, is not to be taken as an expression of opinion as to whether or not they are subject to proprietary rights.

Printed on acid-free paper

springer.com

Contents

Contributors

Stephen D. Hart Department of Psychology, Simon Frazer University, Vancouver, British Colombia, Canada, hart@sfu.ca

Daniel A. Krauss Department of Psychology, Claremont McKenna College, Claremont, California, USA, Dkrauss@claremontmckenna.edu

Bradley D. McAuliff Department of Psychology, California State University, Northridge, California, USA

John G. McCabe Department of Psychology, Claremont Graduate University, Claremont, California, USA

Sarah McFadden Department of Psychology, Claremont McKenna College, Claremont, California, USA

Randy K. Otto Department of Mental Health Law & Policy, Florida Mental Health Institute, University of South Florida, Tampa, Florida, USA, otto@fmhi.usf.edu

Jodi A. Quas Department of Psychology, University of California, Irvine, California, USA, jquas@uci.edu

Michael R. Quattrocchi Independent Practice, Fishers, Indiana, USA, quattrocchimr@sbcglobal.net

Mario J. Scalora Department of Psychology, University of Nebraska, Lincoln, Nebraska, USA, mscalora1@unl.edu

Robert F. Schopp College of Law, University of Nebraska, Lincoln, Nebraska, USA, rschopp1@unl.edu

Christopher Slobogin Vanderbilt University Law School Nashville, Tennessee, c.slobogin@law.vanderbilt.edu

Barbara J. Sturgis Center for Children, Families, and the Law, University of Nebraska, Lincoln, Nebraska, USA, bsturgis@ccfl.unl.edu

Bruce J. Winick School of Law, University of Miami, Coral Gables, Florida, USA, bwinick@law.miami.edu

Introduction

Robert F. Schopp

Recent Supreme Court decisions categorically preclude the application of capital punishment to convicted offenders who were below the age of eighteen or mentally retarded at the time they committed the crimes for which they were sentenced.[1] Neither opinion suggests that offenders in these categories cannot be criminally responsible for their offenses, and the *Atkins* opinion explicitly recognizes that some mentally retarded offenders can qualify as criminally responsible for their offenses.[2] In each case, part of the reasoning in support of the exemption from capital sentences purports to show that capital punishment of these offenders would serve neither the retributive nor the deterrent functions of criminal punishment.[3] Both opinions focus substantial attention on the retributive rationale, contending that these offenders lack sufficient culpability, blameworthiness, or depravity to merit capital punishment.[4] The opinions recognize that a categorical bar for all offenders below a specified age or level of intelligence might exempt some individuals who do not lack culpability sufficient to justify capital sentences. The opinions draw categorical rules, however, to avoid the risk that some individuals who lack sufficient culpability to deserve capital punishment will be misidentified as sufficiently culpable to merit capital sentences.[5]

The dissenting opinions in each case recognize that offenders in these categories have limitations that render them less culpable on average than unimpaired offenders who commit similar crimes. They reject, however, the contention that these differences justify categorical preclusion of capital sentences, rather than individualized assessment of the capacities and culpability of each offender.[6]

The majority opinions in both cases provide some reasoning to support the contention that the limitations manifested by juvenile or mentally retarded offenders render them less culpable or blameworthy than unimpaired adult offenders who commit similar offenses.[7] Neither opinion, however, provides clear reasoning that explains why this impairment necessarily renders all offenders in these categories insufficiently culpable to merit capital sentences for any crime in any circumstances but does not preclude criminal responsibility or culpability sufficient to justify any punishment other than capital punishment.

R.F. Schopp (✉)
College of Law, University of Nebraska, Lincoln, Nebraska, USA
e-mail: rschopp1@unl.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_1, © Springer Science+Business Media, LLC 2009

If these offenders are responsible for capital crimes but exempted from capital punishment, most will receive severe sentences of incarceration. The maximum noncapital sentence varies among jurisdictions, but in most jurisdictions, it is life without the possibility of parole (LWOP).[8] These opinions and these alternative sentences should lead us to ask a series of questions regarding the significance of youth or of various types of psychological impairment for criminal conviction and sentencing. What evidence and reasoning justifies the contention that criminally responsible offenders in these categories necessarily lack sufficient culpability to merit capital punishment but remain sufficiently culpable to merit LWOP?

A persuasive response to this question requires consideration of at least three more specific questions. First, what differences between capital punishment and LWOP support the conclusion that the level of culpability necessary to justify each can render certain categories of offenders necessarily insufficiently culpable to merit capital punishment although they remain sufficiently culpable to merit LWOP? Second, what functional impairment inherent in mental retardation or youth renders members of these populations categorically less deserving of severe punishment than otherwise similar offenders who are not members of these populations? Third, what is the relationship between these characteristics of mentally retarded or juvenile offenders and the relevant differences between capital punishment and LWOP that justifies categorical preclusion of capital sentences for criminally responsible members of these categories of offenders, but does not render them ineligible for LWOP?

Neither the *Atkins* nor *Simmons* opinions provide a substantial response to the first question, but each opinion makes some attempt to address the second question. The *Atkins* opinion identifies differences in the abilities to "understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[9] The opinion concludes that this impairment renders mentally retarded offenders insufficiently culpable to merit capital punishment.[10] The opinion does not address the third question, however, in that it does not explain how these forms of impairment ameliorate culpability in a manner and to a degree that necessarily precludes eligibility for capital punishment among criminally responsible offenders, regardless of the nature and circumstances of the crime. Neither does it explain why these offenders remain sufficiently culpable to merit LWOP. Similarly, the *Simmons* opinion describes juveniles as impetuous, immature, vulnerable to influence, and susceptible to immature and irresponsible behavior.[11] Once again, however, the opinion provides no clear reasoning to explain how these general characteristics categorically preclude culpability sufficient for capital punishment, regardless of the circumstances of the offense or the capacities of the specific individual offender. Neither does it explain why these juvenile offenders who cannot be sufficiently culpable to merit capital punishment remain sufficiently culpable to merit LWOP. In short, neither opinion provides any substantial attempt to address the third and central question.

One answer to this question that is suggested by some Court opinions is that "death is qualitatively different from a sentence of imprisonment, however long."[12]

A plausible defense of this response requires an account of the properties that render death different and justificatory reasoning to support the contention that these differences justify categorical preclusion of capital punishment for offenders in these categories but do not undermine the legitimacy of LWOP for those offenders. Some Supreme Court opinions contend that capital punishment is different from other sentences in severity and finality or irrevocability.[13]

Consider first the claim that capital punishment is unique in its severity. Although it might seem clear at first glance that capital punishment is a more severe punishment than incarceration, reflection can raise some question regarding that assertion. In separate analyses, Jeremy Bentham and John Stuart Mill advanced arguments regarding the justification of capital punishment based on the utilitarian principle that justified law should maximize the balance of pleasure over pain. Although they both argued as utilitarians, they differed regarding the relative severity of capital punishment and life prison sentences. In 1789, Bentham rejected capital punishment for all but the most extraordinary cases because it is "unfrugal." That is, the legitimate preventive purposes of punishment can be served by less severe sentences such as imprisonment. Thus, capital punishment costs excessive pain without providing comparable gains in pleasure.[14] In 1868, Mill accepted the utilitarian justification for punishment as promoting the balance of pleasure over pain. He endorsed capital punishment as preferable to life in prison because capital punishment appears more severe but is actually less severe than life in prison as measured by the suffering inflicted. Thus, it is at least as efficacious as life imprisonment for the preventive functions of deterrence and incapacitation, but it is less inhumane to the criminal than a sentence of life in prison.[15] In short, two writers who accept the common criteria of maximizing the utilitarian balance of pleasure over suffering disagreed about the relative severity of capital punishment and life in prison.

Consider also those offenders who "volunteer" for capital punishment by refusing to advance mitigating evidence in sentencing or by foregoing appeals. Offenders who volunteer in this sense might do so for a variety of reasons, but these decisions by these offenders suggest that some individuals in some circumstances experience extended imprisonment as more aversive than execution.[16] Some offenders make these decisions in some circumstances despite the general tendency to discount long-term effects as compared to short-term effects.

The dispute between Bentham and Mill, as well as the decisions made by these "volunteers" should lead us to question whether capital punishment is clearly a more severe sentence than LWOP if one evaluates severity as the degree of suffering inflicted on the offender. The claim here is not that LWOP is the more severe sentence. Rather, I claim only that neither is obviously more severe than the other when severity is understood as referring to the degree to which the offender experiences the sentence as aversive.

Similarly the contention that capital punishment is unique in its irrevocability may not be as clear as it initially appears. Bentham's argument against capital punishment rested partially on the premise that punishment should be remissible, but capital punishment is irrevocable. That is, the utilitarian value for the maximum balance of pleasure over pain favors punishments that are subject to remission or

compensation if it is discovered that they were misapplied. Bentham rejected capital punishment as not subject to remission through reversal or compensation.[17]

Convictions can be overturned but sentences already served cannot be retrospectively revoked. That is, a reversal by a court can officially invalidate a conviction, but it cannot negate the actual harm or suffering inflicted upon the convicted individual through execution or incarceration. If an individual is shown to be innocent after he has been convicted and incarcerated for part of a sentence of imprisonment, the harm can be ameliorated in that the conviction can be overturned and he can be released, but the years spent in prison cannot be returned to him. Similarly, the harm done to an innocent individual who is convicted of a capital crime and receives a capital sentence can be ameliorated if he is exonerated before the execution occurs. It is possible that both offenders can receive vindication or financial compensation, but neither can have that period of unjustified incarceration returned to them. Exoneration after an individual completes a sentence of imprisonment or after he is executed for a capital crime can vindicate the standing of the individual, but it cannot ameliorate the tangible deprivation of life or liberty inflicted by either sentence.

Capital sentences are less subject to amelioration than are sentences of imprisonment in those cases in which an individual is sentenced to death, executed, and then exonerated. That is, the individual who receives a capital sentence, is executed, and is exonerated after execution can not experience any benefit of amelioration. Although his exoneration might vindicate his standing to others, he cannot experience that vindication, and he can experience no improvement in quality of life through release. In contrast, the individual who receives a life sentence and is exonerated after a period of incarceration that extends beyond the time at which he would have been executed if he had received a capital sentence can have his sentence ameliorated. He can experience the vindication, and his release from prison provides the possibility of improved experience of quality of life. Insofar as the severity of the sentence is measured by the suffering inflicted on the individual, however, it remains unclear which of these two individuals suffers more severely from unjustified punishment. The exonerated individual may suffer to a lesser or greater degree than the executed individual, depending on the duration and intensity of suffering in prison and upon the quality of life he experiences after exoneration.

The risk of erroneous conviction and punishment and the probability of correction of such errors are additional considerations in evaluating the relative severity of these sentences. Mill argued that the severity of capital punishment promotes scrupulous review of evidence regarding guilt by judges and juries in making decisions regarding guilt in capital cases.[18] This premise is more persuasive in current conditions in which capital punishment receives "super due process" involving substantial procedural rigor, appellate review and attention from advocacy groups in addition to any enhancement of careful reflection upon the evidence by trial judges and juries.[19] Thus, it is reasonable to expect that if other considerations are held constant, a wrongfully convicted offender is more likely to be exonerated if he receives a capital sentence than if he receives a life sentence. Insofar as exoneration of wrongfully sentenced individuals is of central concern, the disadvantage inherent in the inability to ameliorate a capital sentence already carried out must be

balanced against the increased likelihood that a wrongful conviction will be discovered and reversed if the individual is sentenced to capital punishment, as compared to LWOP.

This balance of risk suggests the following thought experiment for each reader reflecting upon the horror of experiencing a wrongful conviction for a severe criminal offense. Imagine that you were wrongfully convicted of a capital murder and that the available evidence persuaded you that a capital sentence would place you at serious risk of execution but that it would also increase the likelihood of exoneration. Do you think that you would prefer the risk of execution and the accompanying elevated likelihood of exoneration associated with the capital sentence, or do you think that you would prefer to avoid the risk of execution at the cost of a lesser likelihood of exoneration?

It is clear that we should be very tentative in drawing any conclusions from such reflection on hypothetical situations that we have never directly experienced. The purpose of this thought experiment and of the brief discussion of the Bentham–Mill debate is only to suggest that insofar as the claim that death is different purports to address the severity and irrevocability of the suffering imposed upon the individuals sentenced or upon those wrongly sentenced, it is not obvious that capital punishment inflicts more severe suffering or greater risk of unjustified suffering than LWOP. Although this brief review of the dispute regarding severity and irrevocability addresses only the utilitarian balance of pleasure and pain, the most defensible moral or constitutional justification of capital punishment specifically or of criminal punishment generally remains contentious. Thus a comprehensive analysis would also evaluate the severity and irrevocability of punishment from the perspectives of alternate justifications as well as the reasoned arguments that support these justifications.

In summary, insofar as certain conditions, such as youth, mental retardation or other forms of impairment are plausibly understood to render some classes of offenders categorically ineligible for capital punishment without rendering them ineligible for criminal conviction and punishment, we should ask what significance these conditions should, or should not, carry for criminal sentencing in the range of noncapital sentences. A comprehensive approach to this inquiry requires the integration of a series of justificatory and empirical projects, addressing at least the following elements: (1) explicit articulation of the moral or constitutional justifications for criminal punishment; (2) application of those justifications to various forms of punishment and to the relative severity of those forms of punishment; (3) a clear empirical explanation of the type of functional impairment manifested by those who fall within the condition being examined, including an account of the homogeneity or heterogeneity of the impairment manifested by various individuals in the category; (4) the integration of (1) and (2) with (3) to derive justifications in principle for vesting significance in these conditions in setting justified criminal sentences.

These four steps address the justification in principle for applying these sentences to these categories of individuals. Concerns regarding the application in practice require at least the following additional elements: (5) an empirical inquiry regarding the capacity of sentencers to understand and apply the significance of those considerations to

individualized sentencing decisions; (6) an empirical inquiry regarding the ability of expert testimony regarding these conditions to inform sentencers in a manner that enables them to apply case-specific sentencing; (7) an empirical inquiry regarding the effects of the criminal trial and punishment process on other parties including victims, witnesses, families, prison workers, and others; (8) integration of this complex set of empirical inquiries into the justificatory argument.

This brief introduction addresses only questions regarding criminal sentencing as applied to various sentences and categories of offenders. Similar questions regarding the integration of justificatory and empirical inquiry arise in the contexts of criminal competence and responsibility. The following chapters represent a series of initial steps in an extended process of developing such integrated analyses. We do not pretend that these chapters provide a comprehensive resolution of this extended project. Rather, they represent a series of steps in an extended process intended to gradually advance our understanding of these matters and to promote ongoing programs of interdisciplinary research designed to further that understanding. These chapters are based on a series of presentations made during a symposium at the University of Nebraska during May 2007. These presentations and discussions were organized into three series of presentations and discussions, intended to draw attention to different aspects of the integrated inquiry. The first series draws attention to the variety of roles and purposes for which psychological impairment can have relevance in the criminal process, with particular attention to the potential effects of the criminal justice process on individuals other than offenders. The second and third series each focus attention on one particular area of concern that requires the integration of legal analysis with empirical research.

The first series consists of three primary chapters and reflections upon those chapters by an individual who served as a commentator during the symposium. In the first chapter, I address depression in the context of criminal responsibility, sentencing, and competence. That chapter can reasonably be understood as an extension of this introduction in that I do not purport to defend a series of proposals advocating the most defensible conclusions regarding the significance of depression at these various stages in the criminal process. Rather, I examine the potential effects of depression on the various functions served at these stages of the criminal process in order to develop a more detailed and explicit awareness of the various ways in which we need to pursue the integration of doctrinal, empirical, and justificatory analysis in pursuit of a more satisfactory understanding of these questions.

The second and third chapters examine different explicit questions regarding the intersection of mental disorder and the criminal process, but they share a common concern for the effects of the criminal justice process on those who participate in that process. In Chapter 2, Bruce J. Winick examines the significance of severe mental illness for capital sentencing. The chapter addresses both substantive and procedural questions. Substantively, this chapter endorses a standard that has been proposed by several national professional organizations for exclusion of severely mentally ill offenders from eligibility for capital punishment. The chapter emphasizes the procedural questions regarding the most defensible procedure and decision maker for the application of this exemption. The analysis contends that

the principles embodied in the Eighth Amendment converge with considerations of accuracy, cost and therapeutic jurisprudence in supporting the application through a pretrial determination by the trial judge. The therapeutic jurisprudence analysis supports this approach by considering the potential effects of the process on the judge, the jurors, the attorneys, the family members of the victim, and the defendant. This careful review of the potential effects of the process on a variety of participants in the process is a common concern of the second and third chapters.

In the third chapter, Jodi A. Quas and Bradley D. McAuliff examine a series of concerns regarding the participation in the criminal justice process of child victim–witnesses. These authors identify a series of stages and functions in the legal process that can raise important concerns regarding the ability of these children to provide accurate accounts of the relevant events and regarding the potential effects of the process on these children. The authors review an extended body of research in order to articulate more clearly the circumstances that elevate the risk of undermining the accuracy of the accounts elicited from child victim–witnesses and that exacerbate the stress placed on these children through their participation in the process. They also apply available research in order to identify a series of evidentiary and procedural alterations in the process that might reduce the risk of harm to the children and protect the integrity of the process.

In the fourth and final chapter in the first section, commentator Barbara J. Sturgis identifies a series of questions and concerns raised by earlier chapters. She draws particular attention to the need to reflect carefully upon the legal procedures and clinical practices through which various proposals might be implemented. This discussion reveals some of the complexity that can arise in the attempt to integrate substantive and procedural legal standards with clinical skills and practices. Can we perform the clinical assessments and interventions that are appropriate to a particular legal function in a manner that retains clinical efficacy without interfering with the purpose and justification of the legal process?

The second series of chapters addresses concerns raised by the use of judgments of dangerousness and of expert testimony regarding dangerousness in criminal sentencing. A substantial body of psychological research has sought to illuminate the assessment and management of risk presented by various categories of individuals in various circumstances. Research regarding risk assessment and management can inform social policy in a variety of areas, but the chapters in this section address the concerns raised by the application of psychological expertise regarding risk in the context of criminal sentencing, and particularly in the context of capital sentencing. In the fifth chapter, Christopher Slobogin discusses the use of dangerousness as sentencing consideration in the context of capital sentencing. This chapter addresses a series of objections to relying on determinations of dangerousness as a basis for capital sentencing. It recognizes the concern regarding the unreliability of determinations of dangerousness, but it extends beyond reliability to emphasize the jurisprudential concerns raised by the use of dangerousness as an aggravating factor in capital sentencing. Thus, it draws our attention to the importance of considering the relationship between the reliability of risk assessment and the specific justification for applying a more severe criminal punishment than would be applied for a

similar offense in the absence of the judgment that the individual presented a risk of additional harm. In addition, this chapter focuses attention on the significance of mental disorder for capital sentencing, and particularly upon the significance of mental disorders that might increase the risk presented by an offender while mitigating his blameworthiness for the offense.

In Chapter 6, Daniel A. Kraus, John G. McCabe, and Sarah McFadden emphasize the concerns regarding the application of expert testimony regarding risk assessment to capital sentencing. These authors address a series of concerns regarding the reliability of risk assessment as applied to capital sentencing, including the low base rates in high security prison environments, the lack of directly relevant statistical data to these circumstances, and the inability of sentencers to critically evaluate the reliability of various forms of expert testimony regarding dangerousness. They also address the interaction between these concerns regarding the sufficiency of the evidence and the tendency of jurors to focus attention on dangerousness in a manner that may lead them to underestimate the appropriate sentencing significance of relevant mitigating factors. Chapters 5 and 6 provide the reader with an opportunity to reflect upon the interaction between the jurisprudential and empirical concerns because both chapters recognize and address both categories of concern, but Chapter 5 emphasizes the jurisprudential analysis while Chapter 6 emphasizes the empirical.

In Chapter 7, Stephen D. Hart both narrows and broadens the focus of the inquiry. He narrows the focus by addressing psychopathy as a specific category of psychopathology with particular relevance to the criminal justice process. He broadens the focus by addressing that category of pathology in the context of criminal culpability and in the context of commitment. This analysis draws attention to the importance of fully recognizing the complex patterns and degrees of impairment that can occur among individuals who fall within a particular diagnostic category. It also directs attention to uncertain relationships among various forms of clinical impairment and the relevant legal functions, such as the cognitive or volitional capacities identified by legal standards designed to assess an individual's eligibility for punishment or for commitment. Thus, the chapter emphasizes the importance of synthesizing clinical categories of impairment, legal standards for particular legal purposes, and the method of clinical assessment appropriate to those forms of impairment and legal purposes.

In Chapter 8, commentator Mario J. Scalora identifies and develops a series of concerns raised by the application of clinical skills to the assessment of risk for the purpose of making determination of dangerousness in the context of capital sentencing. This chapter responds to the analyses presented in Chapters 5 and 6, but it extends beyond those chapters to consider the strengths and weaknesses of various approaches to risk assessment. It also identifies the ethical concerns raised by the participation of clinicians in the assessment of risk at various stages in the criminal process. These concerns provide a natural bridge to the chapters in the third and final section of the volume.

The third series of chapters addresses concerns raised by the participation of psychologists and related professionals in specific roles that facilitate the institution

of capital punishment. These chapters draw specific attention to the roles of individuals who participate in the evaluation and treatment of offenders who raise concerns regarding competence to face execution and to the roles of professional organizations that participate in the appellate process regarding capital punishment by filing amicus briefs. In Chapter 9, Randy K. Otto addresses the process of evaluating convicted offenders for the purpose of ascertaining competence to face execution. He begins by reviewing the central legal opinions that have addressed the constitutional requirement that condemned offenders must be competent to face execution at the time of execution. He then discusses the relevance of various forms of psychological impairment for an individual's ability to fulfill the constitutional requirement of competence. Capital punishment often draws careful attention to concerns that apply to criminal punishment more generally and that arise in the broader application of clinical evaluation to various legal functions. In this chapter, the author directs attention specifically to the significance of various types of impairment for competence to face execution, but in doing so, he illustrates the importance of carefully integrating the clinical assessment of the individual's form and severity of impairment with the legal standard applicable to a particular legal determination.

In Chapter 10, I reflect upon an amicus brief addressing the proper standard for competence to face execution as a vehicle that facilitates an examination of the appropriate role of scientific and professional organizations as amici in the context of capital punishment and as amici more generally. This chapter is primarily concerned with articulating various approaches to the role of amicus curiae and the most defensible functions of professional organizations in this role. Although this chapter directly addresses one particular amicus brief, it is intended to elicit broader reflection on the appropriate roles and limits of organizations as participants in the legal process. Ideally, such reflection would advance the abilities of the organizations to fulfill their roles in a manner that will promote the effectiveness and the integrity of the organizations and of the legal institutions. This chapter replaces a different chapter that would have been written by James W. Ellis who contributed substantially to the symposium that provided the basis for this volume. He was forced to withdraw from the written volume due to a personal emergency. We appreciate his contributions to the symposium and regret that the volume will not directly benefit from his expertise and efforts, although various chapters have benefited from his discussion during the symposium.

In Chapter 11, commentator Michael R. Quattrocchi identifies and develops a series of concerns related to those raised by the authors in Chapters 9 and 10. He draws particular attention to the tensions that can arise for members of the clinical professions who participate at various stages of the criminal justice process and in corrections institutions. Perhaps the most complex and troubling of these tensions involve the interaction of legal doctrine, professional ethics, and personal morality that occurs when members of the clinical professions must engage in the evaluation and treatment of prison inmates who are condemned to death and who manifest serious impairment requiring treatment for the dual purposes of improving their ability to adjust adaptively to life in the prison environment and of restoring competence to face execution. These concerns force us to recognize the importance of integrating

legal doctrine with psychological research and practice in a manner that promotes careful consideration regarding the integrity of the legal and professional institutions as well as regarding the potential effects on the broad range of individuals who participate in those institutions.

These chapters reflect the presentations and discussion that occurred at the Spring 2007 Program of Excellence Conference at University of Nebraska at Lincoln. This was the third such program organized by the Interdisciplinary Law and Psychology Program that pursues integration of Legal and Psychological scholarship and graduate education. We are grateful to a number of individuals and units within the University of Nebraska for facilitating this series of symposia. These include the University of Nebraska for the Program of Excellence Grant that enabled us to pursue these symposia, the College of Law, and the Department of Psychology. In addition to the presenters and commentators who participated in the conference and contributed the chapters discussed above, several individuals merit recognition. These include David Hanson (Chair of the Department of Psycholgy) and Steven Willborn (Dean of the College of Law). Steve Willborn also served as co-editor of this volume, along with Richard L. Wiener and Brian H. Bornstein. Finally, graduate student Cindy Laub provided organizational and planning skills of such an advanced degree that she was able to coordinate a program full of professors!

Notes

1. Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).
2. Atkins, 536 U.S. at 318.
3. Simmons, 543 U.S. at 571–3; Atkins, 536 U.S. at 318–20.
4. Simmons, 543 U.S. at 568–71; Atkins, 536 U.S. at 319.
5. Simmons, 543 U.S. at 572–5; Atkins, 536 U.S. at 320–1.
6. Simmons, 543 U.S. at 598–604 (O'Connor, J., dissenting), 618–22 (Scalia, J., dissenting); Atkins, 536 U.S. at 350–51 (Scalia, J., dissenting).
7. Simmons, 543 U.S. at 568–71; Atkins, 536 U.S. at 318–9.
8. http://www.deathpenaltyinfo.org/
9. Atkins, 536 U.S. at 318.
10. *Id*. at 319.
11. Simmons, 543 U.S. at 568–70.
12. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion).
13. *Id.*; Furman v. Georgia, 408 U.S. 238, 286–90 (1972) (Brennan, J., concurring).
14. Jeremy Bentham, The Principles of Morals and Legislation 194–7 (1789).
15. John Stuart Mill, *Speech in Favor of Capital Punishment* 1868 *in*, Philosophical Perspectives on Punishment 271, 272–3 (Gertrude Ezorsky ed., 1972).
16. Whitmore v. Arkansas, 495 U.S. 149 (1990); Gilmore v. Utah, 429 U.S. 1012 (1976).
17. Bentham, *supra* note 14, at 196–7.
18. Mill, *supra* note 15, at 277.
19. Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. Cal. L. Rev.1143 (1980).

Part I
Mental Disorder and the Criminal Process

Chapter 1
Depression and the Criminal Law: Integrating Doctrinal, Empirical, and Justificatory Analysis

Robert F. Schopp

1.1 Introduction

According to public accounts, Andrea Yates drowned her five children, and the jury in her first trial rejected her insanity defense. The same jury reportedly rejected capital punishment after 35 minutes of deliberation.[1] One might hypothesize any number of explanations for these decisions that would interpret them as the result of misunderstandings of or deviations from the applicable law. The jury might have misunderstood the relevant instructions, for example, or there might have been a compromise regarding a guilty verdict and a noncapital sentence during the guilt-phase deliberations. For the purpose of this chapter, I set aside these concerns and take the guilty verdict and noncapital sentence as indicating that the first jury interpreted her depression as insufficient impairment to preclude criminal responsibility but as sufficiently mitigating to preclude a capital sentence for the murder of her children.

Contrast these apparent conclusions to those arrived at in the case of John Joubert, who was executed several years ago for the murder of two children.[2] His execution elicited relatively little controversy, in contrast to an execution approximately a year earlier that was subject to heated debate, demonstrations, and controversy.[3] It appeared that there was relatively little opposition to Joubert's execution because he murdered two children. During informal conversation, he was characterized as "a poster boy for capital punishment."

Consider the contrast between the sentences applied to Joubert and Yates for murdering children. Perhaps the jurors who sentenced Yates accepted the premise that a mother would not kill her children unless she was "sick." Even if they considered her to be "sick," however, they apparently did not conclude that her sickness precluded criminal responsibility. These events should lead us to ponder the following question. What is the nature and severity of the impairment involved in depression such that a jury might conclude that it does not undermine the capacities

R.F. Schopp (✉)
College of Law, University of Nebraska, Lincoln, Nebraska, USA
e-mail: rschopp1@unl.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_2, © Springer Science+Business Media, LLC 2009

necessary for criminal responsibility but that it mitigates blameworthiness to the degree that it outweighs the aggravating effect of the premeditated murder of five children?

Compare Moran, whose depression was sufficient to justify medication during trial but was not sufficient to render him incompetent to proceed at trial or to "volunteer" for capital punishment by waiving his rights to counsel and to present mitigating evidence at sentencing.[4] Consider also one common standard for competence to face execution (CFE) that seems to require only awareness of the pending execution and the reason for it.[5] If that remains the standard for CFE, it seems that depression would not render a convicted offender ineligible for execution unless that individual manifested depression involving psychotic disturbance of reality testing regarding the approaching execution.

Thus, it seems that serious depression can be consistent with criminal responsibility, competence to volunteer for capital punishment by waiving trial rights, and CFE, yet it can be sufficiently mitigating to override the aggravating effect of murdering five children. This should lead us to seek more explicit explanations regarding the nature of the impairment involved in depression; regarding the most defensible interpretation of and justification for the standards for criminal responsibility, blameworthiness for sentencing, competence to proceed, and CFE; and regarding the relationship between this impairment and the justifications for these standards. I do not suggest here that depression or any other diagnostic category should have the same significance for these various legal purposes. Rather, I use depression to examine the manner in which the analysis of the significance of psychopathology for various legal purposes should focus on specific types of functional impairment and on the relationship between an individual's functional impairment and the applicable legal standard as interpreted and applied in a manner that reflects the justification for that standard.

Depression provides a category of psychopathology that illustrates the significance and difficulty of this inquiry because individuals who suffer depression vary substantially in the types and severity of impairment they experience. Thus, it provides an opportunity to examine the different types of functional impairment manifested by these individuals and the appropriate significance of these forms of impairment for various legal purposes. Expert psychological testimony can provide descriptive and explanatory information regarding a particular individual's psychological disorder and the likely effects of that disorder on his conduct and on his ability to perform various psychological functions. Accurate interpretation of the significance of that information for any particular legal purpose requires integration of that testimony with the applicable legal standard as interpreted and applied in a manner designed to serve the purpose and justification for that standard.

This task raises a series of questions regarding the application of psychological expertise to the legal decisions at issue. First, what form and range of expert testimony is relevant to the significance of a specific individual's depressive impairment in each legal context? Second, what type of psychological research would inform our understanding of the specific types of depressive impairment that might have significance for various purposes in the criminal process? Relevant research

might advance our understanding of at least the following questions. What types of functional impairment are manifested by various individuals who suffer depression? What are the effects of that impairment on psychological functions relevant to various legal purposes and standards? To what extent and in what manner are jurors or judges able to understand and apply information regarding depression to legal purposes and standards? What form and content of expert psychological testimony can accurately describe and explain the impairment suffered by a particular depressed individual in a manner that facilitates the ability of jurors or judges to accurately apply that information to applicable legal standards? To what extent can various legal procedures or dispositions address concerns raised by the impairment of the defendant?

This chapter represents an initial attempt to address some of these questions. It is intended to advance our understanding of the appropriate significance of depression for various purposes in the process of criminal adjudication and punishment. It is also intended, however, to address these questions regarding depression in a manner that facilitates our ability to develop a more general framework for examining the significance of various forms of psychopathology for criminal responsibility, sentencing, competence, and punishment. The analysis proceeds in the following manner. Section 1.2 provides a brief exposition of depression. Section 1.3 addresses the significance of depression for criminal responsibility. Section 1.4 examines the significance of depression for criminal sentencing. Section 1.5 addresses depression and competence to proceed in the criminal process. Section 1.6 examines the significance of depression for CFE. Section 1.7 proposes an initial outline of a general conceptual framework for the analysis of the significance of various types of psychological impairment for various purposes in the criminal process. Section 1.8 considers the application of psychological expertise, including testimony and research, to these components of the criminal process. Finally, Section 1.9 concludes the project.

1.2 Depression

Clinical depression can occur along a broad range of severity. One widely adopted diagnostic framework separates relatively less severe but chronic depression as dysthymic disorder from the relatively more severe form of depression as major depressive disorder.[6] A major depressive episode involves a period of at least 2 weeks during which the individual experiences an array of symptoms, such as depressed mood, loss of pleasure or interest in most activities, disturbance of sleep, loss of weight, feelings of worthlessness and hopelessness, impaired concentration, and thoughts of suicide or death.[7]

Major depressive episodes may or may not include psychotic features, including hallucinations or delusions that reflect the depressive themes such as guilt, hopelessness, or worthlessness. Although some major depressive episodes involve psychotic features, other episodes can be severe in the absence of such features.[8] Some symptoms,

such as depressed mood, impaired concentration, pessimism, hopelessness, anhedonia,[9] or the perception that nothing is important, occur in both psychotic and nonpsychotic depressions, but they can differ in severity to a degree that might have significance for various legal purposes. Some severe depressive episodes involve stupor as "a state of lethargy and unresponsiveness with immobility and mutism."[10] Some sources describe this stuporous state as involving impairment of consciousness. Impaired consciousness can have substantial significance for various purposes that require awareness of events, circumstances, or potential consequences. During periods of unresponsive depressive stupor, however, the lack of responsiveness can render it very difficult to ascertain with any confidence the precise nature and degree of impairment in consciousness, cognition, and perception.[11]

Some symptoms of depression in their severe form appear to blur the distinction between psychotic and nonpsychotic depressions. Consider, for example, the following types of impairment. Although unimpaired individuals can vary substantially in the degree to which they tend toward optimistic or pessimistic assessments of themselves and their circumstances, some depressed persons can experience pessimism to the degree that it produces an unrealistic sense of worthlessness and hopelessness.[12] Insofar as severe depressive pessimism distorts an individual's ability to make at least minimally realistic assessments of himself, his situation, and his potential to improve his situation, it becomes difficult to clearly differentiate pessimism from psychotic distortion of the individual's ability to recognize reality and his relationship to that reality.

Seriously depressed individuals can blur the boundary between their own experience and their understanding of the world. One author describes, for example, a depressed mother who appears unable to distinguish between her own chronic misery and the current or likely future experience of her children.[13] Insofar as she was unable to recognize that her children might not experience the severe depression that marked her own life, her ability to realistically recognize and evaluate their circumstances and potential may have been distorted in a manner that constitutes or approximates psychotic distortion of her ability to distinguish her own experience and that of others.

A depressed person in an unresponsive stupor may or may not experience hallucinations or delusions, but even if that person does not experience these familiar forms of perceptual or cognitive distortion of reality, the depressive stupor might involve limited awareness of the immediate circumstances or severe depressive pessimism that distorts the individual's ability to accurately assess his capacity to respond effectively. Thus, the depressive stupor might prevent that person from responding realistically to circumstances.

In short, depression is a disorder of mood that can vary markedly in the type and severity of functional impairment. Major depression can include psychotic disturbance of perceptual and cognitive processes that ordinarily enable one to accurately recognize, reflect upon, and adaptively respond to reality. Serious depression that does not include clearly psychotic distortion of perception or cognition can involve severe pessimism, anhedonia, or a sense of hopelessness or worthlessness that arguably blurs the boundary between nonpsychotic and psychotic dysfunction.

1.3 Criminal Responsibility as Accountability

1.3.1 Common Standards

The most common standards for the insanity defense have been derived from the traditional M'Naghten standard or the alternative standard proposed in the Model Penal Code (MPC). Traditional M'Naghten standards exculpate offenders who commit offenses while "…laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that what he was doing was wrong."[14] The MPC advocates a standard that exculpates an offender if "…as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."[15]

These standards share a common emphasis on cognition phrased as knowledge or appreciation of wrongfulness. The MPC's substitution of appreciation for knowledge and addition of a volitional clause are designed to expand the traditional cognitive standards. Unfortunately, it has been very difficult to provide a clear interpretation of these standards such that they are understandably distinct from the traditional knowledge standards and provide defensible grounds for exculpation. The MPC comments suggest that these modifications are appropriate to make the standards applicable to affective disorders, but provide no clear explanation or justification for this interpretation.[16]

One alternative formulation shifts emphasis from knowledge or ability to control to the capacities of comprehension and reasoning that enable the actor to participate in the public jurisdiction as a minimally competent practical reasoner. This approach addresses criminal responsibility as a formulation of retributive competence that addresses the capacities needed to qualify for standing as a responsible agent in the institutions of criminal law that order the public domain of a liberal society.[17]

1.3.2 Two Offenders

Consider two hypothetical offenders who suffered serious depression at the time of their offenses. Alice experienced major depression with psychosis. The hallucinatory voice of God told her that she must kill her children tonight because Satan was taking control of the earth. If she killed them before sunrise, they would spend eternity in heaven with God, but if she did not, they would have to endure Satan's domination on earth and then spend eternity in hell after they died. Assuming that the fact finder found the evidence of Alice's condition persuasive and applied the law as written, Alice provides a reasonably clear case for the insanity defense under each of the three approaches discussed. Her major depression with psychosis fulfills the requirement of serious impairment. Her psychotic distortion of reality testing

included the hallucinatory voice of God and delusional distortion of her ability to reason competently about her experience and about her children's interests. This severe impairment prevented her from knowing or appreciating the wrongfulness of her conduct. If there is a substantive difference between the knowledge and appreciation standards, it does not seem that this difference would generate different interpretations for Alice. She believed that killing her children was necessary to prevent their capture by Satan, and she experienced the sadness, fear, and sense of obligation associated with that belief. Similarly, her hallucinatory and delusional distortions of perception and cognition prevent her from directing her conduct through a minimally competent process of practical reasoning. Thus, she lacked the minimal retributive competence needed to participate as an accountable agent in the public domain ordered by institutions of criminal law designed to apply to those who possess these minimal capacities.[18]

Alice provides a relatively clear case under these standards, although one might raise some concerns under some interpretations. If the M'Naghten or MPC standards are interpreted to require lack of knowledge or appreciation of criminality, for example, one might argue that although Alice believed that she was acting at God's behest, she knew that her conduct was forbidden by law.

Compare Alice to Betty. Betty experienced major depression with periods of stupor. She did not experience hallucinations, delusions, or other distortions of perception or cognition ordinarily understood as psychotic impairment of her ability to recognize and respond to reality. She experienced life as a horrible ordeal of constant sadness with no hope that it would ever improve. Her mother had suffered similar depression, and Betty believed that her children were doomed to experience the same quality of life. She also believed, however, that if she killed them, they would spend eternity in heaven with God. She was certain that if she killed them, she would have to spend eternity in hell for committing such a terrible sin, but she decided that she must do so. She killed them to spare them the agony of life.

Neither the M'Naghten nor the MPC standards clearly apply to Betty. She was aware that killing her children was contrary to law, and she believed that she would have to spend eternity in hell precisely because she believed that she was committing a terrible sin. One might reasonably think that she did not appreciate that her conduct was wrongful because she believed it was necessary to protect her children from misery. Once again, however, one needs a clear articulation of what it means to appreciate wrongfulness such that appreciation differs from knowledge and provides a justified basis for exculpation. An ordinary person might be inclined to say that "she didn't really know that it was wrong." As with appreciation, it is very difficult to explain the distinction between knowing and "really knowing," but this ordinary person might be raising an intuitive point that merits careful reflection. Arguably, Betty knew that her conduct was forbidden by law and by widely accepted standards of morality. In addition, she may well have endorsed those standards of morality. She also believed, however, that she had a moral obligation to her children to spare them the misery of life. Thus, Betty appears to have held two directly contradictory beliefs about her moral obligations in these circumstances.

Betty's apparently contradictory beliefs draw attention to at least three lines of inquiry that need further clarification. First, we need clarification of the various types of impairment Betty manifests. What exactly does she understand about the circumstances her children encounter? How does she understand her apparent moral obligations to protect them from harm and from the misery of life? Ordinary people sometimes encounter difficult circumstances in which they believe that they have conflicting moral obligations. They must select the most pressing obligation, but it is not uncommon for individuals in these circumstances to believe and feel that nothing they do will be unambiguously right. These individuals might well conclude that they must do something that they consider wrong because the only alternatives would be even worse. Thus, they may conclude that they must choose the lesser evil. These unimpaired individuals might regret and feel guilty about their conduct while simultaneously believing that they were morally obliged to perform it. Does Betty subjectively experience her circumstances in this manner, or does she experience something substantially different?

Second, we must consider once more the ways in which the distinction between psychotic and nonpsychotic disorders can be blurred. Can we draw a clear distinction between the conventional religious belief that innocent children who die will join God in heaven and Betty's belief that by killing her children, she can send them to heaven and spare them the agony of life? Does her experience of life and deep pessimism about any hope for improvement for herself or her children differ from ordinary pessimism in a manner that constitutes a distortion of reality relatedness and of her ability to direct her conduct as a minimally competent practical reasoner? If her depression does not prevent her from knowing that her conduct is wrongful but does prevent her from reasoning in a minimally competent manner regarding this knowledge in the context of her experience, then the traditional ignorance standards might generate different conclusions than the retributive competence approach. In order to make reasoned judgments regarding whether these approaches generate different conclusions and regarding which of these approaches is more defensible, we need more complete understanding of the impairment Betty suffers.

Third, if further study of Betty's condition generated different conclusions under the ignorance and retributive competence approaches, we must return once more to the underlying justificatory questions. What justifies exculpating some people who suffer major distortion of psychological process, and what standard most closely comports with that justification? Better understanding of the functional impairment that Betty and other depressed individuals experience might support the conclusion that different standards for the insanity defense would generate different verdicts. Such understanding of the nature of the impairment can also inform the selection of the most defensible standard, but it cannot be sufficient to justify selection of any particular standard. A fully persuasive justification for a particular standard and for a particular conclusion regarding Betty must integrate understanding of the impairment with the justification for the exculpation.

In short, Alice and Betty illustrate the need to further pursue two interrelated lines of inquiry. Empirically, we need more detailed description of the depressive symptoms, such as depressed mood, pessimism, anhedonia, and depressive stupor,

as these symptoms are experienced by seriously depressed people. We also need more precise explanation regarding the manner in which these symptoms influence decision making and conduct. This empirical description and explanation must be integrated into the justificatory analysis in order to derive the most defensible standards of exculpation and the most justified interpretation of those standards in difficult cases.

1.4 Criminal Sentencing, Blameworthiness, and Mitigation

1.4.1 Criminal Responsibility and Blameworthiness for Sentencing

The insanity defense is designed to identify those individuals who suffer impairment of psychological capacities sufficient to undermine their status as accountable agents who are eligible for the condemnation inherent in criminal punishment. The defense applies only to those whose impairment deprives them of criminal responsibility as a threshold measure of accountability for the crime. The various standards represent attempts to articulate the minimal capacities that are sufficient to render offenders eligible for criminal conviction and punishment. Although the "ignorance" standards emphasize the failure to know or appreciate that one's conduct is wrongful, they do not exculpate simply on the basis of ignorance. These standards exculpate only those whose inability to know or appreciate that their conduct is wrongful is a product of impaired capacities phrased as a disease of the mind, a mental disease or defect, or some similar phrase.[19] Thus, they address ignorance of wrongfulness that is attributable to distortion of the psychological processes involved in acquiring knowledge of wrongfulness. These "ignorance" standards converge with the approach that frames criminal responsibility in terms of adequate capacities of practical reasoning as retributive competence insofar as both justify exculpation of offenders who engage in criminal behavior through the exercise of significantly distorted psychological processes.

These two approaches differ in that the ignorance standards articulate a criterion of exculpation in terms of the effect of this distortion of psychological processes on the offender's awareness of wrongfulness, but they provide no clear account of the relevant distortions of process. The impaired capacity approach, in contrast, identifies a minimally adequate process of practical reasoning that renders an individual retributively competent. It exculpates those who lacked the capacity to decide to engage in the criminal conduct through that minimally adequate process.[20]

The common core of these approaches in substantial impairment of psychological capacities reflects the foundation of criminal liability responsibility in capacity responsibility.[21] That is, both approaches appeal to the underlying premise that minimally competent adult human beings are appropriately subject to the constraints and punishments of the criminal law insofar as they possess the capacities that enable them to participate in a rule-based institution of criminal law as accountable

agents. These individuals are held accountable for criminal conduct and subject to the expression of condemnation inherent in criminal punishment insofar as they exercise those capacities in a manner that justifies that condemnation. That condemnation is not justified, however, when an individual commits an offense while suffering impairment that prevents him from exercising those capacities in an at least minimally competent manner.[22]

While criminal responsibility as the capacities that render one criminally accountable constitutes a necessary condition for eligibility for the condemnation inherent in criminal punishment, assessment of blameworthiness in order to determine the appropriate severity of criminal sentencing requires consideration of a more comprehensive set of morally relevant factors. This more comprehensive assessment determines the degree of condemnation that is justifiably expressed toward this offender for this offense. A justified criminal sentence must reflect this justified expression of condemnation.

The Supreme Court's Eighth Amendment opinions in the context of capital punishment require that the sentencer be able to consider and give effect to a complex set of mitigating circumstances involving the character and record of the offender and the circumstances of the offense.[23] This more comprehensive assessment determines the defensible form and degree of punishment. These relevant sentencing considerations reflect the importance of applying criminal punishment that inflicts harsh treatment and expresses condemnation appropriate to this offender's blameworthiness for his offense.[24] Recent Supreme Court opinions emphasize the importance of blameworthiness or moral responsibility for the purpose of capital sentencing under the Eighth Amendment.[25]

1.4.2 Mitigation in Sentencing

The sections of the MPC that address capital sentencing provide a list of statutory mitigating factors that exemplify the type of considerations that are often thought to reduce the appropriate severity of punishment and degree of condemnation for offenses for which the offender is responsible. Some of these mitigating factors address psychological conditions relevant to the offense. One mitigating factor addresses circumstances in which, "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."[26] The commentary explicitly discusses such disturbance as conditions that render the offender less blameworthy than an offender who commits a similar offense in the absence of such disturbance. The commentary addresses imperfect provocation in that it refers to extreme mental or emotional disturbance in response to conduct by another that is not sufficient to reduce murder to manslaughter but does elicit strong mental or emotional disturbance from the offender.[27] Some sentencers might apply it more broadly to offenders who manifest disturbance for reasons other than in response to such provocation. Although the commentary addresses this imperfect provocation interpretation, it does not explicitly limit this factor to this interpretation. Rather,

it emphasizes emotional disturbance or defect as relevant to the blameworthiness of the offender.[28] The commentary also discusses this factor in combination with another mitigating factor as approximating the diminished or partial responsibility doctrine. According to this interpretation, "[t]he underlying point is that emotional disturbance or defect is relevant to the blameworthiness of the actor."[29]

The other mitigating factor referred to in these passages represents a quasi insanity provision in that it addresses impairment in the capacities to appreciate the wrongfulness of one's conduct or to conform to the requirements of law that reduce blameworthiness although not to the degree that precludes criminal responsibility.[30] These two mitigating factors arguably represent the general principle that sentencing severity should reflect the blameworthiness of the offender and the premise that either impairment of capacities or emotional distress can reduce the offender's blameworthiness, although it is not of a type or degree that precludes criminal responsibility.

1.4.3 Depression as Mitigation

Consider depression as a type of psychopathology that can either impair the offender's capacities of responsible agency or serve as a source of emotional distress that renders it very difficult for the offender to bring those capacities of responsible agency to bear on the decision to engage in the criminal conduct. Depression with psychotic distortion of perception or reasoning can impair the capacities of responsible agency to the degree that those who suffer this impairment no longer possess the minimal capacities needed to qualify as accountable agents. Nonpsychotic depressive symptoms such as difficulty with concentration, unrealistic pessimism, stuporous lack of responsiveness, and the depressed mother's difficulty in differentiating between her own misery and the experience of her children or in recognizing that their lives might not be as miserable as her own can make it very difficult for the depressed person to reason realistically about decisions to engage in various forms of conduct.

The depressive symptoms that blur the boundary between psychotic and nonpsychotic impairment can take on particular cogency when a judge or jury must differentiate between impairment that mitigates blameworthiness for sentencing and impairment that precludes responsibility.[31] First, it becomes difficult to articulate a clear boundary between distortion of reality testing that undermines criminal responsibility and extreme pessimism that arguably mitigates because it renders it very difficult to conform to law. Second, it is difficult to articulate a clear distinction between delusions as beliefs that are not grounded in reason and religious beliefs based on faith. Consider, for example, the severely depressed mother's belief that if she kills her children, they will escape the misery of life and spend eternity with God in heaven. One might interpret this belief as a product of religious faith that God will take innocent children into heaven, of pathological distortion of her ability to assess the relevant circumstances, or of some combination of religious

belief and depressive pessimism. A reasonable assessment of the exculpatory or mitigating significance of these beliefs rests partially on a more precise explanation of the relationship between depressive impairment and religious faith in forming, maintaining, and applying these beliefs. It also rests partially on a clear explanation and justification for attributing differential exculpatory or mitigating effect to beliefs reflecting psychological impairment than we attribute similar beliefs based on religious faith. Third, these difficult matters of interpretation illustrate a more general difficulty in articulating clear boundaries between lack of criminal responsibility due to severely impaired capacities and reduced blameworthiness due to less severely impaired capacities or due to severe distress that renders it very difficult to apply those capacities.

These blurred boundaries require reflection on two interrelated sets of questions. The first set addresses empirical questions including the following. What are the precise forms and degrees of functional impairment associated with various categories of psychopathology, and in what manner does this impairment influence decision making and conduct? Consider, for example, distortions of reality testing such as hallucinations and delusions as compared to extreme depressive pessimism or depressive stupor. Can we provide a reasonably precise explanation of the impairment involved in each of these conditions and of the relationships among them? If we can provide such an explanation, can we provide a reasonably accurate determination regarding which of these conditions a particular offender experienced at the time of the offense and a reasonably reliable explanation regarding the manner in which that condition influenced the individual's decision to engage in the criminal conduct at issue?

The second set of questions addresses the justifications for granting exculpatory or mitigating significance to various types of impairment. Must those who lack responsibility due to impaired capacities manifest qualitatively different types of impairment than those who remain responsible but are less blameworthy, or can a more severe degree of a similar type of impairment suffice to render one not responsible? Although this is a justificatory question, descriptive and explanatory evidence regarding the nature and effects of various types of impairment can inform this judgment.

Consider, for example, two nurses who are charged with reckless homicide for taking no action in response to medical emergencies on the wards to which they are assigned. The first nurse suffers major depression with psychotic features. He does not respond to a patient experiencing a medical emergency because hallucinatory voices from God order him to refrain from intervening because God has decided that it is time for the patient to come to heaven. Compare a seriously depressed nurse who suffers severe anhedonia, pessimism, and hopelessness, but does not suffer psychotic hallucinations or delusions. He lies in a bed and takes no action in response to a similar emergency on the hospital ward. "It's hopeless; nothing that I do works; I'm worthless."

The first nurse suffers psychotic distortions of comprehension and reasoning that prevent him from knowing that his conduct is wrongful and from directing his conduct through the exercise of minimally adequate capacities of responsible

agency. The second nurse does not experience these traditional psychotic distortions. Rather, the second nurse experiences such extreme pessimism that he believes that nothing he does can succeed. It is difficult to explain, however, precisely how this pessimism differs from a delusional distortion of his ability to recognize and reason about reality. Clear justification for treating this second nurse as responsible but as less blameworthy than an unimpaired individual or as not responsible requires a more precise understanding of the different types of impairment involved and of the manner in which each type of impairment influences decisions to refrain from acting. That explanation then requires persuasive justificatory reasoning regarding the significance of each type of impairment as exculpatory or mitigating.

Compare the second nurse to a third nurse who responds to an emergency on the ward by testing the patient with a clinically appropriate instrument. The instrument indicates that the patient has died, and the nurse takes no further action. It is later discovered that the instrument malfunctioned and that intervention by the nurse might have saved the patient's life. This third nurse would not be responsible for any criminal offense because his failure to intervene in circumstances in which he had an obligation to act was a result of misinformation for which he was not responsible. If the second nurse's depressive pessimism is understood as an honest failure to recognize that any intervention by him could benefit the patient, it is difficult to explain what differentiates him from that third nurse who is clearly neither responsible for any crime nor blameworthy. If, however, these two nurses seem to differ in some significant way relevant to responsibility or blameworthiness, we need a more explicit explanation of depressive pessimism and hopelessness as well as an integration of that explanation with the relevant reasoning that justifies exculpation or mitigation.[32]

A separate mitigating factor reduces the appropriate punishment for those who commit the offense while believing that the conduct is morally justified. The commentary suggests the example of an offender who kills from a humane motive, such as euthanasia intended to end the misery of a helpless invalid.[33] This mitigating factor differs from the mitigating factor modeled on the insanity defense in that it directly addresses the humane motive, rather than impaired capacities. It does not explicitly preclude consideration, however, of individuals who act upon humane motives in circumstances in which impaired capacities distort their ability to understand the circumstances or to accurately estimate the likely effects of their conduct on the outcomes. Thus, the mitigating effect of impaired capacities might converge with the mitigating effect of humane motive if an individual's impairment causes him to misunderstand circumstances, and he acts on that misunderstanding from humane motive.

Arguably, this mitigating factor addresses circumstances analogous to the nonpsychotic depressive mother who kills her children to protect them from the misery of life. As in the case of the second depressed nurse, the boundary between pessimism and distortion of reality testing, and thus, between nonpsychotic and psychotic depression, is unclear. In some cases of filicide, it appears that the depressed mother does not differentiate her experience of life as severe misery from the experience of others, including her children, that may be of a different quality.[34] In such

cases, depression may so dominate the individual's experience of life that she cannot realistically recognize the potential for her children to experience life in a different manner. If she kills the children from a sense of obligation to them comparable to the spouse who ends the life of a spouse on life support out of a sense of obligation to that spouse, the plausibly mitigating effects of her depression seem to rest on the combined effect of distorted perception of their circumstances and humane consideration for them.

The difficulty in clearly articulating the basis for this attribution of reduced blameworthiness arguably reflects the intersection of the empirical and justificatory inquiries stated previously. Empirically, we need a more precise explanation of the impairment involved in depressive pessimism and of the effect of that pessimism on the individual's ability to accurately perceive and assess current circumstances and the likely effect of various interventions. Additionally, we need a more precise account of blameworthiness that justifies attribution of mitigating force to impaired capacities, to humane motivation, and to the relationship between these two sources when they interact. Finally, we need careful integration of these empirical and justificatory inquiries.

This brief review of relevant mitigating factors listed by the MPC suggests that various forms of psychopathology can undermine blameworthiness for the purpose of criminal punishment in at least three distinct ways. First, impairment can render an offender not criminally responsible for an offense, and thus, not appropriately subject to the condemnation inherent in any criminal punishment for that offense. Consider, for example, Alice who killed her children in response to hallucinatory orders from God in order to spare them eternity under Satan's domination.[35] Her psychosis prevents her from knowing that her conduct is wrongful and from exercising minimally adequate processes of practical reasoning regarding this conduct. Thus, she is not criminally responsible for her conduct and does not qualify for the condemnation inherent in criminal punishment.

Second, pathology can impair capacities of responsible agency in a manner or to a degree that is not sufficient to preclude criminal responsibility but that reduces the accountable offender's blameworthiness for the offense.[36] Although the offender retained minimally adequate capacities to qualify as criminally responsible, his minimal capacities require exceptional discipline, concentration, or effort to bring them to bear under stress.

Consider, for example, an individual who has been consistently diagnosed since childhood as suffering mild mental retardation and attention deficit/hyperactivity disorder.[37] He currently works on a factory assembly line, where one of his coworkers frequently makes fun of him and calls him names. One day, he fails to adequately perform his task, and that coworker curses at him and calls him "retard." He attacks the coworker in a state of rage, knocking the coworker to the ground and repeatedly kicking him in the head.

This offender is convicted of murder, but under a recent Supreme Court decision, he is not eligible for capital punishment due to his diagnosis of mental retardation.[38] Although the court's reasoning was not entirely clear, it explicitly reasoned that capital punishment should apply only to the most culpable offenders for the

most serious crimes. The court reasoned further that mentally retarded murderers are less culpable than average murderers and, thus, that they are not among those most deserving of death.[39] Arguably, this offender is less blameworthy than unimpaired offenders because his minimally adequate capacities of responsible agency, in combination with his susceptibility to frustration and rage, render it very difficult for him to discipline his conduct through the exercise of his minimally adequate capacities. The *Atkins* opinion did not address noncapital sentencing. Insofar as the opinion is correct in contending that the mentally retarded offenders' impairment necessarily or ordinarily renders them less blameworthy than unimpaired offenders who commit similar crimes, their impairment arguably renders them less blameworthy than unimpaired offenders for noncapital offenses as well as for capital offenses. Thus, insofar as criminal sentencing generally should be proportionate to blameworthiness, the reasoning in *Atkins* apparently supports the contention that mental retardation reduces blameworthiness for the purpose of criminal sentencing in noncapital as well as in capital cases.

Recall Betty whose depression preoccupies her with intense sadness, pessimism, and hopelessness. That overwhelming affective experience renders it very difficulty for her to concentrate her capacities of comprehension and reasoning on decision making. Insofar as Betty's depressive hopelessness interferes with her ability to concentrate her capacities for comprehension and reasoning, it undermines her ability to realistically separate her children's experience from her own misery and to assess their ability to experience positive lives. Thus, she might kill them from a misguided sense of hopelessness regarding their experience of life, and this inability to separate their experience from her own reflects at least partially her impaired ability to apply her capacities of practical reasoning to this decision. A reasonable sentencer might conclude that Betty's impairment does not provide a legal excuse. That reasonable sentencer might also conclude, however, that she resembles the mentally retarded offender discussed above in that her impairment rendered it extremely difficult for her to bring her capacities of responsible agency to bear on the decision to commit the crime for which she is to be sentenced. Thus, the sentencer might conclude that Betty deserves a less severe sentence than an unimpaired offender who commits a similar offense in similar circumstances.

Although Betty resembles the mentally retarded offender insofar as both manifest impairment that renders it very difficult for them to apply adequate capacities of practical reasoning under stress, she differs from that offender in that she acted from humane motive. Insofar as psychological disorder involves emotional responsiveness that distorts the individual's ability to assess the current experiences of others or the likely effects on those experiences of various actions, it might reduce blameworthiness for engaging in harmful conduct with a distorted expectation of the likely effect of that conduct on others. A reasonable sentencer might conclude that Betty's depression did not preclude criminal responsibility but did render her less blameworthy than an unimpaired offender who engaged in similar conduct because her depression led her to markedly overestimate her children's experience of misery and to markedly underestimate their potential to experience satisfying

lives. Thus, Betty acted from the humane motive to spare them lives of misery and from an honest belief that she must kill them to achieve this humane goal.[40]

Notice that Betty's depression might reduce her blameworthiness in either or both of two distinct but related ways. First, it might hinder her ability to bring the ordinary capacities of concentration, comprehension, and reasoning to bear on the situation. Thus, she might have acted with limited or distorted reflection. Second, to the degree that she was able to reflect, her deep pessimism and anhedonia might have distorted her assessment of the misery that her children experienced, leading her to conclude that continued life would subject them to severe and extended agony. Thus, she acted from the humane motive to relieve them of the burden of this life.

In short, the significance of impairment for the purpose of criminal sentencing directly reflects the expressive function of criminal punishment as societal condemnation of culpable wrongdoing in proportion to the offender's blameworthiness for the offense. Mitigating factors identify various ways in which impairment can render one less blameworthy and hence decrease the appropriate level of condemnation. Thus, accurate assessment of impairment for the purpose of criminal sentencing requires accurate understanding of: the nature of that impairment, the effects of that impairment on the psychological operations relevant to the offender's offense, the applicable standards of blameworthiness, and the significance of the offender's impairment for those standards of blameworthiness. Although sentencers might ordinarily rely heavily on experiential and intuitive assessment of the various factors relevant to blameworthiness, clarification of the empirical and justificatory concerns identified here might facilitate the ability of sentencers to perform these assessments in a more accurate and consistent manner. Perhaps of equal importance, the integrity of the sentencing process requires conscientious attempts to address these questions in a disciplined manner.

1.5 Competence to Proceed

1.5.1 Catherine

Alice and Betty raised difficult questions regarding criminal responsibility and blameworthiness for sentencing. Consider Catherine who raises different questions regarding competence to proceed. Catherine ran a small business and raised two children. Due to economic difficulties and mistakes in running the business, she was about to lose the business, and she expected to lose custody of her children to her ex-husband with whom she was in ongoing conflict over raising their children. She became increasingly depressed as it seemed that her entire life was falling apart. One day, she took a gun to work and killed the two employees who she blamed for the failure of her business. She then went to the home of her ex-husband and killed him and his second wife. She was arrested, diagnosed as suffering major depression, and

medicated on a court order in order to maintain her competence to proceed with trial. She waived her right to counsel and represented herself. She called no witnesses and presented no evidence at the guilt or sentencing phases of her trial. She was convicted of four counts of murder and sentenced to death.

1.5.2 Dusky Standard

Requirements of competence to proceed are distinct from responsibility and blameworthiness in that they refer to the capacities relevant to participation in the criminal justice process, rather than to responsibility or blameworthiness for the offense. Thus, the central underlying question addresses the minimal capacities required to participate with at least minimal effectiveness in various stages of the process, rather than the degree of condemnation the offender merits for the offense. The basic standard for competence to proceed at trial in the criminal process requires that the defendant possesses "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."[41]

In Godinez v. Moran, the court rejected the claim that the defendant who chooses to waive the right to counsel and represents himself must meet a higher standard of competence than that required to proceed with counsel.[42] In coming to this conclusion, the court rejected a proposed standard that would require the capacity for reasoned choice and questioned whether such a standard would differ from the required capacity for rational understanding.[43] Because the majority opinion apparently found no difference between the capacity for rational understanding and the capacity for reasoned choice and because the capacity is ordinarily a component of civil competence, I will assume for the purpose of this analysis that requirement of rational understanding for competence to proceed requires that the individual has the ability to engage in at least minimally competent reasoning regarding the relevant decisions.[44] Similarly, opinions addressing the standing of third parties to assume the status of "next friend" and pursue appeals for convicted offenders who chose to waive appeals of their capital sentences have denied those requests absent a showing that those offenders lack competence to represent their own interests.[45]

These decisions reveal a common basis in that they define the standards for competence to proceed and to waive the rights to counsel or to appeal in terms of the defendants' ability to protect their own interests by making decisions through at least minimally competent processes of comprehension and decision making. Similarly, they limit the authority of others to intervene on behalf of offenders to circumstances in which those offenders are not capable of competently protecting their own interests. This approach reflects the function of the competence requirement as one that protects the individuals' rights to make decisions regarding their own interests if they are capable of doing so. Although defendants have strong interests in the criminal process, however, the underlying values extend beyond protecting the defendants' legitimate interests. The dissenting opinion in Moran raises concerns

regarding the important public interest in maintaining the integrity of the criminal justice system.[46]

1.5.3 Competence to Waive and Depression

The dissenting opinion in Moran rejected the majority opinion as applied and in principle. At the level of application in this case, the dissent questioned whether the trial judge had adequately confirmed that Moran met the standard of competence to waive the rights to counsel and to present a defense.[47] More fundamentally, however, the dissenting opinion rejects the majority's conclusion that the same standard should apply to competence to proceed with counsel and to competence to waive the right to counsel and proceed without counsel. The precise standard the dissent advocates is not entirely clear. Some passages in the dissenting opinion seem to indicate that competence to waive the right to counsel requires that the offender is competent to represent himself, but other passages advocate a reasoned choice standard according to which the defendant must have the capacities needed to competently and intelligently choose to represent himself.[48]

Perhaps the most fundamental difference between the majority and the dissent lies in the underlying justification for the competence requirement. Although the dissent discusses the defendant's interest in competently exercising his rights and protecting his legitimate interests, the dissent also explicitly identifies the "fundamental principles of fairness" and the "integrity of our criminal justice system" as important concerns.[49] The dissent does not provide an analysis of the significance of these underlying values for the specific standard to be addressed, but explicitly identifying these values draws attention to two specific concerns that receive very little attention in the majority opinion.

Expert evaluations of Moran's psychological state revealed substantial depression as well as remorse and guilt at the time of trial.[50] Moran explicitly stated that he was waiving the right to counsel in order to prevent the presentation of mitigating evidence at sentencing. By his own testimony, "I guess I really didn't care about anything."[51] These statements raise the questions identified earlier regarding the need for a more precise understanding of the difference between depressive pessimism or hopelessness on the one hand and distortion of ability to recognize or make reasoned decisions about reality on the other.[52] It should also lead us to inquire regarding the relationship between depressive hopelessness and the lack of caring. That is, can we clearly distinguish between the depressive state in which the individual cannot realistically assess the potential for improvement and the alternative depressive condition in which he can realistically assess that potential but does not vest any significance in that potential? Should these two different states carry different significance for legal determinations of competence for various legal purposes? To the extent that competence to proceed in the criminal process or to waive rights to counsel and to present evidence requires "factual understanding"[53] of the proceedings, it seems plausible to argue that depressive pessimism to a degree that

undermines the defendant's ability to realistically assess the potential for success in mitigation of sentencing undermines that factual understanding.

Insofar as he did not care about the outcome of the trial or insofar as he preferred a capital sentence because he realistically recognized that he was depressed and considered lifelong incarceration more aversive than execution, he might well have been competent to waive his legitimate interests in contesting the sentencing hearing. His interests, however, are not the only interests at stake. The dissent's identification of the important public interest in the integrity of the process retains importance independent of Moran's preferences. The public interest in the integrity of the criminal justice process takes on elevated significance in the context of capital sentencing. Thus, a competent defendant may retain the authority to waive his interests in presenting mitigating evidence, but the public retains a vital interest in maintaining the principled application of the most severe sentence, which arguably defines the limits of standing as one who merits consideration in the public domain.[54]

The dissenting opinion's concern regarding the integrity of the process takes on particular significance when the state administers medication to a defendant during the guilt or sentencing phases of the trial. The dissenting opinion reports that Moran was administered four different prescription medications during the period in which he pled guilty and waived the right to counsel in order to prevent presentation of mitigating evidence.[55] Moran reported that he "really didn't care about anything … wasn't very concerned about anything that was going on."[56] This reported lack of caring might have been a product of his previously reported guilt and remorse or of his depression. If it was a product of his depression, the medication might have ameliorated his condition and made it more likely that he would actively participate in the adversarial process. In many cases in which the state administers medication to defendants during trial, that medication might ameliorate the defendants' impairment and augment their ability to contest the state's case.

Insofar as defendants receive medication from state actors, however, the potential for state interference in the defendants' ability or willingness to pursue a rigorous defense raises serious concerns regarding the integrity of the process. Although most state-directed clinicians in most cases might well provide appropriate treatment that enhances the ability of the defendants to competently participate in the process, the lack of structural controls to monitor that treatment and its effects presents the potential for treatment that undermines the integrity of the process in any particular case. This concern takes on particular cogency insofar as the adversarial process requires the willingness to confront and contest. Health care providers who are ordinarily trained to provide care that reduces the intensity of aversive affect, such as depression, might be inclined to overlook or underestimate the potential of medication to undermine the integrity of the process if it does so in a manner that ameliorates the defendant's depression at the cost of reducing his concentration or his motivation to attend and participate. Such side effects might represent reasonable trade-offs in ordinary circumstances of clinical care, but they might undermine the integrity of the adversarial process of a criminal trial.

Appropriate responses to these concerns might involve independent clinical evaluations and independent assessment of the legal consequences of the treatment

by appointed counsel. In these circumstances, the defendant's interests and the public interests converge when one recognizes the distinction between legally protected interests and preferences. The defendant has legally protected interests in a fair trial and in freedom from state-imposed medication that impairs his capacity to participate in that trial. The defendant has no legally protected interest in avoiding a fair trial or a legally imposed criminal sentence. Similarly, the state has a legitimate interest in pursuing a fair trial to resolve serious criminal charges and in carrying out a legitimately imposed sentence. The state has no legitimate interest, however, in facilitating conviction and punishment by prosecuting or punishing a defendant in circumstances that undermine his ability to participate as an effective adversary in the trial and appellate process.[57] Thus, legitimate individual and state interests converge insofar as state-imposed treatment enhances the defendant's ability and willingness to promote accurate findings and just outcomes by vigorously contesting the state's case. Similarly, state-imposed treatment that undermines the defendant's ability or willingness to contest the state's case undermines the legitimate individual interests in holding the state to the law and the legitimate public interest in the integrity of the process.[58]

1.5.4 Catherine and Competence

Assume first that Catherine's depression included psychotic distortion of her ability to perceive and reason about reality. She is convinced that her ex-husband is alive and has paid the judge and her attorney to convict her and have her executed. Thus, there is no hope that any efforts on her part will prevent conviction and execution. She refuses to respond to any questions by either her attorney or the judge. Catherine would be incompetent to proceed in the trial process or to waive her right to counsel by ordinary standards. She would lack factual and rational understanding regarding both decisions. If involuntary administration of treatment ameliorated her psychotic impairment of comprehension and reasoning, it would promote her legitimate interest in competently participating in her trial in a manner that enabled her to contest the state's case and present her defense. That same treatment effect would advance the legitimate public interest in resolving the serious criminal charges and in maintaining the integrity of the process.

If Catherine suffers major depression without psychotic features, however, she raises more difficult questions regarding competence to proceed. If Catherine manifests major but not psychotic depression, she might fulfill the requirements of factual and rational understanding, but her depression might include depressive symptoms that result in refusal to contest the state's case. Thus, it might undermine the integrity of the adversarial process. Consider, for example, extreme pessimism, hopelessness, and anhedonia that might lead Catherine to not care about the trial, its outcome, or her own interests. Such depression might undermine her willingness to contest the state's case or to actively cooperate with the defense attorney. Alternately, her depression might involve such misery, grief, and guilt that she refrains

from assisting in her own defense because she anticipates execution as relief from the misery of life. The criminal trial of such a defendant may undermine the integrity of the process by negating the implicit premise of the adversarial process that the defendant will vigorously contest the state's case.

Circumstances such as those presented by Catherine with serious but not psychotic depression raise a series of difficult and interrelated questions regarding the responsibilities of legal and psychological actors. Here I address only the limited task of identifying some of the central tasks for psychological experts. Psychological evaluations of Catherine or of other depressed defendants can provide descriptions of the depressive disorders manifested by those individuals. As previously discussed the boundary between depressive pessimism and psychotic distortion of one's ability to recognize and reflect upon reality can be difficult to articulate. Insofar as psychologists can provide a relatively clear and detailed description of Catherine's pessimism, they can facilitate the court's ability to decide whether she meets the requirements of factual and rational understanding. When sufficiently detailed information is available, psychologists might be able to describe the depth and breadth of her depressive pessimism and explain how that condition influences her ability to make judgments and decisions relevant to the trial process. A purportedly professional opinion that Catherine was or was not competent to proceed or that Catherine possessed, or lacked, the capacity for factual or rational understanding would exceed the boundaries of professional expertise, however, because such opinions would require the legal conclusion that her capacities to understand and reason were, or were not, sufficient to justify a particular legal conclusion required by legal standards.[59]

Similarly, clinical evaluations of Catherine and her treatment history might provide the basis for expert testimony regarding the likelihood that various forms of treatment would improve her ability to comprehend, reason, and participate in her own defense. When relevant information is available, such testimony might address potential side-effects of treatment and the likely influences of that treatment and its side-effects on Catherine's ability to participate effectively.[60] Furthermore, expert testimony that explains the treatment effects and side-effects of various treatment interventions might promote the ability of judges or jurors to accurately interpret the significance of Catherine's participation and presentation. Thus, it might decrease the risk that decision makers would draw unwarranted conclusions due to the side-effects of treatment.

Once again, however, courts must make the legal determinations regarding Catherine's competence and the legitimacy of proceeding with trial because those decisions necessarily include assessment of the underlying justifications for various legal standards. Recall that the disagreement between the majority and dissenting opinions in Godinez v. Moran apparently reflected the majority's almost exclusive focus on Moran's ability to pursue his own interests and the dissent's additional concern for maintaining the integrity of the process. The latter concern included both Moran's lack of motivation due to depression and the risk that his lack of motivation might have been induced through the administration of medication by the state.[61]

Psychological impairment involving severe distortion of cognitive functions might render a person incompetent to pursue his own interests and incompetent to test the state's case in a manner that maintains the integrity of the process. Affective disorder that does not involve severe cognitive dysfunction might undermine motivation to participate effectively even if the individual retains the cognitive capacities required to comprehend and communicate. A determination that such a disorder does, or does not, render a defendant incompetent to proceed requires interpretation and application of the standard in a manner that conforms to the justifications for that standard, including those that protect the defendant's interests and those that maintain the public interest in the integrity of the process. This justificatory decision extends beyond the range of psychological expertise, but explanatory testimony that clarifies the nature of the impairment and its effects on the defendant's participation can inform the legal judgments at trial and in appellate proceedings.

1.6 CFE: Legal Standards, Justifications, and Mental Disorder

Although one might list CFE as one further stage in the process at which competence to proceed is important, I list it separately because the precise function, standard, and justification for the requirement remain unclear. In Ford v. Wainwright, the Supreme Court recognized the CFE requirement as mandated by history and evolving standards of decency under the Eighth Amendment of the Constitution.[62] The majority opinion reviewed a number of historical sources, justifications, and standards. That opinion recognized that these alternatives were subject to dispute, however, and it provided no clear justification or standard for the requirement.[63]

One plausible interpretation of the CFE requirement suggests that CFE addresses competence to proceed during the period approaching execution. A standard reflecting this interpretation would address capacity to consult with counsel and raise considerations relevant to the capital sentence.[64] If one understands the CFE requirement as an extension of competence to proceed intended to protect the convicted offender's right to contest the capital sentence and execution through the appellate process, a standard that requires the ongoing ability to comprehend, reason, and communicate seems appropriate.

Consider Deborah whose circumstances were identical to Catherine's until she was medicated on court order. She was tried with legal representation. She remained depressed, but she cooperated in her own defense. She was convicted of four counts of murder and sentenced to death. She cooperated with her attorney in the appellate process, but she gradually became more severely depressed as that process continued and her capital sentence was reaffirmed. As the execution date approached, she spent her days lying motionless in bed in a depressive stupor. She presents no evidence of psychotic disturbance of thought or reality testing. To the extent that she responds to attempts to communicate with her, she replies that "I don't care; nothing matters."

The previously discussed questions regarding the precise nature of the impairment involved in a depressive stupor become critical in these circumstances.[65] If Deborah is nonresponsive because she suffers impaired consciousness that renders her unaware of the approaching execution and related events, she lacks the ability to comprehend and communicate required by the ordinary standards for competence to proceed. Alternately, if she is nonresponsive because she does not care about anything, including the approaching execution, it is not clear why this lack of motivation should undermine CFE. Individuals who choose not to raise appeals or cooperate with their attorneys because they find the prospect of endless incarceration more aversive than execution are not incompetent to face execution simply because they lack motivation to contest their sentences. Similarly, if an individual considers the prospect of extended incarceration more aversive than the prospect of execution because he realistically recognizes that he is chronically depressed and likely to remain depressed, it is not obvious why he would be incompetent to face execution.

The claim here is not that depressive stupor consists only of the lack of motivation to respond. It is, rather, that we need a more precise understanding of the impairment involved in the depressive stupor experienced by a particular individual if we are to make well-grounded judgments about the significance of that condition for CFE under a standard modeled upon competence to proceed and intended to protect the individual's right to contest an arguably unjust sentence.

Justice Powell's concurring opinion in Ford recognized that this interpretation of CFE as a component of competence to proceed seems less plausible in current conditions than previously, because the extended appellate process renders it unlikely that a convicted offender approaching execution will be aware of any relevant factors that have not already been raised.[66] Perhaps the most common standard is some variation on the standard Justice Powell presented in his concurring opinion in Ford. According to that standard, "the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." A recent case reveals the difficulty that can arise in interpreting and applying this standard. A convicted offender sentenced to capital punishment reportedly is aware that he committed two homicides, that he was convicted and sentenced for those homicides, and that the state's purported reason for his pending execution is to punish him for those homicides. He reportedly believes, however, that the state's real motivation for executing him is to prevent him from preaching the gospel.[68] The courts must interpret and apply the standard in order to determine whether his delusional interpretation of the state's motive for executing him renders him incompetent to face execution despite his awareness that he committed the murders and received the capital sentence for those murders.

An analogous ambiguity arises with the NGRI standards that address the offender's ability to know or appreciate the wrongfulness of his conduct. Jurisdictions differ regarding the interpretation of this standard as requiring awareness that it is contrary to law, contrary to accepted societal standards of morality, or wrongful according to the offender's understanding of wrongfulness.[69] Clarification of such ambiguities in legal standards requires interpretation according to the purpose and

justification of the standards in question with due consideration for a variety of other considerations such as error preference and providing notice. This interpretive task becomes particularly difficult when the justification for the standard has not been clearly articulated. Because the Ford opinion did not clearly articulate the justification for the CFE requirement, lower courts and officials charged with the responsibility to interpret and apply any particular standard for that requirement lack adequate guidance from the *Ford* opinion.[70]

In his concurring opinion in Ford, Justice Powell explicitly identified the retributive function as a critical justification of capital punishment, and he stated that his awareness standard satisfies the retributive goal of the criminal law.[71] In affirming Panetti's competence to be executed, the Fifth Circuit Court of Appeals referred to the Ford plurality opinion and to Justice Powell's concurring opinion in Ford as sources of authority for the proposition that Panetti met Justice Powell's awareness standard.[72]

The Supreme Court reversed the Fifth Circuit Court of Appeals, holding that the lower courts should have considered Panetti's gross delusions that prevented him from "comprehending the meaning and purpose of the punishment to which he has been sentenced."[73] The majority opinion in *Panetti* also referred to the majority and concurring opinions in Ford in contending that execution of a convicted offender who lacks rational understanding of the reason for his execution cannot serve the retributive purpose of punishment.[74] These passages appear to interpret retribution as involving the recognition by the offender of the gravity of his crime and the reaffirmation of the judgment of the community that the culpability of the offender "is so serious that the ultimate penalty must be sought and imposed."[75] Unfortunately, neither the Ford plurality, Justice Powell's concurrence in Ford, nor the Fifth Circuit opinion in Panetti provides any clear reasoning to explain or justify the asserted significance of the awareness standard for retribution. Thus, it remains unclear what quality or range of awareness is necessary to fulfill the retributive justification of punishment.

Retribution is ordinarily understood as prescribing punishment in proportion to the offender's desert for culpably committing the crime.[76] Understood in this manner, retribution requires punishment that reflects the offender's blameworthiness, including his mental state regarding the criminal conduct and the harm done at the time the crime was committed. It is not clear, however, why his mental state at the time of execution would be central or even relevant to retributive proportionality. This lack of clarity reflects the absence of any explicit articulation of the retributive function as applied to the Eighth Amendment.

Furthermore, it is not clear whether the majority opinion addresses retribution as a necessary justification of punishment or as one acceptable justification. Some passages in the opinion appear to emphasize retribution as a controlling or central consideration in justified punishment, suggesting that execution of offenders who are incompetent to face execution is prohibited because it cannot serve the retributive purpose.[77] Some Supreme Court opinions addressing the Eighth Amendment as applied to capital punishment suggest that retribution sets a limit on punishment in that they appear to mandate severity of punishment in proportion to, or

not greater than, blameworthiness or moral responsibility.[78] Other prior opinions identify retribution as one legitimate purpose, however, and prohibit only punishment that serves no legitimate purpose.[79] Similarly, some passages in the majority opinion in Panetti appear to appeal to alternative rationales for the CFE requirement identified in the Ford plurality opinion.[80] Finally, the court refers to gross delusions that distort awareness of the "link between a crime and it's punishment in a context so far removed from reality that the punishment can serve no proper purpose."[81] These passages seem to suggest that the CFE requirement applies only to impairment that precludes the execution from serving any proper purpose, but the opinion provides no reasoning to support the contention that executing such severely impaired offenders could not serve preventive purposes such as incapacitation or general deterrence.

I do not purport to interpret or defend a retributive justification for the CFE requirement or any alternative justification in this chapter. Rather, the point is only to demonstrate that a persuasive attempt to articulate, interpret, and apply a defensible standard for CFE would require clarification of the purpose and justification of the CFE requirement. As with criminal responsibility, blameworthiness, and competence to proceed, the legal standard for CFE should identify the psychological capacities and operations required to fulfill the purpose and justification for the requirement. Psychological impairment is relevant to each of these steps in the criminal justice process insofar as it undermines the individual's capacity to engage in the psychological operations that would enable him to fulfill the functions needed to justify the legal process at issue.[82]

The significance of various forms of psychological impairment for an individual's capacity to meet the standard for CFE would vary with the standard adopted and with the underlying principles advanced to justify criminal punishment generally, the CFE requirement, and the proposed standard. The lack of a clearly articulated standard and of the underlying justification for that standard renders it difficult to interpret the significance of any particular form of impairment for one's status as CFE.

1.7 Mental Disorder and the Criminal Process

1.7.1 Legal Standards and Mental Disorders

Sections 1.3–1.6 briefly review the significance of depression for the purposes of criminal responsibility, sentencing, competence to proceed, and CFE. In each context, psychological impairment can alter an individual's eligibility for a particular status or punishment. Various clinical and legal sources sometimes refer to various categories of psychological impairment as disorders, diseases, defects, illnesses, or other terms. If one uses the phrase "legal mental illness" as a general term for psychological impairment that renders an individual unable to perform the psychological operations

that render an individual eligible for a particular legal status or intervention, then the relevant question for each legally relevant context is whether an individual's type and degree of functional impairment constitutes a legal mental illness for the specific legal purpose at issue.[83]

Major depressive disorder might, or might not, constitute a legal mental illness for the legal purposes reviewed in Sections 1.3–1.6 for three distinct reasons. First, individuals who suffer major depressive disorder according to diagnostic criteria vary in the specific form and severity of impairment they manifest. As previously discussed, some individuals suffer psychotic distortion of perception and cognition, and some suffer depressive stupor, but others do not.[84] Second, the precise nature and scope of a particular individual's experience of certain types of impairment remains unclear. Depressive stupor involves a lack of responsiveness, for example, but it remains unclear whether a particular individual who experiences depressive stupor experiences limited or distorted consciousness as a component of the stuporous lack of responsiveness. Third, the relationship between any particular type of psychological impairment and the requirements of any particular legal standard might remain unclear. Severe depressive pessimism might lead a mother to believe that killing her children would benefit them by relieving them of the misery of life, for example, but the trier of fact or sentencer must decide whether that honest belief renders her unable to know or appreciate that killing them is wrongful as that standard is interpreted and applied in a particular jurisdiction.

That difficulty in determining the relationship between the psychological impairment manifested by a particular individual and the applicable legal standard reflects the aforementioned variability in the specific form and severity of impairment manifested by various individuals who suffer major depression. It also reflects comparable lack of clarity regarding the most defensible interpretations of various legal standards. Most judges or jurors might find that Alice provides a relatively clear case of a defendant who does not know that her conduct is wrongful, for example, because she acted in response to her hallucinatory orders from God.[85] It is more difficult, however, to confidently state whether Betty knows it is wrong to kill her children when she does so expecting to spend eternity in hell for killing them and firmly believing that it is her obligation as a mother to kill them in order to spare them the agony of life. Although this difficulty is partially due to her apparently contradictory beliefs, it also reflects the lack of precise meaning and boundaries of the knowledge required for this purpose. That concern is exacerbated when a legal standard addresses abilities that lack reasonably clear core definitions, such as the abilities to appreciate or control.[86]

Legal standards that identify certain individuals as appropriate for a specified legal status or intervention should serve discriminative and justificatory functions. That is, these standards should identify recognizable forms of impairment that identify certain individuals as appropriate for differential status or intervention than most individuals, and the types of impairment specified should justify that differential treatment.[87] As discussed previously, standards for the insanity defense attempt to articulate types of impairment that render individuals ineligible for the condemnation inherent in punishment because they lack minimal capacities of accountable

agency. Thus, they limit the condemnation inherent in criminal punishment to those who commit offenses with the capacities of accountable agency that enable them to function as minimally competent participants in the public domain ordered by the criminal law. Similarly, mitigating factors in sentencing are intended to limit the degree of condemnation to that which is justified by the blameworthiness of the accountable offender for the offense.

1.7.2 Legal Standards and Justifications

Standards fulfill the justificatory function insofar as they reflect defensible justifications for the particular status or intervention at issue. Dominant standards for the insanity defense apparently reflect the premise that the ability to recognize the nature, quality, and wrongfulness of one's conduct provides the primary and perhaps the only measure of criminal responsibility. Alternatives address the abilities to appreciate or to control but lack clear explanation regarding the meaning of or justification for these alternatives. A standard that required minimal capacities of responsible agency would reflect the interpretation of criminal responsibility as retributive competence that addresses the capacities one possesses, rather than awareness of wrongfulness.[88] The mitigating factors discussed previously attempt to identify types of impairment or circumstances that are thought to reduce blameworthiness without precluding criminal responsibility.

More satisfactory articulation, interpretation, and application of these legal standards require ongoing attempts to integrate doctrinal, justificatory, and empirical analysis. Doctrinal analysis of statutory or case-law formulations and interpretations, as well as of constitutional principles where applicable, seeks to interpret these standards in a manner consistent with traditional guidelines such as legislative intent and the underlying purpose and justification of the provision. Clarification of the most defensible constitutional principles or moral justifications served by these provisions can guide interpretation and application in close cases. More precise interpretation of this type can enhance the ability of courts and legislatures to articulate standards that accurately represent the underlying justifications and, thus, that facilitate the ability of courts and juries to identify the type of impairment that should constitute legal mental illness for a particular purpose.

The ongoing controversy regarding the most defensible interpretation of the CFE standard reflects the importance of a clearly articulated justification.[89] The *Ford* plurality identified a series of purported justifications for the requirement, but the opinion recognized that these justifications were questionable, and it did not clearly endorse a specific standard or underlying justification. Justice Powell's concurring opinion endorsed the awareness standard and asserted that it was appropriate to the retributive function, but the opinion provided no clear reasoning to explain the retributive function, the relationship of this function to the awareness standard, or the justification for attributing constitutional significance to this retributive function.[90] Thus, the lower courts that addressed Panetti's ambiguous

state of awareness had no clear, principled foundation for evaluating the adequacy of that awareness for this purpose. Similarly, the Supreme Court's majority opinion appeared to endorse the retributive function in some passages, but it provided neither a clear justification for granting constitutional status to that retributive function nor clear explanation regarding the nature and scope of awareness that would fulfill that retributive function. Finally, some passages in the opinion suggest that other legislative purposes for punishment are analogous to retribution in this context.[91] Thus, it remains unclear what types of functional impairment should be understood to constitute legal mental illness for the purpose of CFE because neither the applicable standard nor the underlying justification has been clearly presented. This lack of clarity compounds the ongoing dispute regarding the proper form and range of expert psychological testimony.

1.8 Psychological Expertise

1.8.1 Expert Testimony

A recent Supreme Court decision upheld state law prohibiting the use of expert psychological testimony by a criminal defendant to support the claim that he lacked the capacity to form the mental state required by the criminal offense definition.[92] This opinion was based partially on the court's perception that such testimony presented a substantial risk of misleading or confusing the jury.[93] The potential probative value and prejudicial effect of expert psychological testimony rest partially upon the relationship between the specific form and content of that testimony and the particular legal question at issue.

As previously discussed, the meaning of specific legal standards, such as knowledge of wrongfulness, depends partially on the current legal interpretation and partially on the underlying justification for that standard. If a mother kills her children while believing that she will have to spend eternity in hell for doing so and that she is obliged to do so in order to spare them the agony of life, it appears that she believes that her conduct is severely wrongful and that she is morally obliged to engage in that conduct. The difficulty in determining whether she knew that her conduct was wrongful for the purpose of the insanity defense reflects the apparent contradictions among her beliefs, the vagueness of the insanity standard, and the lack of a clearly articulated justification that would provide guidance for the most defensible interpretation of that standard.

Insofar as psychological experts offer opinions that she did, or did not, know her conduct was wrongful, they must implicitly interpret the requirements of the legal standard.[94] Thus, testimony that a person is or is not "mentally ill" (or the variations on that phrase) or that he did or did not meet various legal standards is almost always beyond the range of expertise because such opinions require legal interpretation of the meaning of terms or phrases such as "know," "appreciate,"

"understand," "as punishment for his offense," or similar legal terms or phrases. Furthermore, such testimony would often implicitly rely on moral judgments regarding questions such as the source or degree of distress or impairment that is sufficient to exculpate or to mitigate blameworthiness. When the relevant information is available, however, experts can provide descriptive and explanatory testimony regarding (1) the functional impairment manifested by the individual; (2) the manner in which this impairment influenced her conduct or decisions relevant to the legal question at issue; and (3) the likely effects of interventions intended to ameliorate this impairment.[95]

A similar pattern emerges in the context of expert testimony regarding dangerousness. The dispute is often framed as whether a psychologist acting as an expert witness can predict dangerousness or offer a professional opinion that an individual is, or is not, dangerous. Expert witnesses cannot predict dangerousness because a legal determination of dangerousness is not a prediction. Rather, it requires an assessment of risk and a legal or moral judgment that the quality and quantity of risk are sufficient to justify the legal intervention or liability at issue. Similarly, when legal standards and professional roles are properly understood, a psychologist in the role of an expert witness can virtually never offer an opinion that an individual is, or is not, dangerous because a determination of dangerousness includes legal or moral judgments that the risk presented is sufficient to justify the legal interventions at issue.[96] A common pattern of analysis applies to expert testimony relevant to legal determinations of dangerousness or of mental illness. Regarding each, psychological experts can provide descriptive and explanatory testimony in relation to risk assessment or the type and severity of impairment manifested by an individual in the circumstances. The relevant legal and moral judgments that identify the type, degree, and circumstances of risk that qualify as dangerous or of impairment that qualify as legal mental illness for a specified legal purpose extend beyond the limits of psychological expertise.

1.8.2 Psychological Research

Although discussion often addresses expert psychological testimony, further empirical research has the potential to advance understanding of many of the concerns raised at the intersection of mental disability and the criminal law. Ongoing research might inform our understanding of the various types of impairment involved in various disorders. As previously discussed, more explicit understanding of the specific type of functional impairment involved in depressive symptoms such as pessimism or stupor might enhance our ability to formulate and apply various legal standards in a manner consistent with the justifications for those standards. Advances in diagnostic techniques might improve our ability to describe and explain the quality and severity of impairment suffered by a particular individual who manifests a particular disorder. Similarly, such advances might enhance our ability to explain the manner in which that impairment influences

conduct, including criminal conduct for which the person is charged, or decision making in the context of competence to proceed.

Empirical research regarding comprehension and decision making in various contexts might inform our understanding of the abilities of judges or juries to understand applicable legal instructions and various forms of relevant expert testimony as well as their abilities to apply those instructions and that testimony to particular individuals for specific legal purposes. Similar research might inform psychological experts regarding the types of testimony that decision makers are likely to understand and the types of errors in interpretation of such testimony they are likely to make. Such research has the potential to enhance the ability of psychological experts to present relevant information in a manner that enables judges or juries to understand that impairment and its effects that are relevant to the legal determination at issue.

Although empirical research of this type might be directed primarily at promoting accurate application of current legal standards, it might also inform the efforts of legislatures and courts that must develop the appropriate formulations of legal standards. Insofar as research can advance our understanding of various forms of pathology and its affect on decisions and behavior, it might advance our ability to revise standards in a manner that more accurately accommodates the significance of various forms of pathology for the most defensible justifications for those standards. Ideally, legal standards, justificatory analysis, and empirical research would interact in a reciprocal pattern in that the current legal standards would promote relevant research which, in turn, might advance our ability to effectively apply those standards and to revise them in a manner likely to more effectively conform to the underlying justification. Similarly, more precise justificatory analysis might enable us to revise those standards and to promote further empirical research that would enhance our ability to apply those standards to individuals who suffer various types of impairment.

1.9 Conclusion

Improving our ability to formulate, interpret, and apply law that appropriately recognizes and accommodates the significance of mental disorder for the criminal law requires the ongoing integration of three lines of analysis. Doctrinal analysis addresses the interpretation and application of legal standards as contained in statutory, constitutional, and case-law sources. Relatively clear cases might turn primarily on evidentiary questions regarding the relevant circumstances, the type of functional impairment manifested by the individual, and the effects of that impairment on the relevant capacities and conduct of the individual. More difficult cases raise difficult questions regarding the most defensible interpretation of the legal standards, however, and these questions require interpretation of the legal standards in a manner that most accurately reflects the justifications for these standards. Empirical research can inform our understanding of a range of matters relevant to the formulation and

application of various legal standards. Although each of these three lines of inquiry contains standards of rigor appropriate to that form of inquiry, meaningful advancement of our understanding of the significance of mental disability requires greater emphasis on the integration of doctrinal, justificatory, and empirical inquiry.

Notes

1. Jayne Huckerby, *Women Who Kill Their Children: Case Study and Conclusions Concerning the Differences in the Fall from Maternal Grace by Khona Her and Adrea Yates*, 10 Duke J. Of Gender L. & Policy 149, 149–50 & n6 (2003).
2. State v. Joubert, 399 N.W.2d 237 (Neb. 1986).
3. State v. Otey, 287 N.W.2d 36 (Neb. 1979).
4. Godinez v. Moran, 509 U.S. 389 (1993).
5. Panetti v. Quarterman, 2007 WL 1836653 (U.S.) *18–21; Ford v. Wainwright, 477 U.S. 399, 421–22 (1986) (Powell, J., concurring).
6. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 369–81 (4th ed. TR, 2000).
7. *Id*. at 349–56.
8. *Id*. at 411–3.
9. A Dictionary of Psychology 39 (Andrew M. Colman ed., 2d ed. 2006) (anhedonia as "inability to experience pleasure or interest in formally pleasurable activities").
10. *Id*. at 714.
11. Taber's Cyclopedic Medical Dictionary 1893–94 (Clayton L. Thomas ed., 1993).
12. American Psychiatric Association, *supra* note 6, at 349–52.
13. Geoffrey R. McKee, Why Mothers Kill 175–90 (2006).
14. M'Naughten's Case, 8 Eng. Rep. 718 (1843); Wayne R. LaFave, Criminal Law § 7.2(a) (4th ed. 2003).
15. Model Penal Code and Commentaries § 4.01 (Official Draft and Revised Commentaries, 1985).
16. *Id*. at 164–9.
17. Robert F. Schopp, Competence, Condemnation, and Commitment 144–8 (2001) (hereinafter Competence, Condemnation, and Commitment); Robert F. Schopp, Automatism, Insanity, and the Psychology of Criminal Responsibility 176–201 (1991).
18. Competence, Condemnation, and Commitment, *id*. at 144–8.
19. *See supra* Section 1.3.1.
20. Competence, Condemnation, and Commitment, *supra* note 17, at 144–8.
21. H.L.A. Hart, Punishment and Responsibility 215–30 (1958).
22. Competence, Condemnation, and Commitment, *supra* note 17, at 144–51.
23. Eddings v. Oklahoma, 455 U.S. 104, 110–15 (1982); Lockett v. Ohio, 438 U.S. 586, 601–08 (1978); Woodson v. North Carolina, 428 U.S. 280, 303–5 (1976).
24. Roper v. Simmons, 543 U.S. 551, 588–93 (2005) (O'Connor, J., dissenting); Joel Feinberg, Doing and Deserving 118 (1970).
25. Roper, 543 U.S. at 568–71; Atkins v. Virginia, 536 U.S. 304, 317–9 (2002).
26. Model Penal code and commentaries, § 210.6(4)(b) (Official Draft and Revised Commentaries, 1980).
27. *Id* cmt. at 138–40.
28. *Id*. cmt. at 138–40.
29. *Id*. cmt. at 139.
30. *Id*. at § 210.6(4)(g) and cmt. at 138–40.
31. *See supra* Section 1.2.

32. Barbara Hannan, *Depression*, *Responsibility*, *and Criminal Defenses*, 28 International J. L. & Psychiatry 321 (2005) (discussing the effects of depression in a manner that demonstrates that we need more careful and subtle reflection on the complexity of the relationships among cognitive, emotional, and volitional processes).
33. Model Penal Code and Commentaries, *supra* note 26 at § 210.6(4)(d) and cmt. at 141.
34. McKee, *supra* note 13 at 175–83 (discussing the case of Marilyn).
35. *See supra* § 1.3.2.
36. Model Penal Code and Commentaries, *supra* note 26 at § 210.6(4)(g).
37. American Psychiatric Association, *supra* note 6, at 41–9 (mental retardation), 85–93 (attention deficit/hyperactivity disorder).
38. Atkins v. Virginia, 536 U.S. 304 (2002).
39. *Id*. at 318–20.
40. *Compare* Model Penal Code and Commentaries, *supra* note 26 at § 210.6(4)(d) and cmt. at 141.
41. Dusky v. United States, 362 U.S. 402 (1960).
42. Godinez v. Moran, 509 U.S. 389, 398 (1993).
43. *Id*. at 397–9.
44. Robert F. Schopp, *Involuntary Treatment and Competence to Proceed in the Criminal Process: Capital and Noncapital Cases*, 24 Behav. Sci. & L. 495, 498–9 (2006).
45. Whitmore v. Arkansas, 495 U.S. 149 (1990); Gilmore v. Utah, 429 U.S. 1012 (1976).
46. Moran, 509 U.S. at 417 (Blackmun, J., dissenting).
47. *Id*. at 410–12 (Blackmun, J., dissenting).
48. *Id*. at 415–6 (Blackmun, J., dissenting).
49. *Id*. at 417 (Blackmun, J., dissenting).
50. *Id*. at 410–11 (Blackmun, J., dissenting).
51. *Id*. at 411 (Blackmun, J., dissenting).
52. *See supra*, text accompanying notes 12–4.
53. *Moran*, 509 U.S. at 396; Dusky v. United States, 362 U.S. 402 (1962).
54. Schopp, *supra* note 44 at 500–1.
55. Moran, 509 U.S. at 410–11, 416–7 (Blackmun, J., dissenting).
56. *Id*. at 410–11.
57. Schopp, *supra* note 44, at 518–23.
58. *Id*. at 520.
59. Competence, Condemnation, and Commitment, *supra* note 17 at 249–67.
60. *Id*.
61. *See supra* at § 1.5.3.
62. Ford v. Wainwright, 477 US 399, 406–10 (1986).
63. *Id*. at 406–8.
64. Linda E. Carter & Ellen Kreitzberg, Understanding Capital Punishment Law 267–68 and n11 (2004).
65. *See supra* Section 1.2.
66. Ford, 477 U.S. at 419–21 (Powell, J. concurring).
67. *Id*. at 422; Carter & Kreitsberg, *supra* note 64 at 267.
68. Panetti v. Quarterman, 2007 WL 1836653, *17–8 (US).
69. LaFave, *supra* note 14 at § 7.2(b)(4).
70. Ford, 477 U.S. at 407–10.
71. *Id*. at 421–22 (Powell, J., concurring).
72. Panetti v. Dretke, 448 F.3d 815, 818–9 (5th Cir. 2006).
73. Panetti v. Quarterman, 2007 WL 1836653 *20, 22 (US).
74. *Id*. at *18–9.
75. *Id*. at *19.
76. The Cambridge Dictionary of Philosophy 759 (Ed. Robert Audi, 2nd ed. 1999).
77. Panetti, 2007 WL 1836653 at *18–21.

78. Penry v. Lynaugh, 492 U.S. 302, 319 (1989); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).
79. Roper v. Simmons, 125 S.Ct. 1183, 1196 (2005); Atkins v. Virginia, 536 U.S. 304, 318–20 (2002); Gregg v. Georgia, 428 U.S. 153, 183–6 (1976) (Plurality opinion).
80. Panetti, 2007 WL1836653 at *18–21
81. *Id* at *21.
82. Competence, Condemnation, and Commitment, *supra* note 17 at 41–49.
83. *Id*.
84. *See supra* Section 1.2.
85. *See supra* at Section 1.3.2.
86. *Id*.
87. Competence, Condemnation, and Commitment, *supra* note 17 at 49.
88. *Id*. at 148–51.
89. Ford v. Wainwright, 477 U.S. 399, 406–10 (1986).
90. *Id*. at 421–22 (Powell, J., concurring).
91. Panetti v. Quarterman, 2007 WL 1836653 (US) *18–21.
92. Clark v. Arizona, 126 S.Ct. 2709 (2006).
93. *Id*. at 2734–7.
94. Although I phrase this discussion in terms of the opinions that the expert offers, the substantive point extends to the attorneys and judges involved in the cases. That is, insofar as particular opinions extend beyond the expertise of the witnesses because they require legal or justificatory interpretations, attorneys should not ask for those opinions, and judges should not allow them.
95. Competence, Condemnation, and Commitment, *supra* note 17 at 41–9.
96. Robert F. Schopp, *Two-Edged Swords*, *Dangerousness*, *and Expert Testimony in Capital Sentencing*, 30 L & Psychology Rev. 57, 91–4 (2006).

Chapter 2
Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment

Bruce J. Winick

2.1 Introduction

In 2002, the United States Supreme Court determined that the Eighth Amendment ban on cruel and unusual punishments precluded execution of those with mental retardation in view of their reduced culpability and deterability (Atkins v. Virginia, 2002). In 2005, it extended this precedent to those whose capital offenses were committed when they were below age 18 (Roper v. Simons, 2005). Like those with mental retardation, juveniles were found to be significantly less culpable and deterable than the average capital murderer. Hence, juveniles were deemed to be categorically less appropriate for capital punishment. For these two categories of offenders, the Court determined that capital punishment would be insufficiently related to the two principal goals of the death penalty, retribution, and deterrence, and that death therefore would be a disproportionate penalty in violation of the Eighth Amendment. As a result, those with mental retardation and who are juveniles at the time of the offense were exempted from capital punishment.

Four leading professional associations – the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill – have recommended that the approach reflected in *Atkins* and *Roper* be extended to severe mental illness (American Bar Association, 2006; American Psychiatric Association, 2005; American Psychological Association Council of Representatives, 2006; National Alliance on Mental Illness, 2006, Section 9.9.1). These four professional organizations recommended that the states adopt legislation exempting offenders from the death penalty if at the time of the offense, their mental illness "significantly impaired their capacity" to "appreciate the nature, consequences, or wrongfulness of their conduct"; to

B.J. Winick (✉)
University of Miami, Coral Gables, Florida, USA
e-mail: bwinick@law.miami.edu

I appreciate the research assistance of Nicole Weinstein, University of Miami School of Law Class of 2008.

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_3, © Springer Science+Business Media, LLC 2009

"exercise rational judgment in relation to the conduct"; or "to conform their conduct to the requirements of law" (American Bar Association, 2006; American Psychiatric Association, 2005; American Psychological Association Council of Representatives, 2006; National Alliance on Mental Illness, 2006, Section 9.9.1).

These recommendations would not apply to exclude from capital punishment all offenders suffering from severe mental illness at the time of the offense, but only those who were functionally impaired in the specified ways. This chapter endorses the wisdom of these recommendations and proceeds on the assumption that they will be accepted in the future. It assumes that they will be accepted either by state legislatures as a matter of policy or by courts applying the Eighth Amendment principles of *Atkins and Roper* or principles of equal protection (Slobogin, 2003). Although severe mental illness at the time of the offense should not categorically exclude capital punishment,[1] when it significantly diminishes the offender's culpability or deterability, the analogy to mental retardation and juvenile status is strong and suggests that the death penalty would similarly be unconstitutional. The debate on the wisdom of the proposals to preclude the death penalty for those with severe mental illness made by the four professional associations, and on the extent to which their acceptance is constitutionally compelled, may depend in part on how this mental illness capital punishment exclusion issue is determined.

If a standard for excluding the death penalty similar to the one proposed by the four professional associations is adopted legislatively, or if severe mental illness would render capital punishment such a disproportionate penalty in at least some (but certainly not all) cases sufficient to implicate the Eighth Amendment, how should the issue be decided in individual cases? Should the issue be determined by pretrial motion made to the trial judge or a special jury convened for this purpose? Should it be determined by the capital jury at the penalty stage that would follow conviction for a capital crime? This chapter analyzes the various factors that should be considered in resolving the procedural question of how this exclusion from capital punishment should be determined, and argues that Eighth Amendment values and considerations of accuracy, cost, and therapeutic jurisprudence all tilt strongly in the direction of having the issue decided pretrial by the trial judge. The chapter then examines whether having the trial judge make the determination would be inconsistent with Ring v. Arizona (2002), which reflects the Sixth Amendment's constitutional preference for jury determinations of disputed issues of fact in capital sentencing. Finally, the chapter analyzes whether the prosecution or the defense should have the burden of persuasion on the Eighth Amendment question, and by what standard of proof that burden should be carried.

---

[1] The author believes that capital punishment should be abolished altogether, and that at some point in the future it will be found to violate the Eighth Amendment's ban on cruel and unusual punishments. *See* People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S.1033 & 1050 (1973) (a case, declaring the New York Death Penalty unconstitutional, that was argued by the author). Until that day arrives, however, arguments short of total abolition are appropriate for certain categories of offenses or offenders, including certain of those with severe mental illness at the time of the offense.

2.2 Considering the Alternative Judge and Jury Modes of Determining the Mental Illness Death Penalty Exclusion Issue

As is well known, procedural rules often have substantive impacts, and may even be outcome determinative. The procedural method chosen to determine the mental illness capital punishment exclusion issue thus can have consequences for the number of offenders excluded on this basis and on the accuracy of these determinations. Moreover, because legislative change in this area will be driven, if not compelled, by Eighth Amendment principles, the choice of the procedural method used to determine the exclusion issue also should take into account the resulting impact on Eighth Amendment values. The differing procedural possibilities also will impact cost and efficiency, and will have inevitable consequences for the psychological well being of the judges, lawyers, jury members, and survivors of the victim who are affected, as well as for the defendant himself. The debate on the wisdom of barring capital punishment for those with severe mental illness or the constitutional necessity of doing so will be informed by how the exclusion issue would be determined procedurally.

Should this issue be determined by the trial judge at a pretrial hearing, by a special jury convened for purposes of making such a pretrial determination, by the capital jury at the penalty phase, or by some combination of these? Capital cases are bifurcated trials in which the trial on guilt or innocence is followed, for those who are convicted, by a separate penalty phase at which the same jury hears evidence concerning aggravating and mitigating circumstances and is asked to recommend life or death. If at a pretrial hearing, the trial judge or special jury were to determine that the death penalty should be barred as a result of the defendant's mental illness at the time of the offense, the case no longer would be treated as a capital case. Such a preliminary determination would occur following a hearing at which expert testimony would be adduced. In such cases, if the defendant were found to satisfy statutory criteria for excluding the death penalty or capital punishment were determined to be a disproportionate penalty in view of the offender's mental illness at the time of the offense, the death penalty would be removed from consideration and the case would proceed as a non-capital homicide case. In the alternative, the mental illness capital punishment exclusion issue could be folded into the penalty phase, and the capital jury could be asked to make the determination, either at the outset of the penalty phase or as part of its weighing of aggravating and mitigating circumstances. Indeed, it is possible to conclude that allowing the capital jury at the penalty phase to consider evidence of mental illness would be all that should be required, and that a pretrial determination of the issue would be unnecessary.

This chapter analyzes how these issues should be determined. In declaring the death penalty for those with mental retardation unconstitutional, the Supreme Court in Atkins v. Virginia (2002, p. 317) declined to specify procedures for determining whether a particular offender was mentally retarded, preferring to leave this procedural question to the states. In thinking about the question of how the mental illness death penalty exemption determination should be made, we should consider which procedural approach would

best effectuate the underlying Eighth Amendment values. In addition, we should take into account considerations of accuracy, cost, and therapeutic jurisprudence.

2.2.1 Accuracy

Judges are likely to be more accurate decision-makers than juries in determining whether the defendant, at the time of the offense, satisfied statutory criteria for excluding the death penalty or suffered from such a serious mental illness that his culpability and deterability were diminished to the extent that capital punishment would offend the Eighth Amendment. This is essentially a normative or constitutional question, more than it is a factual question, and its resolution involves interpretation of clinical testimony and application of a legal standard that may be over the heads of typical jurors. Although there are significant factual components of the determination, including the need to ascertain the defendant's mental condition at the time of the offense and its impact on the crime, the issues seems more suitable for judicial than for jury determination. Judges are accustomed to making pretrial mixed fact/law determinations of this kind, for example, competency to stand trial, pretrial suppression motions, pretrial motions to dismiss for double jeopardy or speedy trial reasons, and determinations under *Atkins* of whether the offender suffered from mental retardation.

Judges may be more accurate decision-makers than juries in determining whether an offender's mental illness should disqualify him from capital punishment for several reasons. First, jury selection practices in capital cases produce juries that are biased in favor of the prosecution and in favor of imposing the death penalty. Prospective jurors are subjected to an elaborate *voir dire* process that seeks to ascertain their views on capital punishment, and that allows prosecutors to exclude all or virtually all who express opposition to the death penalty. This process, known as "death qualification" (Rozelle, 2006; Sandys & McClelland, 2003; Winick, 1982), allows prosecutors to challenge for cause prospective jurors whose scruples against the death penalty substantially impair them from following their oath as jurors to fairly consider conviction and a possible death sentence (Uttecht v. Brown, 2007; Wainwright v. Witt, 1985). At present, some 60% of the American public favor the death penalty, although that support decreases to about 50% when life in prison without possibility of parole is the alternative (Liptak, 2007b). A 2007 poll released by the Death Penalty Information Center shows that 39% of Americans report moral objection to the death penalty that would disqualify them from serving as jurors in a capital case (Liptak, 2007b). A recent Supreme Court decision, by requiring added deference to trial court determinations of whether a perspective juror's views on the death penalty would substantially impair his ability to follow jury instructions in capital cases (Uttecht v. Brown, 2007, pp. 2223–2224), will make it even easier for prosecutors to exclude by challenge for cause prospective jurors who express reservations about capital punishment (Liptak, 2007b). Even when prosecutors are unable to use challenges for cause to exclude such jurors, empirical research shows

that they systematically use peremptory challenges to accomplish this purpose (Winick, 1982).

Prosecutorial removal of all or virtually all prospective jurors who express reservations about the death penalty through a combination of these jury challenges produces capital juries that are unrepresentative of the community and more likely to convict and impose death than juries as a whole (Rozelle, 2006; Sandys & McClelland, 2003; Winick, 1982). Research has demonstrated significant differences between those excluded because of their reservations about capital punishment and resulting juries (Butler & Moran, 2002; Haney, Hurtado, & Vega, 1994; Neices & Dilahay, 1987). Those excluded were found to be less punitive, more concerned with due process, more favorably disposed to mitigating circumstances, and less prone to find aggravating circumstances than those included on capital juries. An extensive body of empirical research demonstrates the conviction proneness of death-qualified capital juries (Hovey v. Superior Court, 1980 (reviewing studies); Grigsby v. Mabry, 1985 (considering studies); Cowan, Thomson, & Ellsworth, 1984; Fitzgerald & Ellsworth, 1984). Death-qualified research subjects were found to have attitudes that were more accepting of the presumption of innocence, less likely to drawn negative inferences from a defendant's failure to testify, more trusting of the prosecutor, less trusting of the defense attorney, less receptive to the insanity defense, and more favorable to harsh punishment for crime (Fitzgerald & Ellsworth, 1984). A meta-analysis of 14 studies of the relationship between juror attitudes toward capital punishment and conviction proneness confirmed that the more an individual favors capital punishment, the more he is likely to favor conviction (Allen, Mabry, & McKelton, 1998). Although the sufficiency and legal significance of this research was rejected by the Supreme Court in Lockhart v. McCree (1986), the Court appeared to misunderstand the research or to be disingenuous in its analysis of it (Ellsworth, 1988).

More recent research, including comprehensive studies conducted by the Capital Jury Project under grants from the National Science Foundation (Bowers, Fleury-Steinner, & Antonio, 2003; Bowers & Foglia, 2003; Capital Jury Project, 2007), has confirmed the conclusion of the earlier studies that the death qualification process produces capital juries tilted in favor of the prosecution and the death penalty (Allen, et al., 1998 (meta-analysis)). Unlike the older studies rejected in McCree, in which the research subjects were not themselves capital jurors, the newer studies involved research subjects who previously had served on capital juries. Because the research subjects had received jury instructions and made actual death penalty determinations, albeit at an earlier time, the results of these newer studies more reliably reflect capital jury behavior than the older studies, which had used non-jurors as subjects.

The tools of challenge for cause and peremptory challenge make it easy for prosecutors to death-qualify capital juries (Winick, 1982). However, defense attorneys have a more limited ability to remove jurors who are death-prone. Jury panels often contain at least some venire persons who favor the death penalty to such an extent that they feel they should vote automatically to impose it for those convicted of capital crimes. Such jurors are biased on the penalty question and subject to removal for cause (Morgan v. Illinois, 1992, p. 729). However, they seem less detectable by defense attorneys at *voir dire*, perhaps because they are less forthcoming or less conscious of their biases

than are those with scruples against the death penalty (Rozelle, 2006, pp. 788–789; Sandys & McClelland, 2003, pp. 400–401). As a result, such jurors frequently are seated on capital juries (Bowers & Foglia, 2003, pp. 60–61).

These jurors can be considered to be "mitigation impaired," viewing mitigating circumstances as irrelevant and unwilling to consider them in support of a sentence less than death (Blume, Johnson, & Threlkheld, 2001, p. 1228; Garvey, 1998; Sandys & McClelland, 2003, p. 401). Inclusion of such mitigation impaired jurors on capital juries further skews such juries in favor of conviction and imposition of death.

Mitigation impaired jurors include those who would vote automatically for the death penalty should the defendant be convicted of a capital offense, and who therefore are subject to challenge for cause, and those whose attitudes favoring capital punishment, although not so strong as to preclude their consideration of an alternative sentence, are "mitigation impaired" in the sense that they refuse to give consideration to certain mitigating circumstances, even though the law requires such consideration. These prospective jurors are even more difficult to detect by defense attorneys at the *voir dire* than are those who would vote automatically for death, and therefore are considerably less likely to be removed for cause or by peremptory challenge (Sandys & McClelland, 2003, pp. 403–404). As a result, capital juries frequently contain mitigation impaired jurors.

Research by the Capital Jury Project conducted on jurors who previously had served on capital juries demonstrated that significant numbers reject various mitigating circumstances as factors they would take into account in deciding sentence and even state that they would consider them to be factors supporting a death sentence (Sandys & McClelland, 2003, p. 403). Thus, for example, some one in five jurors stated they would not consider or would consider as supporting death such strong mitigators as having a lingering doubt about the defendant's guilt or degree of culpability and mental retardation (p. 404). More than half of former jurors in the study would have rejected many of the standard mitigators as factors that would make them less likely to vote for death, including juvenile status at the time of the offense, that the defendant had been seriously abused as a child, that the defendant had no previous criminal record, that the killing was not premeditated, or that the defendant was under the influence of alcohol or drugs at the time of the offense (p. 404). Less than one-third of the former jurors would consider in their determination of sentence such strong mitigating circumstances as mental illness or extreme mental or emotional disturbance at the time of the offense or that the defendant had been institutionalized in the past, but not provided needed treatment (pp. 404–405).

These results raise grave concerns about the ability of capital juries to be accurate decision-makers on the critical question of imposition of capital punishment. This is so particularly because these studies involved research subjects who themselves previously served as capital jurors and thus had been instructed about their role in considering mitigating circumstances. Substantial numbers of capital jurors, quite simply, often are unwilling or unable to consider mitigation evidence.

The research conducted by the Capital Jury Project also demonstrates that capital jurors often reach their decision about penalty at the criminal trial itself and based upon what transpired there, instead of based on evidence presented at the penalty

phase (Bowers, et al., 2003, pp. 426–432; Bowers, Sandys, & Steiner, 1998). This study, also based on interviews with people who had served as capital jurors in prior cases, showed a pervasive pattern in which half of the capital jurors stated that, at the guilt stage of the trial, they thought they knew what the sentencing decision should be (Bowers, et al., 2003, p. 426). Seventy percent of those who had prematurely decided in favor of death and 57% of those in favor of life characterize themselves as "absolutely convinced" prior to the penalty phase, in nearly all of the remaining jurors reported themselves as "pretty sure" (p. 427). Moreover, most of these premature deciders held steadfastly to their conviction for the duration of the proceedings (p. 427). This research thus demonstrates that a significant percentage of capital jurors make their decisions prematurely and that their minds thereafter are closed to consideration of the evidence presented at the penalty phase, the instructions of the trial judge concerning penalty, and the arguments of their fellow jurors. These jurors thus prejudge the penalty question, and therefore a biased on the issue.

Many of the jurors in the study attributed their premature decisions to unmistakable proof of guilt, heinous aspects of the crime, and physical evidence presented at trial, especially graphic photographs or audio or videotape evidence (p. 430). These jurors seem to come to the trial with a predisposition that death is the only acceptable punishment for capital murder, a predisposition that is activated by the gruesome facts of the crime (p. 431). More than half of the jurors in the study expressed the mistaken view that death was the only acceptable penalty for certain crimes, such as repeat murder, premeditated murder, and multiple murder (p. 432), and nearly half thought it was the only acceptable punishment for killing of a police officer or prison guard, or murder by a drug dealer (pp. 432–433).

It has long been known that capital juries often fail to understand jury instructions (Eisenberg & Wells, 1993). The Capital Jury Project also studied juror's comprehension of instructions by the trial judge at the penalty phase. This research showed that many jurors failed to understand which factors may and may not be considered at the penalty phase and the level of proof and degree of concurrence needed for findings concerning aggravating and mitigating circumstances (pp. 437–438). Half of the jurors mistakenly believed that mitigating factors had to be proved beyond a reasonable doubt, and 54% mistakenly believed that jurors had to agree unanimously on a mitigating factor before it could be considered (p. 438). Although capital juries are instructed to weigh both aggravating and mitigating factors, the study showed that many capital jurors mistakenly believed that the death penalty was required, without regard to mitigating circumstances, when the evidence proved that the defendant's conduct was heinous, vile, or depraved (43%) or that the defendant would be dangerous in the future (37%) (p. 440). These fundamental misconceptions demonstrate that capital juries either do not understand the instructions they are given about aggravating and mitigating factors and that they are to weigh them in the particular case and make a moral judgment concerning life or death, or are unwilling or unable to follow them.

Significant questions about the ability of the capital jury to be fair and accurate in playing its role in the capital sentencing process are raised not only by its composition as a result of death qualification, but also by the very process through which such death qualification occurs. The death qualification process itself tends to bias the jury

in favor of believing that the death penalty is an appropriate punishment generally and in the particular case (Haney, 1980; Haney, 1984). Professor Haney suggests that the typical elaborate *voir dire* inquiry into attitudes concerning the death penalty, generally conducted before the entire venire, may itself bias the venire in favor of death and perhaps also in favor of guilt. Prolonged discussion of the death penalty at *voir dire* suggests to prospective jurors that the defendant's guilt is presumed by the attorneys and the judge. It desensitizes jurors to the possibility of imposing the death penalty, communicates the law's disapproval of death penalty opposition, and increases the acceptability of pro-death penalty attitudes. "Rather than simply discovering prejudice, the process of death qualification tends to create it" (Haney, 1980, p. 525).

Prospective jurors observing one of their fellow members being removed by the judge when their responses to questions by the prosecutor and the judge admit that they have reservations against the death penalty quickly learn that the correct answer to such questions should be that they favor capital punishment. This is the answer, after all, that these authority figures seem to want to hear, and those who do not provide it are met with disapproval and are ceremoniously banished from the group. By focusing the jurors' attention on the death penalty at the outset of their participation in the case, the jury selection process provides a frame for all that follows, conveying the message that the defendant must be guilty and deserving of the death penalty, and providing a lens through which they will view the evidence they subsequently will hear at both the trial and the penalty phase. One of the Capital Jury Project's studies provides further support for these conclusions (Bowers & Foglia, 2003, p. 65). Some 10% of jurors in the study, when asked about their perceptions of the impact upon them of the *voir dire*, reported that the questions made them think the defendant must be or probably was guilty and deserving of the death penalty, while only 1% thought the opposite.

For a variety of reasons, therefore, capital juries may be more biased and less accurate decision-makers than would be the trial judge. Like jurors, trial judges may favor the death penalty, but they are more likely to be able to set aside their attitudes about capital punishment when asked to determine, at a pretrial hearing, whether the defendant suffered from serious mental illness that significantly diminished his culpability and deterability. Juries may be limited in their ability to understand complex legal terms even when jury instructions seek to explain or translate them into ordinary language, and as the Capital Jury Project research shows, often have mistaken views about their roles in capital sentencing or are unable or unwilling to follow the instructions they are given (Eisenberg & Wells, 1993; Bentele & Bowers, 2001, pp. 1046–1049). By contrast, judges are more likely to understand complex legal standards and are more likely to apply them rather than some other standard that they may think should be applied. In short, judges probably are more due process oriented than capital juries and more likely to attempt conscientiously to apply the relevant legal standard. Moreover, they will not be subject to the biasing effects of the death qualification process and will be less subject to the psychological pressures that impair many capital jurors' ability to be fair and accurate. In considering, at a pretrial hearing, whether the defendant should be exempted from capital punishment as a result of his mental illness, the judge will be more likely to understand expert testimony about the defendant's psychopathology and its impact on his

culpability and deterability. Although death-qualified capital juries are prosecution prone, and therefore likely to be more accepting of prosecutor's arguments that the defendant's mental illness should not disqualify him from receiving the death penalty, trial judges are more able to be neutral and detached decision-makers when considering the arguments of the prosecution and defense.

The ability of capital juries to decide the death penalty exclusion issue fairly and accurately also is diminished as a result of the misconceptions and stereotypes that many people still have about mental illness. The jury may be more likely than the trial judge to associate serious mental illness with dangerousness, to accept the stereotype of people with mental illness as violent, and to think that the death penalty is the best or only way to protect the community from potential future harm by the defendant (Perlin, 1994, p. 274; Slobogin, 2000, pp. 19–23; Slobogin, 2003, pp. 305, 313). Juries, for example, rarely return a verdict of acquittal by reason of insanity, perhaps basing their decision more on the perceived need to protect the community from the defendant's future dangerousness than on the normative principles embodied in the legal insanity standard (Perlin, 1994, p. 274; Perlin, 1996, pp. 216–217; Slobogin, 2000, pp. 19–20; Slobogin, 2003, p. 305). Indeed, although the test for legal insanity varies among jurisdictions, empirical studies show that the insanity defense test used makes little difference in jury verdicts (Simon & Aaronson, 1988, pp. 125–127; Steadman, et al., 1993, pp. 45–62). Because the standard for exempting a defendant from the death penalty as a result of his mental illness is similar to the legal insanity standard, juries may have similar difficulties in making the determination. Although judges may have their own biases against people with mental illness and will share the desire to protect the community from harm, they are more likely to be able to set aside their biases and will understand that, should the decision be to exempt the defendant from the death penalty, a life sentence, should he be convicted or plead guilty, will adequately protect the public.

If the death penalty exclusion issue is determined by the capital jury at the penalty phase, that jury will already have heard the gruesome facts of the crime and have determined that the defendant is guilty. Can the jury then make a fair and impartial determination of whether the defendant's mental illness should disqualify him from the death penalty? The research demonstrates that capital jurors, many of whom are biased in favor of death and "mitigation impaired," when asked to determine life or death at the penalty phase of the proceedings often focus on the gruesome facts of the crime and the finding they already have made that the defendant is guilty (Bentele & Bowers, 2001, pp. 1046–1049). Based on these factors, they vote for death without considering mitigating circumstances. If asked post-trial to make a threshold determination of whether the defendant should be excluded from capital punishment as a result of his mental illness, they are likely to respond similarly. A jury that has determined that the defendant has committed a particularly heinous, atrocious, and cruel murder may psychologically be unable to ascertain whether the defendant suffers from such a serious mental illness that capital punishment should be excluded from consideration free of the biasing affects of the facts they have heard and determined.

In other contexts, the Supreme Court has found a due process violation when juries have been asked to ignore facts they have heard and concluded are true. For

example, in Jackson v. Denno (1964), the Supreme Court held that due process is violated when the jury is assigned the role of determining both the voluntariness of a confession and its veracity. Even though the jury may be instructed to ignore the confession if it finds it was coerced. This cannot be done free of the biasing effects of its determination that the confession is accurate. As a result, the Court held that due process required a pretrial judicial determination of the coercion issue at a suppression hearing held by the trial judge outside the presence of the jury.

Similarly, in Bruton v. United States (1968), the Supreme Court also invalidated a jury instruction on the ground that it was psychologically beyond the juries' ability to follow. The Supreme Court considered the situation of a joint trial in which one defendant's confession is admitted into evidence and implicates an additional co-defendant. When a conspiracy has not been charged, the statement will be inadmissible hearsay with regard to the non-confessing co-defendant, and when the confessing defendant refuses to testify, there is a Confrontation Clause problem under the Sixth Amendment. The Court previously had upheld the efficacy of jury instructions in this context that ordered the jury to disregard the statement when considering it in connection with the non-confessing defendant's guilt, although considering it in connection with the guilt of the declarant. However, in Bruton, it concluded that having heard and considered the statement, the jury would be psychologically unable to then ignore it. Rejecting the assumption that these instructions were efficacious, the Court therefore held that, to avoid unfairness to the non-confessing defendant, one of several measures would need to be taken. The statement implicating both the declarant and the non-confessing defendant either would not be admissible in evidence or would be admissible only following its redaction in ways that would prevent the jury from knowing that the non-confessing defendant was implicated or from speculating about this possibility (*see* Gray v. Maryland, 1998), or the co-defendants would need to be severed for separate trials (Fed. R. Crim. P. 14).

For similar reasons, a jury that has decided the defendant is guilty of a gruesome murder may be unable psychologically to determine the mental illness/death penalty exclusion issue free of the biasing effects of the determination it already has made (Bentele & Bowers, 2001, pp. 1046–1049). This biasing effect would not occur if the issue were to be decided pretrial, either by the judge or by a special jury convened for this purpose. However, the added costs and burdens on the community of convening a separate jury to decide this question make it unlikely that legislatures would adopt this approach. Moreover, even if a special jury were to be convened for this purpose, the question would arise as to whether this jury should be subject to the usual death qualification process that occurs at the *voir dire* in capital cases. Prosecutors (as well as defendants) have a right to jurors that are unbiased and to jury selection practices that provide them with a reasonable opportunity to exclude those who do not meet this standard. In Lockhart v. McCree (1986), the Supreme Court rejected the contention that the Constitution prohibits the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the penalty phase of the trial. For the same reasons, it would be unlikely that the Court would require the convening

of a separate jury that was not death qualified to determine pretrial whether capital punishment should be barred because of the defendant's mental illness at the time of the offense. Requiring the typically lengthy *voir dire* process to occur twice in one case, would add considerably to the cost and duration of capital cases. Moreover the death qualification process that would occur in screening a special jury convened to decide the death penalty exemption issue would similarly skew the composition of the special jury and produce parallel biasing effects to those described earlier. If a pretrial determination of the death penalty exemption issue is deemed more desirable than a post-trial determination of the issue by the capital jury that convicted the defendant, it therefore is extremely unlikely that a special jury would be used for this purpose, and it would be preferable for that determination to be made by a judge.

In deciding whether a judicial determination of the issue would be more or less accurate than a jury determination, consideration might be given to the question of whether judges are more severe than juries in sentencing generally, and in capital sentencing in particular. There is conflicting social science evidence concerning whether the judge or the jury is more severe in making the capital punishment determination. In the small number of jurisdictions in which the capital jury plays an advisory role and the judge makes the ultimate decision, the literature shows that judges more frequently override jury recommendations of life and impose a death sentence compared to when they override jury recommendations of death and impose a life sentence (Bowers, Foglia, Giles, & Antonio, 2006, p. 978; Bright & Keenan, 1995, pp. 776–813; Burnside, 1999, pp. 1039–1044; Harris v. Alabama, 1995, pp. 519–520 (Stevens, J., dissenting)).

In making these override decisions, judges are not immune from political pressures, and studies show that the occurrence of life-to-death judicial overrides is concentrated in the year before the judge must stand for re-election (Bowers, et al., pp. 978, 989, 1005; Bright & Keenan, 1995, pp. 776–813; Burnside, 1999, pp. 1039–1044; Stevenson, 2003, pp. 1193–1194). Life-to-death overrides, particularly occurring in the run-up to judicial elections, may reflect the fact that state judges, most of whom are elected officials, may not wish to appear to be soft on crime. The risk that not imposing a death sentence may give rise to this appearance, however, may be less in the context in which the trial judge is asked to make a pretrial determination of whether mental illness should exempt the defendant from capital punishment under the Eighth Amendment or statutory exclusion criteria. This risk may be considerably higher in cases in which the defendant already has been convicted and the gruesome facts of the crime have appeared in the media. The appearance of being soft on crime will be less in cases, such as those under consideration, in which a pretrial hearing is all that has occurred and has focused on the defendant's mental illness and its impact on the crime, rather than on the gruesome facts of the crime and the victim's suffering. Although the testimony may inevitably touch upon some of the facts of the crime, it would not be as extensive as would occur at the trial itself as part of the prosecutor's proof of guilt. A defense motion to exclude the death penalty on the basis of the defendant's mental illness at the time of the offense concedes, for purposes of the motion, that the defendant has committed the offense, therefore rendering it unnecessary for the prosecutor to prove guilt in connection with rebutting the motion. The political

pressures that may produce judge overrides of jury recommendations of life in cases in which the defendant has been convicted of capital murder thus may not carry over to the lower visibility judicial pretrial determination of whether the defendant's mental illness at the time of the crime should disqualify him from capital punishment, or may carry over to a much lesser extent. The appearance that the judge is soft on crime may be greater when the judge declines to impose death following a jury conviction of a heinous crime than when the judge, pretrial and preconviction, accepts the testimony of clinical experts that the defendant suffered from such severe mental illness at the time of the offense that the death penalty should be precluded.

One factor that may bear on the question of the relative severity of judge vs. jury sentencing is that prosecutors, when surveyed, favor jury sentencing, while defense lawyers favor sentencing by judges (Smith & Stevens, 1984). Yet, data from Alabama after it transitioned from a jury to a judge sentencing system, found that judges were significantly more harsh in imposing sentences for robbery (35.9 years) than had juries been under the preexisting jury sentencing process (22.5 years) (Smith & Stevens, 1984). This finding, however, may not extrapolate to capital sentencing, and probably will do so to even a lesser extent than the pretrial determination of whether capital punishment should be removed from consideration because of the defendant's mental illness.

The relative severity of judges versus juries in sentencing may inevitably be difficult to ascertain, but the crucial question here should be accuracy, rather than severity. In the capital context, in particular, there is strong reason to think that judges will be more fair and accurate decision-makers than juries in resolving the issue of whether statutory criteria for barring the death penalty as a result of mental illness had been satisfied or an offender's mental illness should exempt him from capital punishment under the Eighth Amendment. The Supreme Court recently had the occasion to consider the relative accuracy of judge versus jury determinations of whether to impose capital punishment (Schriro v. Summerlin, 2004) in determining whether its prior decision in Ring v. Arizona (2002), holding that the Sixth Amendment requires a jury determination of the existence of an aggravating circumstance that would justify imposition of the death penalty, should be made retroactive, the Court discussed the literature on the relative accuracy of judges and juries in capital sentencing. The Court concluded that the evidence on this question was "equivocal" (p. 356) (*citing* Eisenberg & Wells, 1993; Garvey, 2000; Bowers et al., 1998). If the evidence concerning the relative accuracy of judges vs. juries in capital sentencing is equivocal, this may reflect an absence of studies on relative accuracy, rather than evidence that capital juries are more accurate than judges in capital sentencing. In any event, accuracy in capital sentencing is different than accuracy in making the pretrial determination of whether capital punishment should be excluded on the basis of the defendant's mental illness at the time of the offense. In this latter context, there would seem to be strong reason to favor the conclusion that judges are more accurate in making the mixed fact/constitutional or statutory determination of whether the defendant's mental illness at the time of the offense should preclude consideration of the death penalty. The technical nature of the evidence involved in determining this question, turning largely on expert clinical testimony concerning

the defendant's mental illness and its impact on the crime, suggests that law-trained and experienced judges would be more accurate in determining this issue pretrial. In addition, judges would be more reliable decision-makers on the death penalty exclusion issue, more consistent in their application of statutory or constitutional standards than *ad hoc* groups of lay jurors who will lack previous experience in making decisions of this kind (Schriro v. Summerlin, 2004, p. 356; Profitt v Florida, 1976, p. 252 (joint opinion of Steward, Powell, & Stevens, JJ.)).

For the many reasons discussed in this section, capital juries are considerably less likely to apply the proper legal standard free of the biases that the social science research has so forcefully demonstrated.

Accuracy is particularly important in capital cases in view of the high social disutility of an erroneous death sentence. Death is different, the Supreme Court has repeatedly recognized, and this difference argues strongly for procedures that we think will produce a higher degree of accuracy (Gilmore v. Taylor, 1993; California v. Ramos, 1983; Eddings v. Oklahoma, 1982; Enmund v. Florida, 1982, p. 3377; Beck v. Alabama, 1980, p. 637; Lockett v. Ohio, 1976, pp. 604–605 (plurality opinion of Berger, C.J.); Coker v. Georgia, 1977, p. 584; Gardner v. Florida, 1977, pp. 357–358, (plurality opinion of Stevens, JJ.); Gregg v. Georgia, 1976, pp. 187–189; Woodson v. North Carolina, 1976, pp. 303–304 (plurality opinion)). Moreover, limitations on habeas corpus review enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (2006) tend to insulate fact-finding from effective habeas review and to require a high degree of deference to such fact-finding (e.g., Uttecht v. Brown, 2007, p. 2224). These limitations increase the risk that an erroneous death sentence will avoid correction, and therefore also argue strongly for procedures that are likely to increase the accuracy of the determination of the mental illness capital punishment exclusion question. To minimize the risk of error in this context, the question of whether a defendant's mental illness at the time of the offense should exclude the possibility of a death sentence should be determined pretrial by the trial judge.

2.2.2 Cost

In considering whether the mental illness capital punishment exclusion issue should be decided pretrial or at the penalty stage, and if pretrial, by the judge or a special jury convened for this purpose, we should also take into account considerations of cost. A pretrial determination, by either judge or jury, would affect considerable cost savings. Such a pretrial determination is both cost effective and more time efficient than having the issue determined at the penalty phase of a capital trial. Capital trials typically are considerably more lengthy than non-capital trials, necessitating additional judicial, prosecutorial, defense lawyer, jury, and judicial personnel time and courtroom use. The Supreme Court of New Mexico recognized these differences between capital and non-capital trials, noting that "trials involving the death penalty 'are qualitatively

and quantitatively distinct from other criminal proceedings'" (New Mexico v. Flores, 2004, p. 764). The court recognized the "tremendous hardships in terms of time, emotion, energy, and expense" that are involved in capital trials (p. 764). The court invoked these cost considerations to justify its interpretation of a statute requiring a presentence judicial hearing of the question concerning whether a defendant should be excluded from capital punishment as a result of mental retardation. Although the statute specified a post-conviction, presentence hearing, the court, noting the considerably higher costs of capital cases compared to non-capital murder trials, construed the statute to permit the issue to be determined at a pretrial judicial hearing upon motion of the defendant. Because of the extraordinary nature of capital prosecutions, the court concluded, "every effort must be made to avoid a death penalty trial as early in the proceedings as possible where capital punishment is precluded as a matter of law" (p. 764). The court was justifying its decision that the exclusion from capital punishment required by *Atkins* for those with mental retardation be determined at a pretrial judicial hearing, but its analysis supports as well having the issue of whether mental illness should disqualify an offender from capital punishment resolved in the same fashion. If the issue is determined pretrial in favor of excluding the offender from a potential death sentence, the greater investment of resources, time, and emotional energy, that having the issue determined at the penalty phase would necessitate would be avoided.

The fiscal savings alone of avoiding a capital trial that might be unnecessary are themselves quite substantial (Death Penalty Information Center, 2007a). For example, in Washington state, death penalty trials cost about $467,000 more than non-capital murder trials, and on average, approximately $100,000 more for appeals (Death Penalty Information Center, 2007a; Washington State Bar Association, 2007, p. 20). Furthermore, because capital trials were estimated to take 20 or 30 days longer, an additional extra cost in terms of trial court operation should be included, and this was estimated to be $46, 640 to $69, 960 (Washington State Bar Association, 2007, p. 18). In Kansas, "costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration" (Death Penalty Information Center, 2007b). The trial phase of a capital case alone is estimated to cost one million dollars (Block, 2007, p. 27; Liptak, 2007a). Another estimate is that capital cases cost five million dollars, some ten times more than non-capital murder trials (Gibbons, 1988, p. 66).

Cost considerations have led legislatures to require that the determination of the mental retardation exclusion from capital punishment mandated by *Atkins* occur pretrial. When the California legislature was considering how *Atkins* determinations should be made, the Senate Committee on Public Safety emphasized the fact that "a pre-trial procedure would avoid the extraordinary expenses associated with proceeding with a capital trial." (California Bill Analysis, 2003). The federal courts also have recognized the cost advantages of making the Atkins determination pretrial. In United States v. Nelson (2006, p. 893), the federal district court noted that "significant resources are saved in terms of trial preparation, motion practice, *voir dire*, trial time, mitigation research, etc."

If the judge decides the issue pretrial, rather than leaving it to the jury at the penalty phase, additional cost saving would result from avoidance of the very lengthy jury selection process that occurs in capital cases. If capital punishment is removed from consideration, and this is determined by the judge before jury selection commences, the death qualification process, in which prospective jurors are asked about their attitudes toward capital punishment, would be unnecessary. It is not unusual for jury selection in capital cases to last several weeks. If it is determined pretrial that the death penalty may not be imposed, the subsequent *voir dire* therefore would be substantially shorter, avoiding considerable judicial and attorney time and reducing the burdens of jury service. Because, for the reasons shown earlier, death-qualified juries are biased in favor of conviction, eliminating the elaborate *voir dire* inquiry into death penalty attitudes will have the added advantage of increasing the fairness and accuracy of those trials that remain necessary.

In addition, removal pretrial of the possibility of capital punishment will facilitate plea bargaining. In most capital cases, the real focus of the defense is on avoiding a death sentence. Although the chances of obtaining an acquittal may be exceedingly small, when the prosecution seeks the death penalty and is unwilling to accept a guilty plea that avoids it, almost all defendants will elect trial. If the death penalty possibility is removed pretrial, both parties will be more motivated to attempt to reach a negotiated settlement of the criminal charges, and many trials will thereby be avoided.

Furthermore, if the capital punishment issue is removed from consideration pretrial, rather than being determined at a post-conviction penalty phase hearing, the entire penalty phase would be rendered unnecessary. This would affect considerable cost savings as the penalty phase itself is a lengthy trial at which witnesses are presented concerning aggravating and mitigating circumstances, the attorneys present opening and closing arguments, the judge instructs the jury, and the jury engages in deliberations concerning sentence. Rather than this elaborate penalty phase trial, the usual sentencing hearing held before the trial judge would occur, and this typically is a brief hearing, instead of what often is a several week separate trial on penalty.

Every case in which a death sentence is imposed produces several layers of appeals, petitions for certiorari to the U.S. Supreme Court, and petitions for habeas corpus, each of which results in further appeals and petitions for certiorari. These involve considerable attorney, trial court, and appellate judge costs, and costs of printing records and briefs. Convictions in cases not involving a death sentence result in much fewer appeals, petitions for certiorari, and habeas corpus petitions. In cases in which the possibility of a death sentence is removed pretrial, these appellate and post-conviction costs thus will be substantially reduced.

Determining the issue pretrial therefore would be much less costly than deferring its determination until after conviction and deciding it either at a separate proceeding prior to the penalty phase or at the penalty phase itself. If the issue is to be determined pretrial, having it done by a judge rather than a jury also will be less costly and more expeditious. Requiring determination of the issue pretrial, of course, will necessitate what could be a lengthy pretrial hearing on the question at which expert witnesses will testify and the attorneys will make legal arguments. The same expert

testimony and legal arguments, however, will occur anyway if the issue is deferred to the penalty phase, and probably will take much longer to present to a jury than to a trial judge alone. Moreover, determining the issue pretrial rather than at the penalty phase would avoid the necessity of jury instructions on the issue and the added time of jury deliberations needed to resolve it. For a variety of reasons, therefore, determining the issue at a pretrial judicial hearing would be considerably more efficient, less expensive, and less burdensome to the criminal justice process.

2.2.3 Therapeutic Jurisprudence Considerations

An additional consideration in determining whether the issue should be decided pretrial or during the penalty phase, and by judge or jury, is the therapeutic jurisprudence dimension. Therapeutic jurisprudence is an interdisciplinary field of legal scholarship and law reform that focuses attention on the psychological consequences of law and its processes for those affected. (Wexler & Winick, 1991; Wexler & Winick, 1996; Stolle, Wexler, & Winick, 2000; Winick & Wexler, 2003; Winick, 2005). Given that there are various alternative ways of determining the issue of whether mental illness at the time of the offense should exempt the defendant from a possible death sentence, which of these would achieve greater emotional well being for the various individuals affected – the judge, jury, attorneys, family of the victim, and the defendant himself?

2.2.3.1 The Judge

Trying a capital case probably produces significant added stress for the judge. The judge must be extra sensitive to the fairness of the proceedings, and will bear the greater emotional weight of a trial involving the added consequences of a possible death sentence. If the issue of whether the defendant suffers from sufficiently serious mental illness to exclude consideration of capital punishment is determined pretrial, this added stress will dissipate. The earlier the issue is resolved, the less stress the judge will experience. This stress for the judge will be dissipated, of course, whether the determination is made by the judge or a jury pretrial, and some judges might find it less stressful to have the issue determined by a jury, rather than making the decision themselves. However, empanelling a jury and having the jury determine the issue will take longer, thereby prolonging the stress that presiding at a death penalty case probably produces for most judges. By contrast, if the issue is determined post-verdict, the added stress of presiding at such a trial and the added responsibility of participating in the determination of whether to take someone's life may pose significant negative emotional consequences for the judge.

A capital case attracts considerably more media attention than a non-capital case would, with the result that the judge will be under the intense glare of media and

public scrutiny for an added period. Conscientious judges trying a capital case will experience the added pressure of ensuring the fairness and accuracy of the trial, minimizing the risk of an erroneous execution, and creating a record that will stand up to the intense scrutiny the case will receive post-conviction. The psychological burdens and pressures of trying a non-capital case are much less.

2.2.3.2 The Jury

For similar reasons, serving on a capital jury produces considerable stress that can be hazardous to a jury member's mental and physical health. Studies have found that capital jurors experience heightened levels of stress (Miller & Bornstein, 2004, pp. 239–242). Capital jurors report feeling depression and/or anxiety (pp. 239–242). Many factors that contribute to the psychological and physiological distress of criminal jury service generally are much higher in capital than in non-capital cases. These include the presentation of gruesome and graphic evidence, intense media attention, fear of retribution by the defendant, sequestration, the length of the trial, relationship with other jurors, and community pressures (Cusack, 1999, p. 99). Each of these factors is present in a capital case to a heightened extent. When the death penalty is at stake, juror stress levels are higher than in non-capital cases, even when the facts of the cases are comparable (p. 99). The same study found that jurors who imposed the death penalty had a higher risk of "sustain[ing] clinically significant symptoms of post-traumatic stress disorder" (p. 100).

If the question of whether severe mental illness should exclude the possibility of capital punishment is determined pretrial by the judge, the capital jury will never be empanelled. Thus, the special stress of serving on a capital jury will be avoided. Even if a special jury is empanelled to determine the capital punishment exclusion issue pretrial, the stress of determining this issue will presumably be less than the stress of serving on a jury during an extended capital trial and penalty phase. Although the jury at such a pretrial exclusion determination will hear evidence concerning the defendant's mental illness, it is less likely that it will hear a full account of the gruesome facts of the crime and about the victim's suffering. The issues such a pretrial jury are asked to determine are more abstract than the question of whether the defendant should live or die. A pretrial determination of whether the possibility of capital punishment should be eliminated does not produce the same degree of pressure as a determination of whether the death sentence should be imposed. As a result, juror stress in such a circumstance should be considerably less than is usually encountered in serving on a capital jury.

2.2.3.3 The Attorneys

The stakes for a prosecutor in trying a capital case are considerably higher than those in trying a non-capital case, as is the extent of media attention. As a result, the added stress of prosecuting a capital case may cause negative emotional consequences for

at least some prosecutors. The earlier that capital punishment is removed from consideration, the less will be the stress of this kind imposed on the prosecutor.

There is considerable stress in being a defense lawyer in a capital case. The defense attorney literally has his client's life in his hands, and the weight of this responsibility on his shoulders can cause high anxiety, depression, insomnia, and even a form of vicarious post-traumatic stress disorder. Excluding the death penalty from consideration at a pretrial phase, will alleviate these negative emotional effects.

2.2.3.4 The Family of the Victim

Although oftentimes the family of the victim of the capital crime seeks retribution and the death penalty, from an emotional perspective, this may be a misguided quest. A capital sentence, far from giving finality to the family's grief and anger, typically marks the beginning of a lengthy process, lasting 12 or more years in most jurisdictions, until capital punishment can be administered. During this period, the family's wounds are left open, and no sense of closure is achieved. There may be many occasions in which the governor issues a warrant of execution, which has the effect of renewing the family's emotional reaction to the original crime, only to be followed by perhaps inevitable stays of execution issued by various appellate and habeas courts, thereby renewing the family's anger and frustration. The capital punishment system "greatly adds to the years of anguish of the survivors of murder victims," and "holding out the death penalty as some sort of delayed remedy for their grief is a cruel hoax" (Lewis, Dow, Preate, Bright, & Tigar, 1994, p. 1196).

The family has itself been victimized by the capital crime. The murder of their loved one inevitably provokes shock, anguish, anger, and depression. Their participation in the capital trial, even if merely as observers, can provoke a form of "secondary victimization" (Acker & Karp, 2006, p. 154; Kanwar, 2002 pp. 228–229). The indeterminacy of the process can be a persistent source of frustration, resentment, and anxiety.

Rather than serving as a source of sympathy and vindication, the capital trial process seems to many families to neglect their interest and feelings and to focus more on the defendant's rights than what they may perceive to be their own (Armour, 2002, p. 376). The prosecutor, and not them, decides how the case will be presented, and they rarely will be consulted or have their wishes honored. "It's not fair," one family member complained (Gibbons, 1988, p. 67). They play a peripheral role, unless, of course, they are asked to testify, in which case they feel badgered and embarrassed by the defense attorney's cross-examination. "No one has the right to keep us locked out of the judicial process," one family member complained (p. 67). Rather than treating them with humanity and offering sympathy, the judicial system "treats them like a piece of evidence" (p. 67). Even at the penalty phase, they often do not get to tell their stories about how they felt about the victim's murder, and instead of being a memorial to their murdered family member, the penalty trial may be seen by them as an attempt to humanize the defendant and to place him in the best possible light. Family members feel that the way their loved ones are portrayed

in the proceedings "distorted who they had been," with the result that "families felt they lost control of their truth about the victim" (Armour, 2002, p. 376).

The literature on the psychology of procedural justice teaches that when individuals involved in judicial proceedings are given a sense of "voice," the ability to tell their story, and "validation," the feeling that they have been heard and that what they have had to say was taken seriously, and treated with dignity and respect and in good faith, they are more satisfied with the proceeding and more likely to accept its outcome (Lind, et al., 1990; Lind & Tyler, 1988; Tyler, 1990, 2006; Thibaut & Walker, 1978). For the family of the victim, none of these elements may be satisfied. As a result, the pretrial process, the trial itself, and the penalty phase are an altogether unsatisfying experience. Moreover, in the capital process, the trial phase is just the tip of the iceberg. In the years that will follow any imposition of a death sentence, family members will be totally removed from the appellate and post-conviction processes that will prevent execution for a dozen or more years (Gibbons, 1988). They will experience increased resentment with each passing year, and come to feel that justice delayed truly is justice denied.

Many family members will experience a form of post-traumatic stress disorder stemming from the often heinous and cruel murder of the victim (p. 1; Amick-McMullan, et al., 1991. As a result, every occasion within the lengthy legal process that focuses their attention once again upon the horrible crime will reactivate the feelings of panic and anxiety that they experienced at the time of the crime. Rather than obtaining closure, the capital process, with its inherent appellate and post-conviction delays, can cause the family to relive again and again that nightmarish occasion and the feelings it unleashed. Every time a new execution warrant is signed, a stay of execution is granted, or a new petition is filed, media attention will again focus on the murder and cause all of their horrible memories to resurface (Vandiver, 2003, p. 621). Repeated descriptions of the crime in the media, sometimes accompanied by photographs, or videotape images, will make it difficult for the survivors of the victim "to put the murder behind them, or to focus their memories on the victim's life rather than on his or her death" (p. 621). When an appeal or a post-conviction challenge is successful, necessitating a retrial or resentencing, the negative emotional effects for the family will be at their highest as they experience a replay of the entire process. Rather than putting an end to this unfortunate chapter in their lives, the capital process thus can prolong their nightmare indefinitely.

Family members thus "often are not helped, and sometimes further victimized by the criminal justice system" (Vandiver, 2003). For survivors of the victim, the capital process often constitutes what has aptly been described as a form of "secondary victimization" (Acker & Karp, 2006). The secondary victimization problems encountered by family members in the capital process were well captured by a victim's relative, who exclaimed: "You never bury a loved one who's been murdered, because the justice system keeps digging them up" (Kanwar, 2002, p. 241). The capital punishment system "directly undermines" the "healing process and the survivor is repeatedly reminded of the offender's actions" thus impeding recovery (Tabak & Lane, 1989, p. 132).

"In short, the capital punishment system's alienation of survivors, perpetuation of reminders of the crime, and prevention of swift and certain finality compound the survivors' suffering and grief" (p. 132). The prolonged suffering experienced by the survivors of the victim makes them feel that they "are forced to serve a life sentence without parole" (Gibbons, 1998, p. 66).

Although some survivors of the victim may view capital punishment as a means of obtaining closure, it actually may prolong their suffering and prevent closure from occurring. The idea that execution may bring closure "may be more a hoped-for result" than the reality of the experiences and responses of family members (Armour et al., 2006, p. 4). If and when execution actually occurs, it frequently does not bring the victim's survivors the relief they were seeking or put an end to their long ordeal (Armour et al., 2006, p. 2). Moreover, the lengthy capital process may actually provoke intra-family conflict as family members may have differing feelings about the death penalty (King, 2006, p. 294). Family quarrels about whether the offender should be executed can resurface repeatedly during the lengthy capital process, intensifying old family conflicts and alienating one family member from another.

In the long run, it may actually be more therapeutic for the family if the case is not treated as a capital case. If at a pretrial proceeding, the defendant is determined to be so mentally ill that capital punishment should be excluded from consideration because the defendant lacks the requisite degree of culpability and deterability, the family may be better able to come to terms with the crime and achieve a measure of understanding about the perpetrator. At this pretrial hearing, they will learn about the severity of the offender's mental illness and resulting impairment of his ability to have understood what he was doing when he killed the victim, to appreciate its wrongfulness, or to control his actions. They may not forgive him as a result, but this increased understanding may better allow them to come to terms with their loss. They may come to see the offender as less blameworthy than they had thought, or perhaps even not blameworthy at all. This may reduce their anger at the accused, and to allow them to focus more on the sadness of their loss and to deal with it more effectively. By contrast, if the case is treated as a capital case, they are more likely to hold on to their anger for a prolonged period. Held anger of this kind can be extremely debilitating, both psychologically and physiologically, causing a variety of negative emotional effects, compromising immunology, increasing blood pressure and the risk of heart attack or stroke, and even causing physical responses like neck or back pain (Winick, 2007a, p. 616; Winick, 2007b, p. 349). Letting go of this anger, which will be facilitated by a pretrial determination that the defendant's mental illness significantly diminished his culpability and deterability, therefore can increase the surviving family members' emotional and physical well being.

Even if the defendant's life is spared at such a pretrial proceeding, he likely will receive a life sentence, and the family may experience this as a sufficient measure of retribution. In any event, the case will end once the defendant is sentenced, and the family will not experience and re-experience the grief, anger, and negative emotions that are likely to resurface periodically during the lengthy period between a capital sentence and administration of the death penalty. This may better allow the

family's wounds to heal, and permit them to get on with their lives rather than to dwell continuously in the negative emotions that the murder and its aftermath will likely produce. The family thereby will more likely achieve closure if the death penalty is removed from consideration, particularly if done early on in the proceedings. Having the mental illness capital punishment exclusion issue determined pretrial rather than at the penalty phase, therefore, can produce therapeutic advantages for the survivors of the victim, and this therapeutic jurisprudence consideration thus argues for having the issue determined pretrial.

2.2.3.5 The Defendant

Needless to say, being a capital defendant is intensely stressful, at least for most defendants. It probably produces extreme stress, anxiety, shame, embarrassment, fear, and depression. Facing the prospect of execution can produce or exacerbate mental illness in the defendant. Although facing non-capital murder charges will raise all of these emotional effects as well, there can be no doubt that they will be exaggerated even more so if the trial can bring a sentence of death. Thus, from the defendant's perspective, the antitherapeutic effects of facing capital punishment will be reduced if the issue of exclusion of the death penalty is determined pretrial.

2.2.4 Eighth Amendment Values

Which procedural mechanism for determining the mental illness death penalty exemption issue – by the trial judge at a pretrial hearing or by the capital jury at a post-trial penalty stage hearing – would be more consistent with Eighth Amendment values? This chapter argues that accuracy in the determination of this issue would be increased by having the issue resolved pretrial by the judge rather than post-trial by the capital jury. Because "death is different," requiring heightened procedural protections to minimize the risk of erroneous execution (Gilmore v. Taylor, 1993; California v. Ramos, 1983; Eddings v. Oklahoma, 1982; Enmund v. Florida, 1982 p. 3377; Beck v. Alabama, 1980, p. 637; Lockett v. Ohio, 1978 pp. 604–605 (plurality opinion of Berger, C.J.); Coker v. Georgia, 1977, p. 584; Gardner v. Florida, 1977, pp. 357–358, (plurality opinion of Stevens, JJ.); Gregg v. Georgia, 1976, pp. 187–189; Woodson v. North Carolina, 1976 pp. 303–304 (plurality opinion)), Eighth Amendment values would be furthered by having the issue determined at a pretrial judicial hearing. This chapter has proceeded on the assumption that the Eighth Amendment would be violated by imposition of capital punishment on a defendant whose mental illness at the time of the offense significantly reduced his culpability and deterability, and that in any event, legislatures should exempt such defendants from capital punishment as a matter of policy. Whether required by the Constitution or adopted as a matter of legislative judgment, the Eighth Amendment value of avoiding disproportionate punishment constitutes an important consideration in determining the procedures that should be used to make the exclusion decision.

The Supreme Court has frequently emphasized the importance of jury behavior in capital sentencing as an indication of community values in assessing the constitutionality of capital punishment (Coker v. Georgia, 1977; Enmund v. Florida, 1982; Gregg v. Georgia, 1976; Woodson v. North Carolina, 1976). Although not as significant as legislative behavior in this regard, jury behavior is, and has been treated by the Court as, important evidence of whether evolving standards of decency have rejected capital punishment as an appropriate criminal sanction. This consideration may argue in favor of having the jury determine the mental illness death penalty exemption question because jury behavior in making such determinations could provide evidence of community attitudes on the continued acceptability of capital punishment. Because juries reflect the "conscience of the community" more than do judges, the argument might be advanced that the determination of the mental illness exclusion from capital punishment should be made by the jury.

Justice Breyer has made a similar argument in the context of the court's invalidation of judicial fact finding in capital cases in Ring v. Arizona (2002). Although the Court had relied on the Sixth Amendment right to jury trial, Justice Breyer, in a concurring opinion, relied instead on the Eighth Amendment's emphasis on the jury's role as the "conscience of the community" (Ring v. Arizona, 2002, pp. 613–619 (Breyer, J, concurring)). The main purpose for capital punishment is retribution, Justice Breyer asserted, and jury sentencing in such cases is essential because juries have a "comparative advantage" over judges in determining, in a particular case, whether a death sentence would serve that end (p. 614). This advantage, according to Justice Breyer, stems from their superior ability to "reflect more accurately the composition and experiences of the community as a whole," thereby making them a better barometer of "the community's moral sensibility" (pp. 815–816).

This argument, however, does not support having the jury rather than the judge makes the mental illness death penalty exclusion determination. First of all, this analysis is undermined by the death qualification process that characterizes American jury selection practices in capital cases. As discussed earlier, these practices produce juries that are more willing to impose death and to favor conviction than juries as a whole. These jury selection practices result in juries that do not reflect the conscience of the community. Instead, they reflect "community sentiment purged of its reluctance to impose a death sentence" (Winick, 1982, p. 80). The systematic exclusion from capital juries of the substantial percentage of citizens who oppose the death penalty "biases jury composition, resulting in a distorted exaggeration of the community's willingness to impose the death penalty" (p. 81). Were the capital jury assigned the task of determining whether a defendant's mental illness at the time of the offense should exempt him from capital punishment, its determination would provide only a distorted picture of community attitudes on the death penalty. Moreover, as previously shown, capital juries also are biased by having already heard and determined the heinous facts of the crime, frequently misunderstand their role in making death penalty decisions, reject or diminish the importance of mitigating circumstances, and misunderstand or ignore the jury instructions they are given. These compromise the jury's ability to accurately reflect the "conscience of the community" on capital punishment. Because judges are not subject to the distorting

influences of the death qualification jury selection process or to these other biases or misconceptions, their decision on the mental illness death penalty exclusion question actually may more accurately reflect the moral attitudes of the community.

In any event, under the proposal made in this chapter, judges would play this role only in determining pretrial motions raising the issue of whether the defendant's mental illness at the time of the offense should bar the possibility of a death sentence. Should the judge deny such a motion, the capital jury, at the penalty phase that would follow any verdict of guilt, would make the actual determination of whether the defendant deserved the death penalty. In making this determination, the capital jury would have the opportunity to reflect the "conscience of the community" to the extent that it was able to.

As judges would be more accurate decision-makers on the mental illness death penalty exclusion question, allowing the issue to be determined, at least preliminarily, by trial judges would actually provide more reliable evidence of community attitudes. Properly understood, then, Eighth Amendment values argue for judicial rather than jury determinations of the issue. These Eighth Amendment values coalesce with considerations of accuracy, cost, and therapeutic jurisprudence to support assigning this task to the trial judge at a pretrial hearing.

2.3 Remaining Procedural Issues: Jury Trial, Burden of Persuasion, and Standard of Proof

2.3.1 Would a Pretrial Judicial Determination of the Death Penalty Exclusion Issue Violate the Defendant's Sixth Amendment Right to Jury Trial?

This chapter argues that a pretrial determination of the mental illness death penalty exclusion issue would be preferable to having the issue determined post-conviction at or before the penalty phase, and that Eighth Amendment values and considerations of accuracy, cost, and psychological well-being tilt in favor of a judicial rather than a jury determination of the issue. Would this, however, violate the right to jury trial and the Supreme Court's holding in Ring v. Arizona, (2002)?

In *Ring*, the jury, deadlocking on premeditated murder, found the defendant guilty of felony murder which took place during an armed robbery. Under state law, Ring could not be sentenced to death unless further findings were made by a judge, conducting a separate sentencing hearing, concerning the existence of specified aggravating circumstances. The trial judge conducted such a hearing, and finding the presence of several aggravating circumstances, sentenced Ring to death. Ring challenged the constitutionality of the Arizona statute, arguing that it violated the Sixth Amendment right to jury trial "because it entrusts to a judge the finding of a fact raising the defendant's maximum penalty" (p. 595). In *Ring*, the Supreme Court accepted these arguments, finding that a jury trial is required for determination of

any issue of fact that serves as a statutory predicate to administration of the death penalty (p. 589).

A consideration of the procedures used to determine whether a defendant is mentally retarded under *Atkins,* thereby barring the possibility of the death penalty and of their constitutionality under *Ring* provides a useful starting point for examining the Sixth Amendment question under consideration here. In Atkins v. Virginia (2002), the Supreme Court held that the execution of mentally retarded individuals violated the Eighth Amendment. The Court, however, did not offer a specific procedure for determining the existence of mental retardation and left the development of procedures up to the states (Atkins v. Virginia, 2002, p. 317). The Court stated simply that "we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences" (pp. 316–317).

In an article following *Atkins*, Professor James Ellis, the attorney for the petitioner in *Atkins*, offered suggestions for how states should proceed (Ellis, 2003). He recommended two bifurcated schemes. The first (Alternative A) begins with a pretrial bench hearing on death eligibility, with a subsequent opportunity for the defense to present the issue to a trial jury. The second (Alternative B) addresses the mental retardation issue in a special pretrial hearing before a separate jury from the one that will ultimately hear the trial (p. 16). Most states have adopted alternative A (e.g., California Penal Code § 1376, 2007; Colorado Revised Statutes § 18-1.3-1102–1104, 2007; Idaho Code § 19-2515A, 2007; Kentucky Revised Statutes § 532.130–140, 2007; Louisiana Code of Criminal Procedure § 905.5.1; *see* Death Penalty Information Center, 2007c).

When Professor Ellis suggested these approaches, it was not known whether courts would interpret *Atkins* as standing for the proposition that mental retardation is the functional equivalent of an element of the crime and would therefore necessitate a jury determination. It was with this concern in mind that he postulated his suggestions (p. 16). Professor Ellis expressed the view that, "[I]t is not absolutely clear whether the post-Atkins question of whether a defendant has mental retardation is the 'functional equivalent' of an element of the crime, but it certainly bears most of the attributes described in Ring" (p. 16).

These concerns about the applicability of *Ring*, however, seem incorrect, and the lower courts have declined to consider this to be an element of the crime. *Ring* held that, "Capital defendants, no less than non-capital defendants… are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" (p. 589). Applying its earlier decision in Apprendi v. New Jersey (2000), the Court determined that the Sixth Amendment applies to the fact finding mission of deciding whether aggravating circumstances exist.

In responding to *Atkins*, about half of the states created procedures in which a judge made the decision pretrial (e.g., California Penal Code § 1376, 2007; Colorado Revised Statutes § 18-1.3-1102-1104, 2007; Idaho Code § 19-2515A, 2007; Kentucky Revised Statutes § 532.130-140, 2007; Louisiana Code of Criminal Procedure § 905.5.1, 2007; *see* Death Penalty Information Center, 2007c). These procedural schemes have been challenged by defendants as contravening the Sixth Amendment under *Ring.* However, in responding to these challenges, state courts

have concluded that a pretrial determination by a judge is consistent with the principles set forth in *Ring*. In New Mexico v. Flores (2004), the New Mexico Supreme Court held that the Sixth Amendment did not preclude a statutory procedure which called for a pretrial judicial determination of mental retardation. In *Flores*, the defendant was charged with first degree murder and sought an Atkins determination. The defendant argued that whether he was mentally retarded was a factual issue that *Ring* required a jury to determine (p. 762). The court held that "*Apprendi* and *Ring* do not apply to cases where the factual finding at issue operates to lower the maximum penalty rather than to raise the punishment above the statutory maximum" (p. 762). As a finding of mental retardation would lower the maximum penalty, it is not an element of the offense, the court found, thereby making *Ring* inapplicable. In reaching its determination, the New Mexico Supreme Court noted opinions from other state and federal courts that reached the same conclusion (New Mexico v. Flores, 2004, pp. 763–764, In re Johnson, 2003 p. 405; Head v. Hill, 2003, p. 620; *ex parte* Briseno, 2004). Other state supreme courts have followed suit and found that *Ring* does not apply to pretrial judicial determinations (e.g., State v. Grell, 2006) Bowling v. Kentucky, 2005, p. 381; Russell v. Mississippi, 2003).

Federal statutes make no provision for the procedures used to resolve whether a defendant is mentally retarded. The Federal Death Penalty Act (2002) prohibits the execution of those with mental retardation. In considering how the presence of mental retardation should be determined under the federal statute, the Fifth Circuit has held that Ring "does not render the absence of mental retardation an element of the sentence that is constitutionally required to be determined by a jury" (United States v. Webster, 2004, p. 792). A federal district court in Colorado reached the same result (United States v. Sablan, 2006, p. 16).

These decisions rejecting a Sixth Amendment challenge to having the *Atkins* issue determined at a pretrial judicial hearing seem plainly correct. *Ring* was limited to the situation where the determination of an aggravating circumstance that made the defendant eligible for capital punishment was assigned to a judge rather than to the jury. Rather than constituting such an aggravating circumstance, mental retardation is a mitigating factor that conclusively precludes capital punishment.

Moreover, a decision by the trial judge that the defendant does not qualify for the mental retardation exclusion from capital punishment does not amount to a determination that he will receive a death sentence. This issue will be determined subsequently by a jury at the penalty phase should the defendant be convicted. A rejection of mental retardation by the trial judge at a pretrial hearing does not preclude the capital jury from reaching the opposite conclusion at the penalty stage (New Mexico v. Flores, 2004, p. 1270). Under the Eighth Amendment, the sentencing jury may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (Lockett v. Ohio, 1978, p. 604; accord Penry v. Lynaugh, 1989, p. 328; Eddings v. Oklahoma, 1982, p. 114; New Mexico v. Flores, 2004, p. 1270). Thus, a defense contention that the offender is mentally retarded, and as a result must be conclusively excluded from capital punishment, may be renewed in front of the capital jury at the penalty hearing.

For identical reasons, allowing the judge to make a pretrial determination of whether capital punishment should be excluded as a result of the defendant's mental illness at the time of the offense will not violate the Sixth Amendment. If the judge finds that the defendant is not sufficiently mentally ill to bar the death penalty, the defendant will be able to raise the issue again, to the jury during the penalty phase. Even if the trial court at the pretrial hearing has rejected his mental illness capital punishment exclusion contention, he is free again to raise his mental illness as a mitigating circumstance at the penalty phase, and to argue to the jury that this mitigating factor is so strong that it should preclude a sentence of death. This would provide the defendant with a second opportunity to contend that his mental illness should make the death penalty inapplicable, and is in accord with society's and the Supreme Court's strong interest in avoiding erroneous executions. This chapter's proposal that the mental illness death penalty exclusion issue be determined at a pretrial judicial hearing therefore will not frustrate *Ring's* concern that the jury's fact finding role in capital sentencing not be usurped.

2.3.2 Burden of Persuasion

In determining whether the defendant's mental illness at the time of the offense should preclude capital punishment, an additional question is which party – the state or the defendant – should bear the burden of persuasion, and by what standard of proof should that burden be carried. The process for resolving the *Atkins* mental retardation exemption from capital punishment issue again provides a useful analogy. Because the finding of mental retardation has not been deemed to be the equivalent of an element of the underlying crime, the burden can be placed on the defendant (Ellis, 2003, p. 16). The standard of proof concerning the existence of mental retardation, however, should not exceed preponderance of the evidence (p. 16). Post-*Atkins* cases uphold the constitutionality of placing the burden of proof on the defendant and of using a preponderance of the evidence standard. All of the post-*Atkins* statutes that deal with the burden of persuasion question allocate the burden to the defendant (e.g., California Penal Code § 1376, 2007; Nevada Revised Statutes § 174.098, 2007; New York Code of Criminal Procedure § 400.27(12), 2007; Tennessee Code Annotated § 39-13-203, 2007; Death Penalty Information Center, 2007c). Even when the statute fails to specify, the courts have agreed that the burden should be placed upon the defendant. In State v. Grell (2006), the Supreme Court of Arizona compared the finding of mental retardation to proving affirmative defenses and concluded that "[p]roof of mental retardation is like proof of an affirmative defense in that it serves to relieve or mitigate a defendant's criminal responsibility, and as with affirmative defenses, the evidence of retardation will lie largely within the possession and control of the defendant" (State v. Grell, 2006, p. 522). The Supreme Court of Indiana upheld a state statute, which placed the burden on the defendant to prove his mental retardation by comparing an Atkins determination to competency to stand trial (Pruitt v. Indiana, 2005, pp. 99–100). The Court relied

on Medina v. California (1992), in which the U.S. Supreme Court held that placing the burden on a criminal defendant to prove incompetence was consistent with the requirements of due process in that it did not offend principles of fundamental fairness (Medina v. California, 1992, p. 453).

Medina is closely analogous, and the approach it uses for resolving due process challenges suggests that allocating the burden of persuasion at a pretrial hearing to the defendant to establish that his mental illness at the time of the offense should disqualify him from capital punishment would not be unconstitutional. *Medina* rejected the balancing test of Matthews v. Eldridge (1976) that the Court had used in administrative law contexts for measuring the process that is due when the state seeks to deprive an individual of a liberty or property interest. In state criminal cases, instead of using *Matthews* balancing, the Court announced that it would use a fundamental fairness test that would emphasize whether the challenge practice had been rejected as unfair by our history and traditions (Medina v. California, 1992, pp. 445–446; *see* Winick, 1993, pp. 820–825). Under this test, it would be constitutional to place the burden of persuasion on the defendant on the mental illness death penalty exemption issue. There is no historical antecedent for a pretrial proceeding to determine whether mental illness should exempt a defendant from a possible death penalty, and as a result, placing the burden on the defendant cannot be said to violate historical conceptions of fairness.

Moreover, the usual factors that are invoked in allocating burdens of persuasion – considerations of fairness, probability, and policy (Cleary, 1959; Winick, 1993, pp. 846–858) – tilt in the direction of placing the burden of persuasion on the defendant in the mental illness death penalty context involved here. The fairness inquiry focuses on which party has superior access to the evidence in question (Cleary, 1959, p. 5; Winick, 1993, p. 846). As in the competency to stand trial issue involved in *Medina*, the defense will have superior access compared to the prosecution to evidence concerning the defendant's mental illness and the extent of its functional impairment. It therefore would not violate principles of fairness to place the burden on the defendant.

The factor of probability focuses attention on the extent to which the issue that must be proven is more or less likely to be true, and counsels that, other things being equal, the burden be placed upon the party contending for the improbable event (Cleary, 1959, pp. 11–12; Winick, 1993, p. 847). In this context, it will only be in rare cases that mental illness will be so severe as to satisfy statutes that exempt offenders from the death penalty or will impair an offender's blameworthiness for wrongdoing and ability to control his conduct to the extent that the Eighth Amendment would bar his execution. Thus, considerations of probability also argue for placing the burden on the defendant.

The third factor – policy – focuses attention on how the allocation decision might impact whatever policy considerations might be relevant (Cleary, 1959, p. 11; Winick, 1993, pp. 849–858). In this context, the relevant policies would include the strong societal value of avoiding erroneous execution, and also achievement of the general purposes of the criminal sanction, including its educative, deterrence, and retributivist purposes. The burden of persuasion allocation decision will affect outcomes only in cases in which the evidence is in equipoise, with the result that these

policies will rarely be implicated. This is so because the evidence usually tips in one direction or another, and rarely will be so evenly divided that the burden will dictate the outcome. Because the defendant has superior access to evidence concerning his own mental condition, and can hire clinical experts to assist in the gathering and presentation of such evidence at state expense when he is indigent (Ake v. Oklahoma, 1985), placing the burden on the defendant will not frustrate the societal interest in avoiding wrongful execution nor otherwise undermine the purposes of criminal punishment. As a result, placing the burden upon the defendant would be consistent with the usual considerations that enter into burden allocation decision-making.

2.3.3 Standard of Proof

If the burden of persuasion is placed upon the defendant, a preponderance of the evidence standard would seem to be the appropriate measure by which this burden should be carried. Indeed, the Eighth Amendment and due process principles may forbid imposition of a standard higher than preponderance of the evidence (Pruitt v. Indiana, 2005, p. 103). The U.S. Supreme Court has held that a statute placing the burden of persuasion on the defendant to prove incompetency to stand trial by clear and convincing evidence violated due process (Cooper v. Oklahoma, 1996, p. 350). The Court reasoned that a heightened standard impermissibly increased the risk of error (p. 362).

In the Atkins mental retardation context, most states placing the burden of persuasion on the defendant apply a preponderance of the evidence standard (e.g., Arkansas Code § 5-4-618 (2007); California Penal Code § 1376 (2007); Kentucky Revised Statutes 532.130-140 (2007); *see* Death Penalty Information Center (2007c)). A minority, however, apply a clear and convincing evidence standard (e.g., Arizona Revised Statues § 13-703.02 (2007); Florida Statutes § 921.137 (2007); North Carolina General Statutes § 15A-2005 (2007); *see* Death Penalty Information Center (2007c)). Applying the approach of *Cooper*, the Indiana Supreme Court invalidated a statute requiring a defendant to show mental retardation by clear and convincing evidence on the basis that it would result in the execution of some offenders who actually suffered from mental retardation (Pruitt v. Indiana, 2005, p. 103). Several state courts, however, have upheld the constitutionality of such statutes (State v. Grell, 2006; People v. Vasquez, 2004). *Cooper* is closely analogous, and as a result, the standard of proof by which a defendant should be required to establish that his mental illness at the time of the offence was so severe that he should be exempted from capital punishment should be the preponderance standard.

2.4 Conclusion

This chapter proceeds on the assumption that the extension of *Atkins and Roper* to the context of mental illness will occur at some point in the future. Like mental retardation and juvenile status, severe mental illness, at least in some cases,

can produce such severe functional impairments that it will substantially diminish an offender's culpability and deterability. As a result, the Eighth Amendment should exclude capital punishment for this category, and state statutes should follow the recommendations of the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness prohibiting the death penalty for severe mental illness occurring at the time of the offense.

The debate on whether this exclusion should occur may turn in part on the question of how the issue should be determined procedurally. Moreover, if this exclusion is adopted either statutorily or judicially, the procedural question of how it will be determined will need to be faced. This chapter has argued that the issue should be resolved pretrial by the trial judge.

Such a pretrial judicial determination has been the general approach adopted by the states in the wake of *Atkins* for determination of the mental retardation exclusion issue. Having the issue decided pretrial by the trial judge, rather than at the penalty phase by the capital jury, would increase the accuracy of the determination made. Capital jury selection procedures bias resulting juries in favor of capital punishment, and empirical research has demonstrated that capital juries also are biased by having heard and determined the facts of the heinous murder. Such juries have been shown to apply a presumption in favor of death and to misunderstand or disregard their role with regard to mitigating circumstances. Juries also may misunderstand clinical evidence concerning the offender's mental illness and its impact on his functioning at the time of the offense, may incorrectly equate mental illness with dangerousness, and may incorrectly think that the death penalty is the only way to protect the community from the defendant's future violence. The trial judge will not be subject to these biases and misconceptions, and will be better able to understand the clinical testimony and decide the legal/constitutional issue in question.

In addition, having the judge make the determination pretrial will be considerably more efficient and less costly than having the issue resolved by the capital jury at the penalty phase. Capital trials are much more expensive than non-capital trials, with the result that determining the exclusion question at an early time can avoid much needless cost and delay. Having the issue resolved at an early point also can be justified based on therapeutic jurisprudence considerations. Capital trials are significantly more stressful than non-capital trials, with the result that determining the issue at an early point will avoid much stress for the trial judge, the attorneys, the jury, and the defendant. Moreover, although the families of the victim may often seek the death penalty, rather than providing closure and enabling them to come to terms with their loss, capital trials and the long delays between capital sentencing and execution may actually prevent their wounds from healing. Should the death penalty be removed from consideration at an early time based on the defendant's mental illness at the time of the offense, this may better allow the family to come to terms with their loss, perhaps reducing their anger at the offender and permitting them to deal more effectively with their grief and sadness.

Having the issue determined pretrial by the trial judge will not offend Eighth Amendment values or the Sixth Amendment right to jury trial. Although we typically think of the jury as reflecting the "conscience of the community," the biasing affects of capital jury selection and the other problems described earlier that compromise the accuracy of capital juries suggest that trial judges may reflect the conscience of the community on the mental illness/death penalty question more accurately than the capital jury. Although Ring v. Arizona (2002) reflects a constitutional preference for jury determinations of aggravating circumstances that might justify the death penalty, having the trial judge determine the essentially legal question of whether capital punishment should be excluded because of extreme mental illness at the time of the offense will not offend Sixth Amendment values. Trial judges make a variety of pretrial determinations of issues that might have the effect of precluding the death penalty, including ruling on pretrial motions to dismiss for lack of speedy trial or double jeopardy, or determinations under *Atkins* of whether the defendant suffers from mental retardation and therefore should be spared the death penalty. Allowing the trial judge to make these determinations does not offend the Sixth Amendment, and as a result, the right to jury trial would not be violated by having the trial judge determine the mental illness/capital punishment exclusion issue. Should the trial judge deny such a pretrial motion to bar capital punishment, the capital jury will have a full opportunity to pass on all factual issues relating to whether the death penalty should be imposed, including a renewed defense submission that the offender's mental illness constitutes a conclusive mitigating circumstance.

In determining the mental illness/capital punishment exclusion issue, the burden of persuasion should be placed upon the defendant. This would not offend principles of due process under the Supreme Court's approach in Medina v. California (1992), and is consistent with the considerations traditionally invoked in allocating burdens of persuasion – considerations of fairness, probability, and policy. The standard of proof, however, should not exceed preponderance of the evidence. Indeed, imposition of a higher standard upon the defendant, such as clear and convincing evidence, would raise significant due process problems. Allocating the burden of persuasion to the defendant and requiring that it be carried by a preponderance of the evidence has been the general practice in making mental retardation determinations under *Atkins,* and this approach should be followed here as well.

State legislatures and courts have not as yet had the occasion to respond to the question of the implications of *Atkins* and *Roper* for those with mental illness. In thinking about whether capital punishment should be precluded as a result of severe mental illness at the time of the offense, it is important to consider the procedural questions presented concerning how the issue should be determined. Considerations of accuracy, cost, and therapeutic jurisprudence strongly favor a determination of the issue pretrial by the trial judge, rather than at the penalty phase by the capital jury. Determination of the issue this way will offend neither Eighth Amendment nor Sixth Amendment values, and indeed, the greater accuracy produced by having the trial judge decide the issue would further both Eighth Amendment and due process concerns for avoiding erroneous executions.

References

Acker, J. R. & Karp, D. R. (2006). *Wounds that do not bind: Victim-based perspectives on the death penalty.* Durham, NC: Carolina Academic Press.

Ake v. Oklahoma, 470 U.S. 68 (1985).

Allen, M., Mabry, E., & McKelton, D. (1998). Impact of juror attitudes about the death penalty on juror evaluations of guilt and punishment : a meta-analysis. *Law and Human Behavior, 22,* 715–731.

American Bar Association Task Force on Mental Disability and the Death Penalty, (2006). Recommendation and Report on the Death Penalty and Persons with Mental Disabilities. *Mental & Physical Disability Law Reporter, 30,* 668–677.

American Psychiatric Association (2005). *Mentally Ill prisoners on death row: Position statement*, retrieved form http://www.psych.org/edu/other_res/lib_archives/archives/200505.pdf (last visited November 21, 2007).

American Psychological Association Council of Representatives, (2001). *APA policy manual: N. public interest* (incorporating policy adopted by the Council of Representatives in February 2006), retrieved form http://www.apa.org/about/division/cpmpubint2.html#8 (last visited Feb. 21, 2007).

Antiterrorism and Effective Death Penalty Act of 1996. United States Code Annotated, vol. 28, § 2254 (b)(2) (2006).

Amick-McMullan, A., Kilpatrick, D. G., & Resnick, H. S. (1991). Homicide as a risk factor for PTSD among surviving family members. *Behavior Modification, 15*, 545–559.

Armour, M. P. (2002). Journey of family members of homicide victims: A qualitative study of their posthomicide experience, *American Journal of Orthopsychiatry, 72*, 372–82.

Armour, M. P., & Umbreit, M. M. (2006). Exploring "Closure" and the Ultimate Penal Sanction for Survivors of Homicide Victims. *Federal Sentencing Reporter, 19(2)*, 105–112.

Atkins v. Virginia, 536 U.S. 304 (2002).

Beck v. Alabama, 447 U.S. 625 (1980).

Bentele, U., & Bowers, W. J. (2001). How jurors decide on death: Guilt is overwhelming; aggravation requires death; and mitigation is no excuse, *Brooklyn Law Review*, *66*, 1011–1080.

Block, F. A Slow Death, (March 15, 2007) NY Times, Section A; Column 2; P. 27.

Blume, J.H., Johnson, S.L., & Threlkheld, A.B. (2001). Probing 'life qualfication' through expanded voir dire. *Hofstra Law Review, 29,* 1209–1264.

Bowers, W. J., Fleury-Steinner, B. D., & Antonio, M. (2003). The capital sentencing decision: Guided discretion, reasoned moral judgment, or legal fiction. In J. Acker, R. Bohm, & Lanier, C. S. (Eds.), *America's experiment with capital punishment reflections on the past, present, and future of the ultimate penal sanction* (2nd ed., pp. 413–68). Durham, NC: Carolina Academic Press.

Bowers, W. J., Foglia, W. D., Giles, J. E., & Antonio, M. E. (2006). The decision maker matters: An empirical examination of the way the role of the judge and the jury influence death penalty decision-making. *Washington and Lee Law Review, 63*, 931–1010.

Bowers, W. J., & Foglia, W. D. (2003). Still singularly agonizing: Law's failure to purge arbitrariness from capital sentencing, *Criminal Law Bulletin, 39,* 51–86.

Bowers, W. J., Sandys, M., & Steiner, B. D. (1998). Foreclosed impartiality in capital sentencing: Jurors' predispositions, guilt-trial experience, and premature decision making. *Cornell Law Review, 83*, 1474–1556.

Bowling v. Kentucky, 163 S.W.3d 361 (2005).

Bright, S. B., & Keenan, P.J. (1995). Judging and the politics of death: Deciding between the Bill of Rights and the next election in capital cases, *Boston Univeristy Law Review, 75*, 759–836.

Bruton v. United States, 391 U.S. 123 (1968).

Burnside, F. B. (1999). Comment, Dying to Get Elected: A Challenge to the Jury Override, *Wisconsin Law Review, 1999/5,* 1017–49.

Butler, B. M., & Moran, G. (2002). The role of death qualification in venirepersons' evaluations of aggravating and mitigating circumstances in capital trials. *Law and Human Behavior 26,* 175–184.

California v. Ramos, 463 U.S. 992 (1983).
California Bill Analysis, (2003) SB 3, Senate Floor, 2003–2004 Regular Session (Jan. 9, 2003).
California Penal Code § 1376 (2007).
Capital Jury Project, (2007). retrieved form http://www.cjp.neu.edu/ (last visited September 26, 2007).
Cleary, E.W. (1959). Presuming and pleading: An essay on juristic immaturity. *Stanford Law Review, 12,* 5–28.
Coker v. Georgia, 433 U.S. 584 (1977).
Colorado Revised Statutes § 18-1.3-1102-1104 (2007).
Cooper v. Oklahoma, 517 U.S. 348 (1996).
Cowan, C. L., Thomson, W. C., & Ellsworth, P. C. (1984). The effects of death qualification on jurors' predisposition to convict and on the quality of deliberation. *Law and Human Behavior, 8*, 53–79.
Cusack, R. M. (1999). Stress and Stress Symptoms in Capital Murder Jurors: Is Jury Duty Hazardous to Juror Mental Health?. Ph.D. dissertation, St. Mary's University.
Death Penalty Information Center (2007a) *Costs of the death penalty*, retrieved form http://www.deathpenaltyinfo.org/article.php?did=108 (last visited September 27, 2007).
Death Penalty Information Center (2007b). *Facts about the death penalty*, retrieved form http://www.deathpenaltyinfo.org/FactSheet.pdf (last visited September 27, 2007).
Death Penalty Information Center (2007c). States that have changed their statutes to comply with the Supreme Court's decision in Atkins v. Virginia, retrieved form http://www.deathpenaltyinfo.org/article.php?scid=28&did=668, (last visited November 21, 2007).
Eddings v. Oklahoma, 455 U.S. 104 (1982).
Eisenberg, T., & Wells, M. T. (1993). Deadly confusion: Juror instructions in capital cases, *Cornell Law Review, 79,* 1–17.
Ellis, J. W. (2003). Mental retardation and the death penalty: A guide to state legislative issues. *Mental & Physical Disability Law Reporter*, 27, 11–24.
Ellsworth, P. C. (1988). Unpleasant facts: The Supreme Court's response to empirical Research on capital punishment. In K. C. Haas & J. A. Inciardi (Eds.), *Challenging capital punishment: Legal and social science aproache* (pp. 177–212). Newbury Park, CA: Sage.
Enmund v. Florida, 458 U.S. 782 (1982).
Ex parte Briseno, 135 S.W.3d 1, 4 (Texas Court of Criminal Appeals 2004).
Fitzgerald R., & Ellsworth, P. C. (1984). Due process vs. Crime control, *Law and Human Behavior, 8,* 31–51.
Gardner v. Florida, 430 U.S. 349 (1977).
Garvey, S. P. (2000). The emotional economy of capital sentencing. *New York University Law Review, 75,* 26–73.
Garvey, S. P. (1998). Aggravation and mitigation in capital cases: What do jurors think? *Columbia Law Review, 98,* 1538–76.
Gibbons, Tom (1988). Victims again: Survivors suffer through capital appeals. *American Bar Association Journal,* 64, p. 5.
Gilmore v. Taylor, 508 U.S. 333 (1993).
Gray v. Maryland 523 U.S. 185 (1998).
Gregg v. Georgia, 428 U.S. 153 (1976).
Grigsby v. Mabry, 758 F.2d 226 (8th Cir.) (1985).
Haney, C., Hurtado, A., Vega, L. (1994). Modern death qualification: New Data on its Biasing effects. *Law and Human Behavior, 18,* 619–633.
Haney, C. (1984). On the selection of capital juries: The biasing effects of the death-qualification process. *Law and Human Behavior, 8*, 121–132.
Haney, C. (1980). Juries and the death penalty: Readdressing the witherspoon question. *Crime & Delinquency 26*, 512–527.
Harris v. Alabama, 513 U.S. 504 (1995).
Head v. Hill, 587 S.E. 2d 613 (Ga. 2003).
Hovey v. Superior Court. 616 P.2d 1301 (Cal.) (1980).
Idaho Code Annotated § 19-2515A (2007).

In re Johnson, 334 F.3d 403 (5th Cir.2003).
Jackson v. Denno, 378 U.S. 368 (1964).
Kanwar, V. (2002). Capital punishment as "Closure": The limits of a victim-centered jurisprudence. *New York University Review of Law & Social Change, 27,* 215–256.
Kentucky Revised Statutes § 532.130–140 (2007).
King, R. (2006). The impact of capital punishment on families of defendants and murder victim's family members. *Judicature, 89*, 292–296.
Lewis, A., Dow, D. R., Preate Jr., E. D., Bright, S. B., & Tigar, M. E. (1994). Panel discussion: The death of fairness? Counsel competency and due process in death penalty cases, panel one, *Houston Law Review, 31,* 1105–1204.
Lind, E. A. et al. (1990). Voice, control, and procedural justice: Instrumental and noninstrumental concerns in fairness judgments. *Journal of Personality & Social Psychology, 59,* 952–959.
Lind, E. A., & Tyler, T. R. (1988). *The social psychology of procedural justice.* New York: Plenum Press.
Liptak, A. (2007a). Does death penalty save lives? A new debate. *New York Times*, November 18, p. 1A.
Liptak. A. (2007b). Ruling likely to spur convictions in capital cases. *New York Times*, June 9, p. 1A.
Lockhart v. McCree, 476 U.S. 162, (1986).
Lockett v. Ohio, 438 U.S. 586 (1976).
Louisiana Code of Criminal Procedure § 905.5.1 (2007).
Medina v. California, 505 U.S. 437, (1992).
Miller, M. K., & Bornstein, B. H. (2004). Juror stress: Causes and interventions. *Thomas Marshall Law Review 30,* 237–270.
Morgan v. Illinois, 504 U.S. 719 (1992).
National Alliance on Mental Illness (2006). *Public policy platform.* Section 9.9.12 (November 2006), retrieved form http://www.nami.org/template.cfm?section=NAMI_Policy_Platform (last visited September 27, 2007)
Neices, M. L., & Dilahay, R. C. (1987). Death qualification and conviction proness: Witt and Witherspoon Compared. *Behavioral Sciences and The Law, 5,* 479–494.
Nevada Revised Statute §174.098 (2007).
New Mexico v. Flores, 135 N.M. 759, (N.M. 2004).
New York Code of Criminal Procedure § 400.27(12) (2007).
Penry v. Lynaugh, 492 U.S. 302 (1989).
People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, *cert. denied*, 414 U.S. 1033 & 1050 (1973).
People v. Vasquez, 84 P.3d 1019, 1023 (Colo. 2004).
Perlin, M. (1996). The executioner's face is always well-hidden: The role of counsel and the courts in determining who dies. *New York Law School Law Review 41*, 201–280.
Perlin, M. (1994). The sanest lies of jurors in death penalty cases: the puzzling role of mitigating mental disability evidence. *Notre Dame J Ethics & Public Policy, 8,* 239–280.
Pruitt v. Indiana, 834 N.E.2d 90 (Ind. 2005).
Profitt v. Florida, 428 U.S. 242 (1976).
Ring v. Arizona, 536 U.S. 584 (2002).
Roper v. Simons, 543 U.S. 551, (2005).
Rozelle, S. D. (2006). The principled executioner: Capital juries' bias and the benefits of true bifurcation, *Arizona State Law Journal*, *38*, 769–808.
Russell v. Mississippi, 849 So. 2d 95 (2003).
Sandys, M., & McClelland, S. (2003). Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality. In J. R. Acker, R. M. Bohm, & C. S. Lanier (Eds.), *America's experiment with capital punishment* (pp. 413–467). Durham, NC: Carolina Academic Press.
Schriro v. Summerlin, 542 U.S. 348 (2004).
Simon, R. J., & Aaronson, D. E. (1988). *The Insanity defense: A critical assessment of law and policy in the post-Hinckley era.* New York: Praeger.

Slobogin, C. (2003). What Atkins could mean for people with mental illness. *New Mexico Law Review*, *33*, 293–314.

Slobogin, C. (2000). Mental illness and the death penalty. *California Criminal Law Review.1, 3–38.*

Smith, B. L., & Stevens, E. H. (1984). Sentence disparity and the Judge-jury sentencing debate: An analysis of robbery sentences in six southern states. *Criminal Justice Review, 9,* 1–7.

State v. Grell, 212 Ariz. 516 (2006).

Steadman, H. J., McGreevy, M. A., Morrissey, J. P., Callahan, L. A., Robbins, P. C., & Cirincione, C. (1993). *Before and after Hinckley: Evaluating insanity defense reform.* New York: Guilford Press.

Stevenson, B. A. (2003). Two views on the Impact of Ring v. Arizona on capital sentencing: The ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in capital sentencing. *Alabama Law Review, 54,* 1091–1155.

Stolle, D., Wexler, D. B., & Winick, B. J. (2000). *Practicing therapeutic jurisprudence: law as a helping profession.* Durham, NC: Carolina Academic Press.

Tabak, R. J., & Lane, J. M. (1989). The Execution of injustice: A cost and lack-of-benefit analysis of the death penalty, *Loyola,LosAngeles Law Review 23*, 59–146.

The Federal Death Penalty Act (2002). United States Code vol. 18, § 3596(c).

Thibaut J., & Walker, L. (1978), A theory of procedure. *California. Law Review, 66,* 541–566.

Tyler, T. R. (1990, 2006). *Why people obey the law.* Princeton, N.J: Princeton University Press.

United States v. Nelson, 419 F. SUPP. 2d' 891 (E.D. La. 2006).

United States v. Sablan, 461 F. Supp. 2d 1239 (D. Colo. 2006).

United States v. Webster, 392 F.3d 787(5th Cir. 2004).

Uttecht v. Brown, 127 S. Ct. 2218 (2007).

Vandiver, M. (2003). The impact of the death penalty on the families of Homicide Victims and of condemned prisoners. In J. R. Acker, R. M. Bohm, & C. S. Lanier (Eds.), *America's experiment with capital punishment: Reflections on the past, present, and future of the ultimate penal sanction* (pp. 613–645). Durham, NC: Carolina Academic Press.

Wainwright v. Witt, 469 U.S. 412 (1985).

Washington State Bar Association (2007). *Final report of the death penalty subcommittee of the committee on public defense,* retrieved form http://www.wsba.org/lawyers/groups/website-posting42707.pdf (last visited on November 16, 2007

Wexler, D. B., & Winick, B. J. (1991). *Essays in therapeutic jurisprudence.* Durham, NC: Carolina Academic Press.

Wexler, D. B., & Winick, B. J. (1996). *Law in a therapeutic key: Developments in therapeutic jurisprudence.* Durham, NC: Carolina Academic Press.

Winick, B. J. (2007a). Overcoming psychological barriers to settlement: Challenges for the TJ Lawyer. In M. A. Silver (Ed.), *The affective assistance of counsel: Practicing law as a healing profession* (pp. 341–363). Durham, NC: Carolina Academic Press.

Winick, B.J. (2007b) A legal autopsy of the lawyering in Schiavo: A therapeutic jurisprudence/ preventive law rewind exercise. *Univeristy of Miami Law Review 61*, 595–664.

Winick, B. J. (2005). *Civil Commitment: A therapeutic jurisprudence model.* Durham, NC: Carolina Academic Press.

Winick, B. J. (1993). Presumptions and burdens of proof in determining competency to stand trial: An analysis of Medina v. California and the Supreme Court's new due process methodology in criminal cases. *University of Miami Law Review, 47,* 817–866.

Winick, B. (1982) Prosecutorial peremptory challenge practices in capital cases: an empirical study and a constitutional analysis. *Michigan. Law Review*, *81,* 1–98.

Winick, B. J., & Wexler, D. B. (2003) *Judging in a therapeutic key: Therapeutic jurisprudence and the courts.* Durham, NC: Carolina Academic Press.

Woodson v. North Carolina, 428 U.S. 280 (1976).

Chapter 3
Accommodating Child Witnesses in the Criminal Justice System: Implications for Death Penalty Cases

Jodi A. Quas and Bradley D. McAuliff

> *But justice, though due the accused, is due the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.*
>
> Former U.S. Supreme Court Justice Benjamin N. Cardozo
> Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

Capital cases are among the most controversial in the United States legal system. Indeed, since our founding fathers drafted the constitution, the death penalty's necessity, fairness, and implementation have been hotly debated by legal scholars, politicians, and lay persons. As many of the chapters in this book demonstrate, these debates are by no means over. Controversy continues to focus on whether the death penalty is fair and just at each stage of the legal process. Why then, one might ask, is there a chapter concerning child witnesses in a book devoted to defendants' competence and mental health, particularly in relation to the death penalty? Well, criminal, including capital, cases involve more than just defendants. Witnesses also participate. They are questioned by authorities, investigators, and attorneys; they may testify at trial and sentencing. Moreover, in capital cases, victim impact statements take on special significance, addressing the ultimate fate of the defendant—life or death. When these witnesses are children, an important question arises as to whether they experience undue trauma or distress when participating, testifying, and providing such statements. Certainly the potential for emotional harm to witnesses should not automatically outweigh the needs and constitutionally based rights of defendants, whose lives may be at stake. However, when these witnesses are children, we argue that their emotional well being should be considered in conjunction with a defendant's rights to minimize potential short- and long-term harm that may result from their participation.

The overarching purpose of this chapter is to review evidence concerning why children's needs should be considered in criminal cases. We first discuss potential consequences on children of participating in criminal cases. We then describe

J.A. Quas (✉)
Department of Psychology, University of California, Irvine, California, USA
e-mail: jquas@uci.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_4, © Springer Science+Business Media, LLC 2009

evidentiary and procedural alterations that may reduce these consequences without forsaking defendants' constitutional rights. Before we begin our review, however, it is important to establish that children actually serve as witnesses in criminal and capital cases and that their participation is critical to the pursuit of justice.

Unfortunately, children are exposed to a range of crimes, and they may end up as witnesses in criminal cases. The most common type of case in which children have contact with the legal system is that involving alleged sexual abuse (Goodman, Quas, Bulkley, & Shapiro, 1999), although children also at times witness murder and can become key witnesses even in capital trials. Two well-known cases provide important examples: In 2002, Alejandro Avila abducted 5-year-old Samantha Runion while she was playing outside her California apartment complex with a friend, Sarah Ahn. The following day Samantha was found murdered. Despite being barely 6 years old, Sarah provided key information to the police that helped identify Avila and his vehicle within 72 hours of the abduction. Several years later, Sarah testified in the capital trial that resulted in a guilty verdict (Orange County District Attorney, n.d.). Avila now awaits execution on death row in California. In Nevada, Marc Anthony Colon was charged with capital murder for the death of 3-year-old Crystal Figueroa who was found in a dumpster in January of 2005 (Bach, 2006). Colon, who was dating the child's mother, Gladys Perez, is alleged to have beaten the child to death before he and the child's mother abandoned the girl. Colon's two daughters, ages 10 and 11, were with Gladys, Crystal, and their father when the crime is believed to have occurred. These two girls may be called to testify about the events that took place the night the young child died.

No one would argue with the assertion that children's involvement in criminal cases such as the capital cases just described is critical. What is less clear, however, is whether children's legal involvement affects their well being and how to balance this concern against the constitutional rights of the accused. Given recent Supreme Court rulings such as Crawford v. Washington (2004) that restrict the use of testimonial hearsay, children's participation—specifically in-court testimony—may be required now more than ever before. Without it, some cases simply will be unable to proceed. At the same time, however, we cannot overlook the Court's historical holding that states have a "compelling interest" to safeguard children's well being and that on occasion certain fundamental rights may give way to this interest, including the right to free speech (New York v. Ferber, 1982), the right to a public trial (Globe Newspaper Co. v. Superior Court, 1982), and even the right to confrontation (Maryland v. Craig, 1990). Thus children's direct participation in criminal cases should not come at the expense of unnecessary or lasting trauma on their behalf, even when constitutional rights are involved.

3.1 Consequences of Legal Involvement on Children

During the past few decades, a small but significant body of research has examined the consequences of criminal court involvement on child victim/witnesses. Social scientists have addressed two primary questions in this research: How well can

children participate in legal proceedings, and does participation affect their well being? Regarding the first question, when a case relies on an eyewitness account provided by a child, it is imperative that the child be able to participate fully in the case, which includes recounting information accurately and completely in interviews, taking the stand, and answering questions by both parties. Any factors that impede children's ability to communicate could hinder the case's ability to move forward. Regarding the second question, it is particularly important to determine which aspects of children's participation are directly linked to adverse outcomes so that changes can be made to reduce and/or eliminate them, without affecting the case's progression or a defendant's rights.

To date, most studies concerning the effects of legal involvement on children have focused on child victims of sexual abuse. This specific focus is due to several factors. For one, as mentioned, a majority of children who come into contact with the criminal justice system do so because of alleged sexual abuse (Goodman et al., 1999). Child sexual abuse cases also often rely heavily on children's accounts (corroborative evidence is rare), thus demanding children's direct involvement. Finally, to obtain large enough samples and maintain better statistical control over analyses, it is most feasible to include children who have experienced the same general type of crime. Although the rationale underlying this specific focus of research is clear, one might ask whether children's experiences in sexual abuse cases generalize to other types of crimes. We believe they do and here's why: All of the factors related to adverse outcomes in sexual abuse cases that we are about to describe (legal knowledge, repeated interviews, testifying, and case length/outcome) are common to virtually all types of criminal cases, not just those involving sexual abuse. These factors may be even more strongly associated with adverse outcomes in capital cases, given the extremity of the crime and finality of the punishment.

When children are involved in a criminal case, they are expected to understand the purpose of their participation and the key personnel involved. They are interviewed about their alleged experiences, they may be called to testify, and the case may go on for months or years and then not end in a guilty verdict. Each of these factors: children's legal understanding, exposure to repeated interviews, testifying, and the case length and outcome, has been related to children's reactions to legal involvement and their functioning afterward (e.g., Goodman et al., 1992; Sas, 1991). Of course these are not the only factors that could potentially affect children, but these have been relatively well studied, and findings are fairly consistent. Nonetheless research is needed to identify additional factors that predict children's adjustment during and after their involvement in criminal cases.

Legal understanding. As mentioned, when children become involved in a legal case, they are expected to have some understanding of the purpose of the trial, their role, and the function of the individuals with whom they interact. Evidence consistently indicates that this expectation is rarely met: Children are limited in their legal knowledge and have considerable difficulty understanding details of a specific case. For example, Warren-Leubecker, Tate, Hinton, and Ozbek (1989) asked 3- to 14-year-olds to define various terms relevant to criminal court. By age 5,

children could articulate a basic understanding of the judge's role but had difficulty defining most other legal concepts. By age 10, about half of the children could accurately define a lawyer. However, children's ability to define technical (e.g., jury) or less common (e.g., perjury) legal concepts remained nebulous through early adolescence. Similar deficits have emerged in studies including older children (Crawford & Bull, 2006; Freshwater & Aldridge, 1994) and children actually involved in the legal system as victims in dependency cases or defendants in juvenile cases (Burnett, Noblin, & Prosser, 2004; Cauffman & Steinberg, 2000; Cooper, 1997; Flin, Stevenson, & Davies, 1989; Grisso et al., 2003; Quas, Wallin, Horwitz, Davis, & Lyon, in press). Thus, involvement in the legal system does not necessarily translate into more advanced legal understanding.

Even when children appear knowledgeable about the legal system generally, they often have difficulty applying that knowledge to a specific case (Saywitz, Jaenicke, & Camparo, 1990). In Warren-Leubecker et al.'s (1989) study just described, for instance, children also listened to a hypothetical legal scenario involving a boy who was falsely accused of arson and answered questions about the scenario. Greater general knowledge (i.e., more accurate definitions) was unrelated to children's responses. Similarly, Quas et al. (in press) assessed maltreated children's ability to define legal terms and their understanding of dependency hearings that they had just attended. No significant associations emerged. Thus, having basic legal knowledge was not predictive of similar knowledge of children's own case.

Children's legal understanding, including of their own situation, has implications for their ability to participate effectively in a case, their experiences of distress, and possibly the consequences of that participation on their well being. First, if children do not understand the purpose of the case, including the function of individuals with whom they interact, they may be too confused to participate and may provide incorrect information to some individuals. For instance, children may not realize why they must answer questions from both defense and prosecuting attorneys (questions that may well be identical) or may assume that one individual is repeating questions because their former answers were wrong. Such assumptions may lead to omissions, inconsistencies, or inaccuracies in children's reports. Although forensic interviewing protocols recommend establishing ground-rules at the outset of interviews with child witnesses (e.g., the NICHD Interviewing Protocol; see Orbach et al., 2000; Sternberg, Lamb, Esplin, Orbach, & Herschkowitz, 2002), these rules may not include explanations about who is conducting the interview, that individual's relationship to the case, or why children might have to answer the same questions repeatedly. Or children may not fully understand their role in the case and possibly may think that they are "in trouble" for some reason. Block, Oran, Oran, Baumrind, and Goodman (in press) interviewed 7- to 10-year-old maltreated children about what happened during a dependency hearing they had attended concerning their removal from home. When asked why they were at court, although a majority (53%) of the children stated that it was to decide where they should live, nearly 10% of the children said that it was because they had been bad. Obviously such fears could affect children's willingness to assist the case, disclose information in interviews, and answer questions in court.

Children's lack of understanding may also affect how distressed they are during the case (which can then affect their ability to communicate and susceptibility to false suggestions while answering interview questions; Goodman et al., 1992; Nathanson & Saywitz, 2003). Specifically, several lines of research indicate that poor understanding of an impending stressor is associated with increased distress. For instance, in medical contexts, children are significantly more anxious when they do not know what will happen during a procedure that they are about to undergo than when they are knowledgeable about the procedure (Harbeck-Weber & McKee, 1995; Goodman, Quas, Batterman-Faunce, Riddlesberger, & Kuhn, 1997; Zeltzer, Fanurik, & LeBaron, 1989). Similar findings have emerged in legal contexts: Goodman et al. (1998) administered a legal knowledge questionnaire to 5- to 8-year-olds, some of whom later testified in mock trials. Greater legal knowledge was associated with lower levels of anticipated stress while testifying. Quas et al. (in press) assessed legal understanding in 4- to 15-year-old maltreated children involved in dependency proceedings. Poorer ability to describe the function of key personnel was associated with more negative feelings about attending their hearing.

Although research has not examined directly whether lack of legal knowledge contributes to increased distress over time, insofar as children's limited knowledge continues during and possibly after the case, children may not understand why a particular outcome occurred and experience continued distress as a result. Child witnesses who did not understand what happened may also develop generally negative attitudes toward the system's fairness or toward justice, similar to negative attitudes about fairness that often emerge in adults when they do not feel as though they were active participants during a case (e.g., Cascardi, Poythress, & Hall, 2000; Lind & Tyler, 1988). Children's lack of understanding or negative attitudes may further lead to reduced willingness to report crimes in the future. Finally, adults' tendency to overestimate children's legal knowledge (e.g., Eltringham & Aldridge, 2000) may serve to prolong children's misunderstanding and distress, for example, because they continue not to be adequately informed about what happened and why.

Repeated interviews. When children (like adults) have witnessed a crime, they may be interviewed by police, investigators, attorneys, and victim advocates. These interviews are necessary to gather evidence critical to the case. During these interviews, child witnesses must answer questions posed by typically unfamiliar adults about events that were likely distressing and frightening. These questions may focus on negative behaviors of an adult who children know and trust. Children may fear retaliation from the adult or negative consequences to themselves or their family if they describe the alleged crime (e.g., Burgess & Holmstrom, 1975; Bussey & Grimbeek, 1995; Herman, 1981; Malloy, Lyon, & Quas, 2007). Enduring just one such interview is likely quite distressing, much less more than one (Herman & Hirschman, 1981). Yet exposure to multiple interviews is the norm for child witnesses (Goodman et al., 1992; Gray, 1992; Malloy et al., 2007). Children's initial responses may be incomplete or lack adequate details, clarification might be needed for statements that were unclear, or children may need to be asked additional questions as new evidence arises. Finally, both parties in a given case have the right to question witnesses directly, further necessitating some repetition.

Although only a handful of studies concerning consequences of legal involvement on children has data concerning the number of interviews children endure during a legal case, results fairly consistently suggest that exposure to repeated interviews is stressful, both immediately and over time. Tedesco and Schnell (1987) found that the number of different interviewers who questioned child victims of sexual abuse was negatively related to the victims' ratings of the perceived helpfulness of the system after their involvement had ended. Similarly, Berliner and Conte (1995) found that increased contact with legal professionals (e.g., detectives, prosecutors), which is likely correlated with number of interviews, was related to increased distress. Finally, in a study of long-term consequences of criminal court involvement on child victims of sexual abuse, Quas et al. (2005) found that experiencing a greater number of interviews was associated with more mental health problems.

Testifying. Although only a minority of legal cases goes to trial, thus limiting the number of children who actually have to take the stand (Goodman et al., 1992; Goodman et al., 1999), testifying is routinely considered the most stressful aspect of legal involvement. Even when cases do not go to trial, children may still testify in depositions or in preliminary hearings. Their statements often constitute key pieces of evidence, without which a case may not be able to be prosecuted. According to the Sixth Amendment of the U.S. Constitution, a defendant has a constitutional right to confront her/his accuser. This right is similar to those outlined in international doctrines, such as the United Nations' European Convention on Human Rights Article 6 [3]. Thus, when a case relies on evidence presented by a child, it is highly likely that the child will be called to testify in some fashion.

Yet some legal professionals have argued that testifying constitutes a form of secondary victimization of children, exacerbating the trauma caused by the crime itself (e.g., Glaser & Spencer, 1990; Katz & Mazur, 1979; however, see Orth & Maercker, 2004). Hostile and humiliating cross-examination and public in-court discussion of personal, traumatic, and embarrassing events, especially repeatedly, are believed, both by laypersons and professionals, to be traumatic for many children (e.g., Batterman-Faunce & Goodman, 1993). In fact, both federal and state laws consider testifying to be distressing to children. For instance, Federal Rules of Evidence 611 requires that all witnesses, including children, be protected from "harassment or undue embarrassment." California Evidence Code 765 similarly states that, when child victim/witnesses under age 14 are involved, the legal system is responsible for ensuring their emotional well being while providing the most fair judicial process for the accused (e.g., by protecting the child from undue harassment or embarrassment, restricting unnecessary repetition of questions, and insuring that questions are asked in a developmentally appropriate form). Even the U.S. Supreme Court has supported protections for children who must take the stand, further promoting the belief that testifying can adversely affect children's ability to participate and be harmful to them (Maryland v. Craig, 1990).

Empirical research confirms legal concerns: Testifying is associated with increased distress, both during and after a case. During a case, testifying in open court is associated with increased anxiety, as measured via children's or parents' reports

and direct observation (e.g., Davies & Noon, 1993; Goodman et al., 1992). Such findings are evident in studies of actual legal cases (e.g., Davies & Noon, 1991; Sas, 1991) and mock trials (e.g., Goodman et al., 1998; Nathanson & Saywitz, 2003). In a qualitative study of child witnesses' experiences in court, Sas (1991) found that children expressed fear of "being screamed at" in the courtroom and of facing the defendant. More than half of the child witnesses participating in another study by reported they were "really scared" of giving testimony, being questioned by the defense lawyer, and using embarrassing words in court (Freshwater & Aldridge, 1994). Goodman et al. (1992) followed several hundred child sexual abuse victims during their participation in criminal cases. Children who testified were interviewed before and after testifying and were observed while doing so. Before court, most children reported feeling negative and afraid, especially at the prospect of seeing the defendant in court. While testifying, greater distress was associated with poorer ability to answer the prosecutors' and defense attorneys' questions. After testifying, although children did not feel as negative about having testified as they had anticipated feeling, their anxiety about seeing the defendant remained high. Given that distress while recounting a prior experience (i.e., stress at retrieval) is associated with poorer memory and increased errors (Quas, Bauer, & Boyce, 2004; Quas & Lench, 2007; Saywitz & Nathanson, 2003), concerns about the effects of testifying on children's immediate ability to participate, or more specifically provide accurate testimony in court, appear warranted.

Beyond courtroom testimony being stressful because children must face the defendant (who at times is a known and trusted adult), testifying is distressing because of the questions asked, especially via cross-examination. That is, multiple rephrasing of questions and the use of legalese are common questioning styles among both prosecutors and defense attorneys (Brennan & Brennan, 1988). Further, as Weiss and Berg (1982) point out, the primary goal of cross-examination is to discredit witnesses by highlighting inconsistencies or errors in their reports. To do this, attorneys may rely on subtle or not-so-subtle intimidation, leading (misleading) questions, and badgering witnesses. These questioning tactics are associated with decreased accuracy in adults and children alike (Carter, Bottoms, & Levine, 1996; Perry, McAuliff, Tam, & Claycomb, 1995). In addition, children's lack of understanding of the legal process may be further perpetuated via attorneys' questioning tactics.

U.S. Supreme Court Justice Antonin Scalia and others have argued that short-term distress is inevitable for any witness (Coy v. Iowa, 1988; MacDonald, 1971; Shore, 1985), and negative reactions are simply a necessary aspect of the pursuit of justice. However, adults who experience such reactions can reason about justice and weigh, somewhat rationally, the need for their testimony against their experienced distress while doing so, thereby reducing their distress or at least accepting it as a requirement of the legal system. That is, adults may recognize and appreciate the process underlying the pursuit of justice, in a manner similar to adults' common support of procedural justice when evaluating the fairness of the legal system (Tyler, 1990). Given children's more limited coping and cognitive functioning (Case, 1991; Compas, Connor-Smith, Saltzman, Thomsen, & Wadsworth, 2001), they may not

be able to rationalize the need for their testimony against their experienced distress, leading to potential adverse emotional reactions.

Several studies have revealed that the associations between testifying and distress in children are not short-lived, but instead, testifying predicts various negative mental health outcomes over time. Oates and Tong (1987) interviewed 49 CSA victims in Australia 2.6 years after their cases were referred to a hospital for evaluation. Among the 21 cases that resulted in juvenile or criminal prosecution, parents of children whose cases went to court were more likely than parents of children whose cases did not go to court to indicate that their child had behavioral problems at school. Bill (1995) compared personality, behavioral characteristics, and school performance among three groups of children: 12 children who testified in sexual abuse cases, 17 children who did not testify, and 30 children who reportedly had not been abused. Four years after the case, children who testified had the lowest scores on self-concept, self-control, and discipline. Of course, without controlling for a priori differences between children who did versus did not testify (e.g., in age, abuse duration, or severity of abuse), the precise reason for the increased behavior problems among the testifiers is unclear. Goodman et al. (1992) compared behavioral adjustment of children who testified in sexual abuse cases to that of children who did not testify but who were matched to the testifiers on key demographic (e.g., age) and abuse characteristics (e.g., type of sexual acts), and behavior problems at the start of the legal case. Compared to children's behavioral adjustment at the start of the case, 7 months post-testifying, the non-testifiers behavioral adjustment had significantly improved, while the testifiers' scores had not. Because the testifiers and non-testifiers were initially matched on key characteristics, many potential confounds were eliminated, increasing the confidence with which one can attribute differences to the experience of having testified. In a long-term follow-up study of the children who participated in Goodman et al.'s research, Quas et al. (2005) examined the long-term associations between testifying and mental health. Approximately 14 years after the former victims' cases had ended, testifying repeatedly in childhood continued to be associated with increased mental health problems, with abuse and family characteristics controlled statistically.

Finally, both Goodman et al. (1992) and Quas et al. (2005) found that the associations between testifying and adverse outcomes are mediated by specific aspects of children's legal experiences. In Goodman et al. (1992), increased behavior problems were evident primarily among testifiers whose cases lacked corroborative evidence, who did not receive maternal support during the case, and who testified repeatedly. Lack of corroborative evidence (regardless of the allegations' veracity) can mean the entire case rests on a child's report, which certainly could increase stress associated with taking the stand. Lower levels of caregiver (most often the mother) support at the start of the case indicate a mother who is relatively unbelieving or overtly hostile to the child. Caregiver support of child victims is crucial for their well being, regardless of legal or testifying experiences (e.g., Conte & Schuerman, 1987; Everson, Hunter, Runyan, Edelsohn, & Coulter, 1989). Without caregiver support, the stress or testifying may simply have been too overwhelming for children's coping resources. Finally, insofar as testifying multiple times indexes exposure to repeated

stress, negative associations between number of times children testified and poor mental health would be expected (Goodman et al., 1992).

In Quas et al. (2005), the highest level of mental health problems were reported by individuals who had testified repeatedly in cases that involved especially severe abuse (e.g., close perpetrator relationship, more invasive sexual contact, long duration of abuse exposure). The fewest problems were reported by individuals who had not testified in similar cases. Of interest, Quas et al. also found that not testifying predicted higher levels of defensive avoidance symptoms when the abuse was less severe, suggesting that, under certain circumstances, although testifying might be distressing initially, it may be better over time for some children to have had their day in court.

Together, empirical evidence fairly consistently suggests that taking the stand is distressing for children. This distress does appear to adversely affect (or at least is adversely related to) children's ability to provide complete and accurate testimony. Moreover, in certain instances, this distress does not dissipate and testifying is associated with poorer long-term functioning. When children testify repeatedly, when the abuse was especially severe, the case lacks corroborative evidence, and children do not receive support from non-offending caregivers, negative outcomes are more likely. To the extent that children testify in capital cases, which involve severe, typically violent crimes, and may rely heavily on children's statements (e.g., victim impact statements), findings concerning predictors of negative consequences of testifying are particularly important.

Case length and outcome. Two final factors that have been linked to adverse consequences following legal involvement include the length and outcome of the case. Runyan, Everson, Edelsohn, Hunter, and Coulter (1988) found that delays and continuances kept children's anxiety at relatively high levels and slowed their emotional recovery. As mentioned, Goodman et al. (1992) found that continuances predicted poorer functioning in children who testified. Finally, Sas (1993) reported better adjustment among children whose cases ended in a guilty rather than not guilty verdict. However, neither Goodman et al. (1992) nor Quas et al. (2005) reported similar links in their studies of child victims in criminal court. Obviously it is not possible to control the eventual length of a trial (or appeal) or the outcome. Nonetheless, these findings highlight both the need for continued research on their effects and also on methods of intervening to help children understand the necessity of continuances and the outcome of the case.

Summary. Involvement in a criminal case is stressful for all parties involved, particularly child witnesses who likely lack full understanding of the case and may have only limited ability to cope with the inevitable challenges associated with their participation. Exposure to an unfamiliar, confusing, and often hostile legal environment, testifying while confronting the accused, and enduring multiple interviews containing complex legal vocabulary are all sources of distress that may reduce children's functional participation in cases. Long delays and continuances may also increase children's anxiety, further contributing to their limited participation. Finally, after the case has ended, having testified repeatedly, along with

having been repeatedly interviewed, is related to poorer functioning, both in the short-term and over time periods spanning into adulthood. Of importance, none of the studies described focused on child witnesses involved in criminal cases other than those associated with alleged sexual abuse. However, repeated interviews, testifying (including at sentencing), lengthy trials, and multiple appeals and legal challenges are inevitable components of many types of criminal cases, especially those that involve capital offenses. Accordingly, negative outcomes for children have the potential to emerge across different types of crimes, demanding that attention be paid to means of reducing these outcomes while maintaining fair judicial proceedings for the accused, including, most noteworthy, for individuals accused of capital offenses.

3.2 Evidentiary and Procedural Alterations to Accommodate Children

Legal concerns and social science indicating that participation in legal proceedings is distressing for children have prompted legislators to introduce various evidentiary and procedural alterations to accommodate children (see Table 3.1). Collectively these alterations aim both to reduce children's stress and to facilitate their participation, particularly their provision of accurate testimony. Yet several important differences also exist. For one, alterations vary in the extent to which they affect traditional trial practice. Permitting the use of leading questions or the appointment of a support person requires less procedural modification than does allowing the child to testify outside the courtroom or outside of the defendant's presence. In addition, the resources required to employ a particular modification and the ease with which it can be introduced into traditional trial practice vary. Certain modifications, such as limiting the duration of a child's testimony, are relatively easy to implement at trial and require few resources. In contrast, the use of closed-circuit television testimony (CCTV) or videotaped testimony may require physical alteration of the courtroom environment and additional equipment (e.g., television monitors to transmit the

Table 3.1 Evidentiary and procedural innovations available in criminal proceedings involving children in the United States

Type of innovation
Child Advocacy Center
Child Presumed Competent to Testify
Videotaped Testimony and/or Depositions
Closed-Circuit Television Testimony
Hearsay Testimony Exception
Speedy Disposition of Case
Videotaped Interviews or Statements
Appointment of Support Person
Closed Courtrooms
Anatomically Detailed Dolls
Leading Questions
Limitations on the Duration of Child's Testimony

child's testimony to jurors). Modifications further vary in whether they potentially infringe on the constitutional rights of defendants. Alternative procedures that deny a defendant the right to confront his or her accuser are more likely to serve as the basis for a subsequent appeal on constitutional grounds than alterations that do not directly affect the trial procedure itself. Finally, the availability and use of alterations differ considerably. A few modifications (e.g., pretrial preparation, courtroom tours, support persons) are used quite often with child witnesses. However, many others, particularly those that may raise defense challenges or alter traditional trial procedures, are used quite infrequently (Goodman et al., 1999; Sigler, Crowley, & Johnson, 1990).

Next we review research concerning several accommodations for children in criminal cases: child advocacy centers, support person use, pretrial preparation, videotaped testimony, and CCTV. Other alterations exist (see Table 3.1; Goodman et al., 1999; Malloy et al., 2007) and may affect children's distress, participation, and functioning during and after a legal case. We limited our review to a subset of modifications for several reasons. First, the ones we discuss have considerable potential to affect those characteristics of a legal case that are related to children's well being. Second, the alterations described here have been the focus of at least some empirical research concerning children's reactions to legal involvement. And third, our review serves to demonstrate the potential utility of modifications more generally as a means of reducing children's distress and facilitating justice in criminal, including capital, proceedings.

Child advocacy centers. In the mid-1980s Huntsville Alabama District Attorney Bud Cramer established the first Child Advocacy Center (CAC) to help prosecute child sexual abuse and promote more child-friendly criminal investigations (Faller & Palusci, 2007). With the help of federal funding in the early 1990s, the presence of CACs in the U.S. has increased dramatically. By the end of 2005, over 600 accredited and associate CACs existed nationwide. They served more than 160,000 children (National Children's Alliance, 2006), the vast majority of whom were alleged sexual abuse victims, although 10% (approximately 1,600 children) were witnesses to other violent crimes, including capital offenses.

CACs typically attempt to coordinate interviews across agencies (e.g., child protective services, law enforcement, district attorney's office) and provide services (e.g., medical, mental health) to children and their families at a single location (Cross, Jones, Simone, Kolko, 2007). Thus, the professionals who work together at CACs are from a variety of backgrounds (e.g., social work, law, medicine). Children are interviewed by highly trained social workers who use a minimal number of leading questions. Interviews are also routinely videotaped, with a law enforcement officer and at times a deputy district attorney observing the interview from behind a one-way mirror. In many U.S. jurisdictions, if the case goes forward, the law enforcement officer may appear at the preliminary hearing to describe the child's statements and possibly to show the videotaped interview. It is then determined if the case should be bound over for trial.

Recently, researchers have collected descriptive data pertaining to CAC use and examined the utility of CACs in terms of the progression of the case and, to some

extent, children's experiences. The bulk of this work has been done by Cross and colleagues as part of the Multi-Site Evaluation of Children's Advocacy Centers (see Cross et al., 2008). One comparison between sexual abuse investigations conducted by CACs versus non-CAC sites in four different states confirmed that specialized services believed to benefit child victims (e.g., the use of multidisciplinary interview teams, joint police/child protective services investigations, and video/audiotaping interviews) were more prevalent in CACs (Cross et al., 2007). Also, suspected victims were twice as likely to receive forensic medical examinations in CAC versus non-CAC investigations (Walsh, Cross, & Jones, 2007). Interestingly, CAC use was not associated with a reduced number of interviews: 95% of all children sampled across locations were interviewed less than two times (Cross et al., 2007). Finally, in a comparison of the length of time between critical events in child sexual abuse cases prosecuted in jurisdictions with and without CACs, after controlling for various case characteristics, cases in CAC jurisdictions were charged more quickly than in non-CAC jurisdictions. Sixty-seven percent of CAC cases reached indictment between 31 and 60 days after the initial law enforcement report was filed compared to 46% and 54% at the comparison sites. However, neither the case resolution time (i.e., length between the indictment and final disposition) nor case processing time (i.e., length of time between the initial law enforcement report and final disposition) were significantly reduced for CAC versus non-CAC cases (Walsh, Lippert, Cross, Maurice, & Davison, 2008).

These trends suggest that CACs could be beneficial in reducing children's anxieties (e.g., by facilitating the interview process, shortening certain aspects of the case), although several key case characteristics are not improved when CACs are involved. It is thus possible that increased attention to child victims' experiences in legal contexts generally may be affecting forensic practices across the board, not only in jurisdictions with CACs. Of course, whether specialized services, some of which are more prevalent in CACs, actually translate into more positive experiences for child victims is another question. And, according to the few studies that have addressed this question, the answer is a tentative "yes." Jones, Walsh, and Cross (2007) assessed non-offending caregiver and child victim satisfaction following sexual abuse investigations conducted in either CAC sites or non-CAC comparison sites. Caregivers in CAC-site cases were more satisfied with the investigation than those from the comparison sites, even after controlling for a number of relevant variables (e.g., child and alleged offender characteristics, number of interviews, case outcome). Surprisingly, however, children's experiences with investigations did not differ as a function of CAC use. Most children expressed moderate to high satisfaction with the investigation. Children's chief complaint, irrespective of CAC use, was having to repeatedly describe the details of their abuse to investigators.

In summary, research has begun to shed much-needed light on the nature and utility of CAC use with children. Certain potential benefits, including the prevalence of certain services and reduced charging time, were associated with CAC use. However, other case features, such as the number of interviews, timing of the forensic medical examination, and case resolution time, did not vary systematically with CAC use. Interestingly, caregivers in CAC-site cases report higher levels

of satisfaction with sexual abuse investigations than those in non-CAC-site cases, yet no such differences emerged for children. Finally, in none of the studies was CAC associated with negative consequences. Thus, at worst, CACs appear to be unrelated to many of the objective, measurable case characteristics (e.g., number of interviews, case length) that themselves relate to poor outcomes, but appear to be related to greater caregiver satisfaction. At best, CACs are beneficial both according to the actual progression of cases and their impact on families' experiences.

Support person use. Both federal and state legislation permit the appointment of support persons in various legal proceedings involving children. In fact, through the Child Abuse and Treatment Act (CAPTA) of 1974, Congress required all states receiving federal funds for the prevention of child abuse and neglect to provide support persons for children involved in child welfare cases. At least 16 states permit the appointment of special support persons in criminal cases involving physical or sexual child abuse (U.S. DHHS, 2000). Trial judges also have a fair amount of discretion when determining whether a support person should be allowed and who is qualified to serve as that person. In some states, the support person is an attorney or guardian *ad litem* appointed by the state to represent the child's interests, whereas in other states, a friend, family member, or any individual who contributes to the well-being of the child can serve as the support person (e.g., victim/witness advocate, relative). State statutes also vary in the degree to which they specify the exact nature of the support person's role in the trial proceedings. Some states (e.g., Hawaii) restrict interactions between the support person and the child during the child's testimony, whereas other states (e.g., Idaho, California) allow the support person to accompany and remain in close proximity to the child during his/her testimony (McAuliff & Kovera, 2002).

Research examining support person use is surprisingly scant, despite the ease with which support persons are theoretically able to be employed (Goodman et al., 1999). McAuliff, Maurice, Neal, and Diaz (2008) surveyed child victim/witness assistants (VWAs) nationwide to gain basic descriptive information about support person use in legal proceedings involving children. Prosecutor-based VWAs or parents/guardians most frequently served as support persons, whereas court-appointed special advocates and guardians *ad litem* rarely did. Support persons were most common in cases involving child abuse and adult domestic violence, and least common in divorce/custody cases. Overall, support persons provided more informational (e.g., referrals to community resources, courtroom visit/orientation, procedural information) than emotional (e.g., comforting the child, accompanying child to hearings) support.

Again, of interest is not what the support person does per se, but instead, the effects of the support person's presence on children's legal participation and emotional reactions. Only two studies to date have data relevant to this issue, although numerous studies have revealed general benefits of supportive interviewers in terms of increasing children's memory and reducing their suggestibility (see Bottoms, Quas, & Davis, 2007) and benefits of supportive adults on children's coping with trauma (e.g., Conte & Schuerman, 1987; Spaccarelli & Kim, 1995). As previously mentioned, Goodman et al. (1992) conducted a large study concerning child sexual

abuse victims' involvement in the criminal justice system, including while testifying. Among children who testified, those with a non-offending parent or loved one present in the courtroom during preliminary hearings were rated as less frightened during their testimony and were less likely to provide inconsistent testimony about details of the abuse than children without such an individual present. Similarly, children who testified in the presence of a non-offending parent or loved one at trial were able to answer a greater number of the prosecutor's questions. More recently, Santtila, Korkman, and Sandnabba (2004) analyzed investigative interviews of suspected child abuse victims in Finland and found that support person use was associated with interviewers' behaviors and children's responses, although the direction of these associations was unexpected: The presence of a support person was associated with longer, more suggestive interviewer utterances and shorter, less detailed responses from children. The contradictory findings between the Goodman et al. (1992) and Santtila et al. (2004) studies, in concert with limitations inherent in correlational research (i.e., inability to make causal inferences or control for confounding variables), highlight the need for additional research to clarify the precise nature of the associations between support person use and children's reports and experiences in court.

Pretrial preparation. Many courts engage in or allow specific practices to prepare children for involvement in the legal system, especially their day in court. This preparation varies in formality and foci. Informal preparation may consist of an attorney providing a child with a tour of the courtroom and cursory review of the case facts (Saywitz & Snyder, 1993). More formal preparation programs may focus on increasing the accuracy of children's testimony (Saywitz & Snyder, 1996), increasing their knowledge of the court's professionals and procedures, or reducing the stress attendant to testifying in open court (Sas, 1991).

One of the latter types of program, located in Huntsville, Alabama (Keeney, Amacher, & Kastanakis, 1992), uses a series of structured sessions to address child witnesses' uncertainties (e.g., about who the Judge is) and fears (e.g., about facing the defendant and answering prosecutors' and defense attorneys' questions) concerning criminal court involvement. Sessions incorporate tours of the courthouse and courtroom, art and Gestalt techniques, and role-playing activities to familiarize children with court and testifying. If this program increases children's understanding and reduces at least some of the distress associated with their participation (which is itself an empirical question in need of answering), its use can be promoted more broadly.

Although experimental research on preparation effects is sparse, several field studies indirectly suggest that preparation is beneficial to children. Sas (1991, 1993) assessed a Canadian preparation program for child witnesses in which they learned about courtroom participants, toured a courtroom, practiced speaking in court, and learned relaxation techniques to reduce their stress. Children who took part in the program and later testified in court were better adjusted psychologically than children not in the program. Moreover, attorneys who interacted with the prepared children found them to be better witnesses than those who the attorneys had previously encountered in court. It is unknown as to whether the prepared children

were actually more accurate because there was no record of the actual events about which the children testified. For instance, perhaps they were more confident, which although often taken as an index of accuracy, is often not related (Bothwell, Deffenbacher, & Brigham, 1987). A final piece of anecdotal evidence of benefits of preparation comes from two elaborate mock trial studies that Goodman and colleagues conducted, once concerning the effects of hearsay (Goodman et al., 2006) and the other concerning the effects of CCTV (Goodman et al., 1998) testimony on jurors' decisions. In both studies, children in some of the trials testified live in open court. Before testifying, these children toured the courtroom, interacted with the judge, and saw the jurors were sitting quietly as they would soon be doing while the children testified. The tour was done so that children would be comfortable testifying in the studies. However, Goodman and colleagues did not actually measure children's distress, and all children received the tour. Thus, the "effects" of the tour specifically were not directly examined and it is unknown as to whether the tour per se affected children's distress.

In summary, court preparation is perhaps the easiest and least expensive modification to implement and has been one of the most common methods of reducing children's distress and facilitating their participation (Goodman et al., 1999). However, the precise elements of this preparation and its effects on the actual accuracy of the evidence children provide are not yet clear. To assess the effects of preparation in a more comprehensive and systematic way, it is necessary to have an objective record of an event to which children's reports can be compared. It is also necessary to have both a preparation and non-preparation condition so that direct comparisons in children's distress can be made.

Videotaped testimony. At least 17 states permit children to testify using some form of videotape (NCPCA, 2006, July). Videotaped evidence can be presented in the form of a deposition, testimony, or forensic interview, and the exact nature of each varies from state to state. In some states, for example, the child witness is deposed in the presence of both attorneys prior to trial and a videotape of the child's deposition is later admitted at trial. In other states, a child's grand jury or preliminary hearing testimony is presented at a subsequent trial. Finally, some states permit a videotape of a previously conducted forensic interview with the child to be admitted at trial.

The admissibility of previously made videotaped statements or testimony is relatively non-controversial when a child is available and also testifies at trial. What remains much more controversial, however, is when a child is unavailable to testify and the prosecution seeks to admit the videotapes in lieu of the child's live, in-court testimony. Here the videotapes would constitute hearsay testimony, and courts have scrutinized this evidence heavily in the wake of Crawford v. Washington (2004). In *Crawford*, the U.S. Supreme Court held that "testimonial" hearsay is inadmissible at trial unless the defendant has the opportunity to cross-examine the victim, regardless of the hearsay statement's reliability. Unfortunately the Court provided little guidance as to what constitutes testimony hearsay, noting only that "prior testimony at a preliminary hearing, before a grand jury, or a former trial; and police interrogations" (p. 54) would fall under this category. Post-*Crawford* courts generally have considered two factors when evaluating whether hearsay evidence is testimonial

in nature: (1) the involvement of government agents in the production of the statement; and (2) the context in which the statement was made (Phillips & Jacobsen, 2008). Examples of testimonial hearsay include statements obtained by government agents; such as police officers, prosecutors, and child protective service officers in non-emergency interrogations; or by individuals in other contexts that an objective declarant would expect that his/her statements could be used by a prosecutor in court. Accordingly, should a child's videotaped statement be deemed testimonial, it may only be allowed at trial if the child testifies in court and is subject to cross-examination by the defense. Keep in mind, however, case-law on this issue is continuing to develop and define the parameters of videotaped testimony and hearsay inadmissibility (e.g., Giles v. California, 2008; Sullivan & Brill, 2008).

Although researchers have not directly assessed whether the presentation of videotaped statements reduces the number of times children must testify or their experiences of distress, researchers have examined the effects of videotaped testimony on jury decision-making (e.g., Goodman et al., 2006; Swim, Borgida, & McCoy, 1993). Swim and colleagues, for example, presented undergraduates with a videotaped child sexual abuse trial in which the child testified live in court or via videotaped deposition. Participants who viewed the trial that included the videotaped deposition believed that the child was better able to testify and that testifying via the videotaped deposition was less harmful to the child's well-being relative to participants who viewed the trial in which the child testified live. No differences between the two testimony groups emerged in participants' perceptions of the defendant or the overall trial fairness. Interestingly, analyses of online response data indicated that participants who viewed the child's videotaped deposition harbored a pro-prosecution bias at several points throughout the trial, but they were actually less likely to find the defendant guilty of first degree sexual assault (30% did so) compared to participants in the live testimony condition (48%). In contrast to Swim et al.'s results, Goodman et al. (2006) found no significant pre- or post-deliberation differences in trial verdicts between jurors who viewed a mock trial in which a child testified live versus a trial in which a videotaped interview was presented instead.

In general, the presentation of videotaped statements may reduce, but not eliminate, the need for children to testify in court, which in theory should reduce adverse consequences specifically associated with testifying repeatedly. Whether and how videotaped statements affect the progression or outcome of the case is unclear, although videotaped statements do not appear to increase guilty verdicts. Nonetheless, unlike several of the earlier alterations, videotaped statements remain particularly controversial with respect to their admissibility in court.

Closed-circuit television testimony (CCTV). Despite 36 states enacting legislation permitting the use of CCTV in criminal child abuse proceedings (NCPCA, 2006, May) and the Supreme Court approving its conditional use (Maryland v. Craig, 1992), CCTV remains one of the most controversial and rarely used forms of alternative testimony available (Goodman et al., 1999). CCTV transmissions involve a child answering questions via television monitor rather than in open court. Jurors can thus see and hear a child's answers directly, while the child is shielded from having to testify in open court and possibly face the defendant. CCTV statutes vary

on several dimensions. Some states, for example, allow the attorneys and the defendant to be present with the child in the testimonial room while the judge and jury remain in the courtroom, whereas other states allow only the attorneys to be present in the testimonial room to question the child. Still in other states, all participants (except the child) remain in the courtroom and the attorneys conduct direct and cross-examination via CCTV.

CCTV is much more prevalent in countries outside the physical and constitutional boundaries of the United States, and a sizeable amount of quasi-experimental research in these countries has examined the effects of CCTV testimony on children's distress and eyewitness reports. Davies and Noon (1991), for example, evaluated the use of CCTV (called "Live Link" in Britain) during the first 2 years after it was introduced in England and Wales. Seventy-four percent of judges, 83% of barristers, and 93% of court clerks who had recently participated in CCTV cases reported a "favorable" or "very favorable" impression of it. Further comparisons revealed that children who testified via CCTV ($n=150$, all in England) were judged to be less stressed and to give more complete, consistent testimony than children who testified in open court ($n=89$, all in Scotland). Children who testified in CCTV trials in England were also rated as more resistant to leading questions and less likely to give inconsistent testimony about the main actions of the accused than the Scottish children who testified in court. Davies and Noon qualified their findings by noting that other differences existed between the English and Scottish samples (e.g., the nature of the reported offense and the child's role) which could have affected the observed associations between CCTV and children's participation.

However, similar benefits of CCTV have appeared in other studies. Cashmore (1992) found that Australian legal professionals, law enforcement personnel, non-offending parents, and the child victims themselves expressed the belief that CCTV reduced stress and facilitated testimony for children, and that CCTV did not create unfair prejudice against defendants. A minority of the legal professionals, however, was concerned that testifying via CCTV might make it easier for children to lie and more difficult for viewers to detect dishonesty. Finally, Murray (1995) found that the majority of parents whose children testified via CCTV in Scotland believed that their child's evidence would not have reached the trial at all without the use of CCTV. During post-trial interviews, 94% of the children who testified in this manner believed it to be easier and less distressing than traditional courtroom testimony, citing reasons such as being able to testify outside the presence of the defendant and the crowded courtroom.

As with many of the aforementioned quasi-experimental studies or naturalistic observations, however, certain caveats govern the interpretation of findings. In particular, the researchers' inability to manipulate the variable of interest and to assign participants randomly to different testimonial conditions precludes conclusions regarding causation. For example, although judges reported that children appeared less stressed when testifying via CCTV, we cannot conclude that the use of such accommodations *caused* children to be less stressed. Moreover, because children were not randomly assigned to testimonial conditions, other variables (e.g., the nature of the crime) may have contributed to children's distress or their particular assignment to Live Link, thus confounding interpretations of the results.

Some experimental work, however, has confirmed the trends evident in naturalistic studies. Experimental work also allows for insight into the effects of CCTV on case outcome. In the most elaborate study of CCTV use to date, Goodman et al. (1998) had children of various ages participate in a play session with an unfamiliar male confederate who encouraged children to place stickers either on their exposed body parts (e.g., toes and belly buttons) or on their clothing. Two weeks later, children testified about the play session at a mock trial in a downtown courthouse. Children provided either traditional in-court testimony or testimony outside the courtroom that was transmitted to mock jurors via CCTV. Overall, children who testified via CCTV were better able to answer direct questions than children who testified in open court. Also, younger children who testified via CCTV made fewer omission errors to suggestive questions than did their peers who testified in open court. Children who expected to testify via CCTV indicated lower levels of pretrial stress than did children who expected to testify live. Finally, jurors rated children testifying via CCTV as being less stressed during their testimony than children testifying in open court. Thus, fairly clear benefits, in terms of children's ability to provide accurate information, children's anxiety, and others' perceptions of children's anxiety, were evident when children did not have to testify live, in open court with the defendant, jury, and judge present.

At issue constitutionally is whether the use of CCTV unfairly biases jurors against a defendant. Research has generally failed to uncover differences in jurors' perceptions or case outcome when children testify via CCTV rather than live. For instance, Ross et al. (1994) presented participants with a videotaped simulation of a child sexual abuse trial in which the victim testified in open court, in open court from behind a protective screen, or outside the courtroom via one-way CCTV. Participants' guilt verdicts, ratings of defendant and child credibility, and ratings of trial fairness did not differ significantly across testimonial conditions (see Lindsay, Ross, Lea, & Carr, 1995, for similar results). However, in a second study, Ross et al. stopped the trial simulation immediately after the child's testimony and found that, at this particular moment, undergraduates were less likely to convict the defendant when the child testified via alternative procedures rather than testified in court (see Eaton, Ball, & O'Callaghan, 2001, for similar results). In contrast, Goodman et al. (1998) found no differences in juror perceptions across testimony conditions in the elaborate mock-trial CCTV study just described. In other words, the use of CCTV did not bias mock jurors against the defendant. Overall, jurors who viewed CCTV testimony were no more likely to find the defendant guilty than jurors who viewed in-court testimony. The format of the children's testimony also did not affect jurors' ratings of trial fairness for the defendant. Of interest, according to several measures, CCTV may have actually biased jurors against the children: Jurors who viewed CCTV testimony evaluated child witnesses more negatively on several dimensions (e.g., believable, confident, honest) compared to jurors who viewed live in-court testimony.

Thus, CCTV does not appear to systematically bias jurors against the defendant, but instead, either has no effect on jurors' decisions or may even have a negative effect on their evaluations of the children. Despite the lack of effects, however, and

as mentioned, CCTV use remains rare. According to Maryland v. Craig (1992), CCTV is acceptable when it can be demonstrated that a child will be so traumatized by testifying in open court that the child cannot reasonably communicate. Demonstrating this may be difficult without actually having the child take the stand. Further, fear of decisions being overturned upon appeal (Goodman et al., 1999) may also substantially reduce prosecutors' willingness to employ CCTV, despite its potential benefit. Finally, there is some preliminary evidence that children who are more (rather than less) distressed while testifying are more believable (e.g., Goodman et al., 1999; Goodman et al., 2008; McAuliff et al., 2008), which again may well reduce the likelihood of CCTV being used.

Summary. Although controversies exist concerning the use of modifications in criminal proceedings, evidence generally suggests that their use can benefit child witnesses. CACs may reduce the number of times children are interviewed, and perhaps increase the quality of those interviews. Parents feel more positive when taken to CACs versus traditional interviewing centers. Support person use and court preparation programs are both inexpensive and easy to implement. They also, by reducing children's distress while on the stand, may directly affect the accuracy of children's testimony. Finally, despite concerns about the use of videotaped statements and CCTV, their implementation may well facilitate children's participation and reduce some of the negative outcomes associated with testifying, especially repeatedly, in open court. Moreover, to date the use of such procedures does not appear to affect the final outcome of legal cases. As evidence concerning other innovations continues to be gathered, hopefully the list of available and effective modifications for use with child witnesses will grow even more.

3.3 Conclusion

Wexler and Winick (1996) have discussed the need for therapeutic jurisprudence in the U.S. legal system. From this perspective, the law and all that it entails (e.g., rules, procedures, actors) are viewed as a social force that can bring about therapeutic and/or antitherapeutic outcomes for those involved. Wexler and Winick argue we should strive to enhance therapeutic outcomes (and reduce or eliminate anti-therapeutic outcomes) without compromising due process and other justice values. We could not agree more. Of course, we also realize that it is impossible to eliminate all sources of stress for children that arise in legal proceedings. However, it is not only possible, but *imperative* that attention be paid to the unique needs of child witnesses when they participate in criminal cases. Although certain legal experiences are particularly likely to increase children's distress, there are means of modifying the legal process that not only reduce this distress but concurrently remain mindful of defendants' constitutional rights. In the end, the pursuit of justice can be best served when children, like all individuals, are active and able participants in criminal proceedings.

References

Bach, L. J. (2006, July 21). Crystal Figueroa: Charges stand in girl's death. *Las Vegas Review Journal.* Retrieved February 9, 2008, from: www.reviewjournal.com/lvrj_home/2006/Jul-21-Fri-2006/news/8612341.html.

Batterman-Faunce, J., & Goodman, G. (1993). Effects of context on the accuracy and suggestibility of child witnesses. In G. Goodman & B. Bottoms (Eds.), *Child victims, child witnesses* (pp.310–330). New York: Guilford.

Berliner, L., & Conte, J. R. (1995). The effects of disclosure and intervention on sexually abused children. *Child Abuse and Neglect, 19,* 371–384.

Bill, D. F. (1995). *The effect of testifying in court on children who have been sexually abused.* Unpublished doctoral dissertation. The Fielding Institute.

Bothwell, R., Deffenbacher, K., & Brigham, J. (1987). Correlation of eyewitness accuracy and confidence: Optimality hypothesis revisited. *Journal of Applied Psychology, 72,* 691–695.

Bottoms, B. L., Quas, J. A., & Davis, S. L. (2007). The influence of the interviewer-provided social support on children's suggestibility, memory, and disclosures. In M. E. Pipe, M. Lamb, Y. Orbach, & A. C. Cedarborg (Eds.), *Child sexual abuse: Disclosure, delay, and denial.* Mahwah, NJ: Lawrence Erlbaum Associates Publishers.

Block, S., Oran, D., Oran, H., Baumrind, N., & Goodman, G. S. (in press). *Abused and neglected children in court: Knowledge and attitudes. Child Abuse and Neglect.*

Brennan, M., & Brennan, R. E. (1988). *Strange language: Child victims under cross-examination* (3rd ed.). Wagga Wagga, New South Wales: Charles Sturt University-Riverina.

Burgess, A.W., & Holmstrom, L.L. (1975). Sexual trauma of children and adolescents: Pressure, sex, and secrecy. *Nursing Clinics of North America, 10,* 551–563.

Burnett, D. M., Noblin, C. D., & Prosser, V. (2004). Adjudicative competency in juvenile population. *Criminal Justice and Behavior, 31*(4), 438–462.

Bussey, B., & Grimbeek, E. J. (1995). Disclosure processes: Issues for child sexual *abuse victims*. In K. J. Rottenberg (Ed.), *Diclosure processes in children and adolescence (pp. 166–203)*. Cambridge: Cambridge University Press.

Carter, C. A., Bottoms, B. L., & Levine, M. (1996). Linguistic and socioemotional influences on the accuracy of children's reports. *Law and Human Behavior, 20,* 335–358.

Cascardi, M., Poythress, N. G., & Hall, A. (2000). Procedural justice in the context of civil commitment: An analogue study. *Behavioral Sciences & The Law*, *18*, 731–740.

Case, R. (1991). *The mind's staircase. Exploring the conceptual underpinnings of children's thought and knowledge.* Hillsdale, NJ, England: Lawrence Erlbaum Associates.

Cashmore, J. (1992). *The use of closed-circuit television for child witnesses in the ACT.* Sydney, New South Wales: Australian Law Reform Commission.

Cauffman, E., & Steinberg, L. (2000). (Im)maturity of judgment in adolescence: Why adolescents may Be less culpable than adults. *Behavioral Sciences and the Law, 18*, 741–760.

Compas, B. E., Connor-Smith, J. K., Saltzman, H., Thomsen, A. H., & Wadsworth, M. E. (2001). Coping with stress during childhood and adolescence: Problems, progress, and potential in theory and research. *Psychological Bulletin, 127*, 87–127.

Conte, J. R., & Schuerman, J. R. (1987). The effects of sexual abuse on children: A multidimensional view. *Journal of Interpersonal Violence, 2,* 380–390.

Cooper, D. K. (1997). Juveniles' understanding of trial-related information: Are they competent defendants? *Behavioral Sciences & the Law, 15*(2), 167–180.

Coy v. Iowa, 487 U.S. 1012 (1988).

Crawford v. Washington, 541 U.S. 36 (2004).

Crawford, E., & Bull, R. (2006) Teenagers' difficulties with key words regarding the criminal court process. *Psychology, Crime, and Law, 12,* 653–667.

Cross, T. P., Jones, L. M., Simone, M., & Kolko, D. (2007). Child forensic interviewing in Children's Advocacy Centers: Empirical data on a practice model. *Child Abuse and Neglect, 31,* 1031–1052.

Cross T. P., Jones L. M., Walsh W. A., Simone M., & Kolko D. (2007). Child forensic interviewing in Children's Advocacy Centers: Empirical data on a practice model. *Child Abuse & Neglect, 10,* 1031–1052.

Cross, T. P., Jones, L. J., Walsh, W., Simone, M., Kolko, D. J., Szczepanski, J., Lippert, T., Davison, K., Cryns, A., Sosnowski, P., Shadoin, A., & Magnuson, S. (2008). *The multi-site evaluation of children's advocacy centers: Overview of the results and implications for practice.* OJJDP Crimes Against Children Series Bulletin. Washington, DC: Office of Juvenile Justice and Delinquency Prevention.

Davies, G.M., & Noon, E. (1991). *An evaluation of the live link for child witnesses.* London, England: Home Office.

Davies, G., & Noon, E. (1993). Video links: Their impact on child witness trials. *Issues in Criminological & Legal Psychology, 20,* 22–26.

Eaton, T., Ball, P. J., & O'Callaghan, M. G. (2001). Child-witness and defendant credibility: Child evidence presentation mode and judicial instructions. *Journal of Applied Social Psychology, 31*, 1845–1858.

Eltringham, S., & Aldridge, J. (2000). The extent of children's knowledge of court as estimated by guardians ad litem. *Child Abuse Review, 9,* 375–286.

Everson, M., Hunter, W., Runyan, D. K., Edelsohn G., & Coulter M. (1989). Maternal support following disclosure of incest. *American Journal of Orthopsychiatry,* 197–207.

Faller, K. C., & Palusci, V. J. (2007). Children's advocacy centers: Do they lead to positive case outcomes? *Child Abuse and Neglect, 31,* 1021–1029.

Flin, R. H., Stevenson, Y., & Davies, G. M. (1989). Children's knowledge of court proceedings. *British Journal of Psychology, 80,* 285–297.

Freshwater, K., & Aldridge, J. (1994). The knowledge and fears about court of child witnesses, schoolchildren, and adults. *Child Abuse Review, 3,* 183–195.

Glaser, D., & Spencer, J. R. (1990). Sentencing, children's evidence and children's trauma. *Criminal Law Review, June,* 371–382.

Giles v. California, No. 07–6053 (US Sup. Ct., cert. granted Jan 11, 2008).

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

Goodman, G. S., Myers, J. E. B., Qin, J., Quas, J. A., Castelli, P., Redlich, A. D., & Rogers, L. (2006). Hearsay versus children's testimony: Effects of truthful and deceptive statements on jurors' decisions. *Law and Human Behavior, 30,* 363–401.

Goodman, G. S., Quas, J. A., Batterman-Faunce, J. M., Riddlesberger, M. M., & Kuhn, G. (1997). Children's reactions to and memory for a stressful event: Influences of age, anatomical dolls, knowledge, and parental attachment. *Applied Developmental Science, 1,* 54–75.

Goodman, G. S., Quas, J. A., Bulkley, J., Shapiro, C. (1999). Innovations for child witnesses: A national survey. *Psychology, Public Policy, and Law, 5,* 255–281.

Goodman, G. S., Taub, E. P., Jones, D. P. H., England, P., Port, L. K., Rudy, L., & Prado, L. (1992). Testifying in criminal court: Emotional effects of child sexual assault victims. *Monographs of the Society for Research in Child Development, 57* (Serial No. 229).

Goodman, G. S., Tobey, A. E., Batterman-Faunce, J. M., Orcutt, H., Thomas, S., Shapiro, C. & Sachsenmaier, T. (1998). Face-to-face confrontation: Effects of closed circuit-technology on children's eyewitness testimony and jurors' decisions. *Law and Human Behavior, 22,* 165–203.

Gray, E. (1993). *Unequal justice: The prosecution of child sexual abuse.* New York, NY: Free Press.

Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Reppucci, N. D., & Schwartz, R. (2003). Juveniles' competence to stand trial: A comparison of adolescents' and adults' capacities as trial defendants. *Law and Human Behavior, 27*, 333–363.

Harbeck-Weber, C., & McKee, D.H. (1995). Prevention of emotional and behavioral distress in children experiencing hospitalization and chronic illness. In M. C. Roberts (Ed.), *Handbook of pediatric psychology* (2nd ed., pp. 167–184). New York: Guilford Press.

Herman, J. L. (1981). *Father-daughter incest.* Cambridge, MA: Harvard University Press.

Herman, J., & Hirschman, L. (1981). Families at risk for father-daughter incest. *American Journal of Psychiatry, 138*(7), 967–970.

Jones, L. M., Walsh, W. A., & Cross, T. P. (2007). Do Children's Advocacy Centers improve families' experiences of child sexual abuse investigations? *Child Abuse and Neglect, 31,* 1069–1085.

Katz, S., & Mazur, M. A. (1979). The false rape report. In S. Katz & M. A. Mazur (Eds.), *Understanding the rape victim* (pp. 205–214). New York: John Wiley.

Keeney, K. S., Amacher, E., & Kastanakis, J. A. (1992). The court prep group: A vital part of the court process. In H. Dent & R. Flin (Eds.), *Children as witnesses* (pp. 201–209). Chichester, England: Wiley.

Lind, E. A., & Tyler, T. R. (1988). *The social psychology of procedural justice.* N.Y.: Plenum.

Lindsay, R. C. L., Ross, D. F., Lea, J. A., & Carr, C. (1995). What's fair when a child testifies? *Journal of Applied Social Psychology, 25,* 870–888.

MacDonald, A. P. (1971). Internal-external locus of control: Parental antecedents. *Journal of Consulting & Counseling Psychology, 37*, 141–147.

Malloy, L., Lyon, T. D., & Quas, J. A. (2007). Filial dependency and recantation of child sexual abuse allegations. *Journal of the American Academy of Child and Adolescent Psychiatry, 46,* 162–170.

Maryland v. Craig (1990). 497 U.S. 836, 110 S. Ct. 3157.

McAuliff, B. D., & Kovera, M. B. (2002). The status of evidentiary and procedural innovations in child abuse proceedings. In B. L. Bottoms, M. B. Kovera, & B. D. McAuliff (Eds.), *Children, social science, and the law* (pp. 412–445). New York: Cambridge University Press.

McAuliff, B. D., Maurice, K. A., Neal, E. S., & Diaz, A. (2008). *"She should have been more upset…": Expectancy violation theory and jurors' perceptions of child victims.* Paper presented at the annual meeting of the American Psychology-Law Society, Jacksonville, FL.

McAuliff, B. D., & Nicholson, E., Amarilio, D., & Ravanshenas, D. (2008). *Supporting children in legal proceedings*: *Descriptive data from a national survey of victim/witness advocates. Manuscript under review.*

Murray, K. (1995). *Live television link: An evaluation of its use by child witnesses in Scottish criminal trials.* Edinburgh, Scotland: Scottish Office, Central Research Unit.

Nathanson, R., & Saywitz, K. (2003). The effects of the courtroom context on children's memory and anxiety. *The Journal of Psychiatry and Law, 31,* 67–98.

National Center for Prosecution of Child Abuse (2006, May). *Legislation regarding the use of closed-circuit television testimony in criminal child abuse proceedings.* Retrieved February 9, 2008, from http://www.ndaa.org/pdf/ncpca_statute_tv_testimony_ may_06.pdf.

National Center for Prosecution of Child Abuse (2006, July). *Legislation regarding the admissibility of videotaped interviews/statements in criminal child abuse proceedings.* Retrieved February 9, 2008, from: http://www.ndaa.org/pdf/ncpca_statute_videotaped _interviews_july_06.pdf.

National Children's Alliance (2006). *Joining hands together to protect children: National Children's Alliance 2005 annual report.* Washington D.C.: NCA.

New York v. Ferber, 458 U.S. 747 (1982).

Oates, R. K., & Tong, L. (1987). Sexual abuse of children: An area with room for professional reforms. *The Medical Journal of Australia, 147,* 544–548.

Orange County District Attorney (n.d.) *People v. Alejandro Avila.* Retrieved February 9, 2008, from: http://www.orangecountyda.com/home/index.asp?page=337.

Orbach, Y., Hershkowitz, I., Lamb, M. E., Sternberg, K. J., Esplin, P. W., & Horowitz, D. (2000). Assessing the valuye of structured protocols for forensic interviews of alleged abuse victims. *Child Abuse and Neglect, 23,* 91–98.

Orth, U., & Maercker, A. (2004). Do trials of perpetrators retraumatize crime victims? *Journal of Interpersonal Violence, 19,* 221–227.

Perry, N. W., McAuliff, B. D., Tam, P., & Claycomb, L. (1995). When lawyers question children: Is justice served? *Law and Human Behavior, 19*, 609–629.

Phillips, A., & Jacobsen, J. (2008). The *Crawford* outline: Cases interpreting *Crawford v. Washington.* Alexandria, VA: National District Attorneys Association.

Prince v. Massachusetts, 211 U.S. 158 (1944).

Quas, J. A., Bauer, A B., & Boyce, W. T. B. (2004). Emotion, reactivity, and memory in early childhood. *Child Development,* 75, 1–18.

Quas, J. A., & Lench, H. C. (2007). The effects of emotion, physiological reactivity, and context on children's memory. *Applied Cognitive Psychology, 21,* 289–305.

Quas, J. A., Goodman, G. S., Ghetti, S., Alexander, K., Edelstein, R., Redlich, A., Cordon, I., & Jones, D. P. H. (2005). Childhood sexual assault victims: Long-term outcomes after testifying in criminal court. *Monographs of the Society for Research in Child Development, 70, Serial No. 280.*

Quas, J. A., Wallin, A. R., Horwitz, B., Davis, E., & Lyon, T. D. (in press). Maltreated children's understanding of and emotional reactions to dependency court involvement. *Behavioral Sciences and the Law.*

Ross, D. F., Hopkins, S., Hanson, E., Lindsay, R. C. L., Hazen, K., & Eslinger, T. (1994). The impact of protective shields and videotape testimony on conviction rates in a simulated trial of child sexual abuse. *Law and Human Behavior, 18,* 553–566.

Runyan, D. K., Everson, M. D., Edelsohn, G. A., Hunter, W. M., & Coulter, M. L. (1988). Impact of legal intervention on sexually abused children. *The Journal of Pediatrics, 113,* 647–653.

Santtila, P., Korkman, J., & Sandnabba, K. (2004). Effects of interview phase, repeated interviewing, presence of a support person, and anatomically detailed dolls on child sexual abuse interviews. *Psychology, Crime, and Law, 10,* 21–35.

Sas, L. D. (1991). *Reducing the system-induced trauma for child sexual abuse victims through court preparation, assessment and follow-up* (Final Report, Project No. 4555–1–125, National Welfare Grants Division, Health and Welfare Canada). London, Ontario: London Family Court Clinic.

Sas, L. D. (1993). *Three years after the verdict: A longitudinal study of the social and psychological adjustment of child witnesses referred to the child witness project* (Final Report, Project No. 4887–06–91–026 to the Family Violence Prevention Division of Health Canada). London, Ontario: London Family Court Clinic.

Saywitz, K., Jaenicke, C., & Camparo, L. (1990). Children's knowledge of legal terminology. *Law and Human Behavior, 14,* 523–535.

Saywitz, K. J., & Nathanson, R. (1993). Children's testimony and their perceptions of stress in and out of the courtroom. *Child Abuse and Neglect, 17,* 613–622.

Saywitz, K., & Snyder, L. (1993). Improving children's testimony with preparation. In G. S. Goodman & B. L. Bottoms (Eds.), *Child victims, child witnesses: Understanding and improving testimony.* New York: Guilford Press.

Saywitz, K. J., & Snyder, L. (1996). Narrative elaboration: Test of a new procedure for interviewing children. *Journal of Consulting and Clinical Psychology, 64,* 1347–1357.

Shore, M. (1985). The clinician as advocate-intervention in court setting: Opportunities, responsibilities and hazards. *Journal of Clinical Child Psychology, 14,* 236–238.

Sigler, R. T., Crowley, J. M., & Johnson, I. (1990). Judicial and prosecutorial endorsement of innovative techniques in the trial of domestic abuse cases. *Journal of Criminal Justice, 18,* 443–453.

Snyder v. Massachusetts, 291 U.S. 97 (1934).

Spaccarelli, S., & Kim, S. (1995) Resilience criteria and factors associated with resilience in sexually abused girls. *Child Abuse and Neglect, 19,* 1171–1182.

Sternberg, K. J., Lamb, M. E., Esplin, P. W., Orbach, Y., & Hershkowitz, I. (2002). Using a structured interview protocol to improve the quality of investigative interviews. In M. Eisen, J. Quas, & G. Goodman (Eds.), *Memory and suggestibility in the forensic Interview* (pp. 409–436). Mahwah, NJ: Lawrence Erlbaum Associates.

Sullivan, B., & Brill, L. W. (2008). Brief of the National Association of Counsel for Children and the American Professional Society on the Abuse of Children as Amicus Curie in support of Respondent in Giles v. California.

Swim, J.K., Borgida, E., & McCoy, K. (1993). Videotaped versus in-court testimony: Is protecting the child witness jeopardizing due process? *Journal of Applied Social Psychology, 23*, 603–631.

Tedesco, J. F., & Schnell, S. V. (1987). Children's Reactions to Sex Abuse Investigation and Litigation. *Child Abuse and Neglect, 11,* 267–272.

Tyler, T. R. (1990). *Why people obey the law.* New Haven, CT: Yale University Press.

U.S. Department of Health and Human Services (2000). *Child Abuse and Neglect State Statute Series, 4.* Washington D.C.: National Clearinghouse on Child Abuse and Neglect Information.

Walsh, W. A., Cross, T. P., & Jones, L. M. (2007). Which sexual abuse victims receive a forensic medical examination? The impact of Children's Advocacy Centers. *Child Abuse and Neglect, 31,* 1053–1068.

Walsh, W. A., Lippert, T., Cross, T. P., Maurice, D. M., & Davison, K. (2008). How long to prosecute child sexual abuse for a community using a children's advocacy center and two comparison communities? *Child Maltreatment, 13,* 3–13.

Warren-Leubecker, A., Tate, C. S., Hinton, I. D., & Ozbek, I. N. (1989). What do children know about the legal system and when do they know it? First steps down a less traveled path in child witness research. In S. J. Ceci, D. F. Ross, & M. P. Toglia (Eds.), *Perspectives on children's testimony* (pp. 158–183). New York: Springer-Verlag.

Weiss, E. H., & Berg, R. F. (1982). Child psychiatry and law: Child victims of sexual assault: Impact of court procedures. *Journal of the American Academy of Child Psychiatry, 21,* 513–518.

Wexler, D. B., & Winick, B. J. (1996). *Law in a therapeutic key.* Durham, NC: Carolina Academic Press.

Zeltzer, L.K., Fanurik, D., & LeBaron, S. (1989). The cold pressor pain paradigm in children: Feasibility of an intervention model, Part II. *Pain, 37,* 305–313.

Chapter 4
Protecting Well-Being While Pursuing Justice

Barbara J. Sturgis

The second and third chapters in this section draw attention to circumstances in which concerns regarding the ability of the criminal justice process to achieve just outcomes intersect with concerns regarding the potential effects of that process on the psychological well-being of various participants. These chapters by Bruce Winick, Jodi Quas, and Bradley McAuliff can reasonably be understood as complimentary in the following sense. Winick's chapter endorses a substantive legal standard and a proposed procedure for applying that standard that raises a series of questions regarding the manner in which that procedure, and the participants in that procedure, will be able to fulfill its goals. The chapter by Quas and McAuliff emphasizes the extensive body of empirical research addressing the effects of the criminal justice process on participating children in an attempt to promote the development of processes that will protect the well-being of those children while promoting just outcomes.

4.1 Serious Mental Illness and Capital Punishment

In his chapter on determining when severe mental illness should disqualify a defendant from capital punishment, Winick writes that those with severe mental illness (SMI) at the time of the offense should be afforded the same categorical preclusion from capital punishment as those with mental retardation (Atkins v. Virginia, 2002) and as juveniles (Roper v. Simmons, 2005). Both those with mental retardation and juveniles were found to be categorically less culpable and therefore less appropriate for capital punishment. He endorses the approach favored by the American Bar Association (ABA), American Psychological Association (APA), American Psychiatric Association (APA), and National Alliance on Mental Illness (NAMI), that there should be an exemption from capital punishment only for those with SMI

B.J. Sturgis (✉)
Center for Children, Families, and the Law, University of Nebraska,
Lincoln, Nebraska, USA
e-mail: bsturgis@ccfl.unl.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_5, © Springer Science+Business Media, LLC 2009

who suffer significant impairment of their capacity to: (1) appreciate the nature, consequences, or wrongfulness of their conduct; (2) exercise rational judgment in relation to their conduct; or (3) conform their conduct to the requirements of law (Winick, 2009, this volume, p. 45) He outlines a number of procedural changes that could occur if such a categorical bar were in place, and he maintains that these procedural changes would positively impact not only the defendant, but also possibly the family of the victim and various other actors in the legal system.

For the purposes of this discussion, assume that there is a subset of offenders with SMI who do not qualify as not guilty by reason of insanity (NGRI), who manifest the above impairments, who are arguably less culpable than unimpaired offenders, and who probably should not face the death penalty. The question becomes how to determine who these people are, and what procedures should apply to them. Throughout the chapter, Winick relies heavily on laws and cases involving mental retardation, making the case that what applies to those with mental retardation applies to those with SMI who have the requisite "impaired capacities." While many of those with mental retardation and SMI share some similarities, there are many important differences between these two diagnostic categories. Both mental retardation and SMI cause significant impairment in individuals' functioning. The description of "impaired capacities" outlined above could certainly apply to those with mental retardation and some of those with SMI. However, there are crucial differences between these two categories of psychological impairment that raise important questions regarding the reliability of retrospective assessment of SMI in a relatively limited pretrial hearing.

First, mental retardation, at its various levels, is a specific diagnosis whereas SMI is not. Mental retardation has a specific description and agreed-upon criteria within the lexicon of mental disorders (DSM-IV, 1994). Although the precise measure of mental retardation that would constitute a barrier to capital punishment may vary from jurisdiction to jurisdiction, the category and its levels are well defined and well accepted within the mental health community. Under Winick's proposal, SMI would become a legal definition that would remain undefined clinically, and therefore would be left to courts or legislatures to determine. SMI could cover a multitude of diagnostic categories and would likely vary significantly from jurisdiction to jurisdiction. Probably the most common perception of SMI would include schizophrenia and other psychotic disorders. Those diagnoses would comport with the public's perception of what mental illness is. However, those with cognitive impairments, such as dementia and delirium, could qualify as well as those with severe mood disorders. SMI could also be descriptive of those with the serious dissociative disorders (such as dissociative identity disorder) and even in some with severe personality disorders (such as borderline personality disorder). Therefore, a good deal of the DSM-IV could be captured by potential legal descriptions of SMI.

Another concern raised by the differences between mental retardation and mental illness is that, by definition, mental retardation is a global impairment of cognitive capacities. When an individual is diagnosed with mental retardation, while there may be some variation within their limitations, they have significant deficits in all areas of cognitive functioning. If there is a deficit only in a specific area

of cognitive functioning, that would more likely be defined as a specific learning disability. Therefore, a diagnosis of mental retardation would be an accurate and consistent prediction of a person's functional impairment in virtually all situations.

On the other hand, individuals who carry diagnoses potentially covered by the descriptor SMI can be fairly functional in some, and perhaps many areas, and they can be significantly impaired in other areas. For example, an individual might experience paranoid delusions about aliens who are trying to poison him and make him ill, but he might remain competent and confident in handling his financial obligations. He then could be severely impaired in managing his diet (only green canned vegetables) and in dealing with medical professionals (the aliens in disguise who are trying to kill him). He would not necessarily be impaired in dealing with his banker and paying his bills. Should an individual be severely impaired in a manner that profoundly affects all aspects of his life, it is hard to understand why he should not be found to be NGRI.

Not only is mental retardation a specific diagnostic category within the DSM-IV, it also has well-established and standardized methods of assessment. Evaluating an individual for mental retardation is a relatively straightforward procedure. It requires the standardized administration of an individual intellectual test, an assessment of adaptive functioning, and a review of the individual's developmental history. The intelligence test assesses the individual's performance on a number of standardized tasks that have been normed on a standardized population. At the level of mental retardation that would be at issue for any legal proceedings there are one or two commonly used standardized tests. Assessment of adaptive functioning, by report of the individual and those who interact with him or her, looks at practical functioning in a wide array of daily tasks. The history determines the etiology of the retardation, including early developmental history and any events that may have affected the individual's functioning and development. An assessment and diagnosis of mental retardation can be done without any knowledge of the individual's criminal activity. It would only be at the upper levels of mental retardation (mild) that an individual would likely meet the requirements of criminal responsibility. Those at lower levels of functioning would be likely to be found not guilty by reason of mental defect and also incompetent to stand trial. In a sense, measuring intellectual functioning is much more of an actuarial process, although it does involve some clinical judgment.

While there are various assessment instruments which aid in the evaluation of those with mental illness, such assessments rely much more heavily on clinical judgment than do assessments of metal retardation. There is no single standardized method of assessing SMI, since it is not a clinical diagnosis. There are no tests comparable to intelligence test in that they are conventionally accepted as determining an individual's psychological condition as SMI. Therefore the determination of SMI is much more fluid and open to interpretation. This would be especially true at the level where the individual is not NGRI but would still be under consideration for preclusion from capital punishment. Presumably, if someone is so severely impaired that it is clear to all, it is much more likely that he or she would be found NGRI.

Along with the fact that the symptoms of SMI vary significantly within individuals and between individuals in the same diagnostic categories, many symptoms of SMI can be ameliorated by medication. In the area of schizophrenic and psychotic disorders there is a vast array of antipsychotic medications which, for many individuals afflicted with psychoses, can reduce the more florid and disturbing symptoms. While it is difficult to completely eliminate delusional thinking, it can be reduced to a significantly more controllable level. Many antipsychotic medications can also reduce or even eliminate hallucinatory experiences. Therefore, understanding an individual's functioning at any given time would have to take into account whether he or she were medicated and the impact of medication at the time of the offense. That raises the concern that a person might qualify as SMI at one point in time, and, with proper medication controlling symptoms, not qualify as SMI at some other time, while carrying the same diagnosis. Thus, establishing that an offender manifests SMI at a particular time before or after an offense does not clearly establish that he or she suffered SMI at the time of the offense. In contrast, there are no medications that can directly improve functioning in an individual with mental retardation. There may be some medications that can improve ancillary functioning, such as medications to reduce anxiety or improve focus, but there are none that can increase intellectual functioning overall. Thus, the severity of mental retardation remains consistent over time, rendering it less difficult to retrospectively establish the severity of impairment at the time of the offense.

Therefore, a psychological assessment of an individual that would be of assistance to the court to determine whether or not he or she fits one of the diagnostic categories that would likely be included in the category of SMI would necessitate a thorough understanding of the legal standard in the particular jurisdiction and of the relationship between that standard and clinical diagnoses. For example, is anyone who carries the diagnosis of schizophrenia considered SMI or just those with serious symptoms? Is the individual not SMI at some points, as when properly medicated with symptoms well controlled, but SMI at others, when off medication and experiencing more florid symptoms? Because the recommended rule emphasizes the individual's behavior "at the time of the offense," any assessment would have to take into account the individual's psychological impairment at that time.

This proposal further narrows the category to be precluded from capital punishment to those with SMI who have a significant impairment in their capacity to appreciate the nature and consequences or wrongfulness of their conduct, to exercise rational judgment in relation to their conduct, or to conform their conduct to the requirements of the law (Winick, 2009, this volume, p. 45). Therefore, any assessment relevant to the legal questions would have to take into consideration the particular conduct and understanding of the law that the person had at the time of the crime. The assessment would involve a thorough understanding of the individual's psychological impairment at the time of the crime, the details of the crime itself, and the relationship between the two. That assessment would necessitate the defendant conceding the facts of the crime and a description of his/her thinking/belief at the time. For example, if our paranoid individual in the above example stabbed and killed the nurse who was giving him his flu shot because he believed

she was an alien trying to kill him, he might fit the definition of SMI and "significant impairment" for the purposes of preclusion from capital punishment. However, if that same schizophrenic individual, properly medicated, stabbed the nurse because she made him wait too long in line and he was angry, he might not be sufficiently impaired to qualify as SMI for the purposes of preclusion from capital punishment. Nor would he be if he shot a teller while attempting to rob the drive up window at his bank because he wanted more money. Knowledge of the crime and the thinking/belief at the time would not be necessary for the assessment of mental retardation, which can be done absent any knowledge of the crime itself.

For that reason, a pretrial hearing, although focusing on the defendant's mental illness, would be much more involved than one making a determination of mental retardation. It would still necessitate a thorough airing of the "gruesome facts of the crime" in order to determine the relationship between the defendant's impaired processes and the criminal conduct. The psychologist would have to know exactly what happened and what the defendant was thinking at the time to evaluate the relationship between any diagnostic category and the crime. Since the determination of both SMI and "impaired processes" are legal decisions the judge would also have to know the details of the crime to make that judgment. That raises the question of what sources for the facts of the crime would be allowed. For example, would the psychologist or judge rely only on the information provided by the defendant or would he/she get the crime scene photos? None of this is necessary in a case involving mental retardation in which the judge only needs to decide which psychological evaluation to accept.

Given the complexity of determining that an exemption from capital punishment is warranted for some individuals with SMI, Winick's proposal that such hearings be done by judges rather than juries makes sense. The judge would have to first determine whether the individual was SMI at the time of the crime and the effect of that SMI on the criminal behavior. Given the potential for fluctuation in functioning within individuals with a history of SMI, it would be quite possible that a person who appears relatively intact at the time of the hearing was quite impaired at the time of the crime. Furthermore, determination of whether the requisite "significant impairments" occurred at the time of the crime requires a nuanced analysis of what qualifies as "significant impairments," how those impairments impacted the individual's behavior, and whether they rose to the level that would preclude capital punishment. Judges have a greater understanding of the law and are "probably more due process oriented than capital juries" (Winick, 2009, this volume, p.). Judges would likely have more exposure to cases in which SMI plays a part, either for NGRI or in other exemption hearings. They would therefore have a wider experiential base with which to compare the extant case to others, as well as more experience with evaluating expert testimony. This recommendation is consistent with David Baldus' research into judicial versus jury sentencing in capital cases (Baldus, Woodworth, Grosso, & Christ, 2002). He found support for greater consistency in judicial sentencing compared to jury sentencing (Baldus et. al., 2002, p.669). Preclusion of an individual with SMI and the requisite impairments would be potentially more complex than capital sentencing and require more legal understanding

and more sophistication with regard to mental health issues than would be found in most juries.

Winick also raises considerations with respect to Therapeutic Jurisprudence the intentional and unintentional psychological impact of the law on the well-being of the people involved (Wexler & Schopp, 1992). His contention is that having the issue of preclusion from capital punishment decided pretrial would significantly reduce the stress on those involved in the process. It seems reasonable that if the defendant were found not eligible for capital punishment in a pretrial hearing, there would be significantly less stress for those involved in the guilt and penalty phases of the actual trial. They would not face the possibility that the defendant might eventually be put to death as a result of their decisions. He noted that there would likely be less intense scrutiny on the judge in a non-capital trial as well as less potential distress for the jury. The same could hold true for the attorneys. There is a question regarding the feelings of the family of the victim. While some may feel relief at having the death penalty off the table and therefore the potential of more timely closure, others may feel cheated out of the retribution they feel is deserved.

Although those involved in the pretrial hearing would be making decisions that could place the defendant in the position of being eligible for capital punishment, it is reasonable to expect that the stress would still be less than the stress of a capital sentencing hearing since they would be insulated from the final outcome by the guilt and penalty phases of the actual trial. The judge (or jury) would know that even if the defendant was found eligible for capital punishment, several more legal proceedings intervene prior to his or her facing death. While Winick did not mention the psychologist, it would also seem reasonable to expect that participating in a pretrial determination of eligibility for capital punishment would be less stressful than relevant evaluations further along the process, such as an evaluation of competency to face execution. Presiding at a pretrial hearing might be quite stressful for the judge, however, in that he or she may face even more intense scrutiny as the sole decision-maker regarding whether the defendant would ultimately face capital sentencing.

Throughout the paper, Winick focuses on the blessings that would occur if an individual with SMI and the requisite impairments could be precluded from capital punishment in a pretrial judicial hearing. He does not discuss the impact of such a process when the defendant is found eligible for capital punishment. All of the Therapeutic Jurisprudence advantages would vanish. The stressors on the individuals involved in a capital trial would still be present, along with the added strain of the rather complex pretrial hearing itself, almost the trial before the trial. Winick was also concerned about the "lens" through which a capital-qualified jury views the evidence in a capital trial. If the use of a pretrial hearing to determine eligibility for capital punishment were commonly understood, and the defendant were found to be eligible, jurors would potentially have another "lens" through which to view the defendant and the evidence. First, the defendant would have conceded the details of the crime for the purposes of the pretrial hearing. Would this increase the likelihood of a guilty verdict at trial? Second, a judge has decided that the defendant was sane enough to face the possibility of the death penalty. The jury might assume that the

sanity issue has been settled and no longer needs to be considered. This might, for example, have a significant effect on a jury's willingness to consider mental illness, or even SMI, as a mitigator during the penalty phase.

Another question arises regarding how this pretrial process would work in conjunction with a potential plea of NGRI. Since the issue of NGRI is handled at trial, would the defendant have to pursue a pretrial hearing to determine if he/she is eligible for capital punishment and then present the NGRI defense at trial, or would a pretrial determination of eligibility effectively preclude an NGRI defense, although it technically should not? Insofar as the defendant must pursue each claim in separate phases, would the pretrial process regarding SMI contaminate the accurate evaluation of the NGRI defense during the trial? Alternately, would the desire to pursue a NGRI defense lead the defendant to make a strategic decision to forgo the pretrial SMI hearing in circumstances in which it should be addressed?

It seems likely that there is a subset of defendants who, while not NGRI, are sufficiently impaired because of SMI to be less culpable and not deserving of the death penalty. The question becomes how to accurately identify these people, and what procedures should be used to ensure fairness. The process endorsed by Winick has the potential to be extremely complex and vary widely from jurisdiction to jurisdiction. For some participants in these procedures, the pretrial determination might reduce the psychological stress without undermining other important considerations, such as the accuracy of the determinations and comparative justice. The potential length and complexity of such hearings suggests, however, that they might inflict substantial stress on some participants under some circumstances. Alternatively, attempts to reduce the length or complexity of such hearings might undermine attempts to attain comparative or non-comparative justice. Thus, an attempt to design and implement such hearings in a manner that ameliorates harm to the psychological well-being of the participants will require an extended inquiry regarding a complex set of empirical and justificatory questions.

The third chapter in this section discusses a related set of empirical studies that are relevant to a different category of criminal proceedings.

4.2 Protecting Child Victim Witnesses

Quas and McAuliff present information on children's involvement in the criminal justice system. They emphasize both the necessity of having children in court and also the potential impact of that participation on children's well-being. They present data on the kinds of stressors that can occur when children are involved in legal procedures and the kinds of accommodations that might be made to mitigate those stressors. Some of those stressors include lack of legal knowledge, repeated interviews especially by different people whom the children do not know, testifying, facing the perpetrator in court, case length, and case outcome. Relatively non-controversial interventions that have addressed some of these stressors include providing information about the legal process to child witnesses, coordinating

investigations through the use of child advocacy centers (CACs), and providing support persons. Other, more controversial changes to procedures, have included the use of videotaped testimony and testimony outside the courtroom via closed circuit television.

Quas and McAuliff refer in particular to data about child victims of sexual abuse who become witnesses since much of the research on children's involvement as witnesses in both the criminal and juvenile systems has been done with this population. They note that there are many factors common to child sexual abuse cases that are also common in other kinds of criminal cases. These include case length, repeated interviews, testifying, and case outcomes. However, there are important factors central to sexual abuse cases that may not be found in other situations where children might testify. Primary among them is that most children who testify in sexual abuse cases are the victims. Most often, they have a prior relationship with the perpetrator who uses that relationship to involve the child in sexual activity. Since children rarely disclose sexual abuse immediately (if ever) the abuse has often continued over a significant period of time (Lyon, 2007; Roesler & Wind, 1994). Because of these factors and the sexual nature of the crime, child victim/witnesses commonly experience lasting feelings of responsibility, shame, embarrassment, and guilt (Sgroi, 1982; Roesler & Wind, 1994). They often feel guilty for the abuse itself, for the disruption caused by the disclosure, and for the consequences to the perpetrator whom the child may care about. Also, it is not uncommon for them to risk relationships with other family members by virtue of the disclosure. Therefore, child sexual abuse cases, while likely being the most common situation in which children testify, and while providing most of the available data on the impact of legal proceedings on children, present additional stressors that may not be present in other types of cases where children might testify.

Regarding the consequences of legal involvement on children, Quas and McAuliff enumerate a number of areas that may cause stress or trauma for children. The first area they discuss is legal understanding. They note that children are limited in both general legal knowledge and also about the specifics of their case. The question becomes how this lack of knowledge impacts both children's ability to participate fully as witnesses and the level of distress that they feel. Children who are maltreated often feel partly responsible for the maltreatment and may assume that the legal involvement signifies that they are in trouble or that they are causing trouble for others. Children who are fearful that they are in trouble may disclose less information and experience more confusion and stress during the process. Because providing children with information regarding legal proceedings would not negatively impact those proceedings, it would appear to be a straightforward way to enhance children's participation and potentially reduce stress.

Children need information both about how the court system works in general and about the specifics of their case. This may reduce their level of anxiety and contribute to the perception that the process is fair (Melton et al., 1992). Research efforts might refine our understanding of the kinds of legal information that are important to children of particular age groups, the best method for delivery, and how to assess whether children truly understand the information they need. For

example, there has been significant research in the medical field on the utility of preparing children prior to medical procedures (Cardona, 1994). Some of those studies have looked at parents providing the information and the use of videotapes of children explaining the procedures to children, which the children have found helpful in reducing their anxiety and in helping them cope with the procedure itself (Pinto & Hollandsworth, 1989). As with adults, keeping children informed regarding the specifics of their case and why things take as long as they do is important. Children's perception of time is different from adults' sense of how long things take. It is also harder for especially young children to keep track of the passage of events. Therefore, they need more support and ongoing information to understand the status of their case.

Another potential source of stress that Quas and McAuliff review is the impact of repeated interviews on children. Certainly, at the investigative stage, there is significant concern regarding the impact of repeated interviews on children (Poole & Lamb, 1998; Ceci & Bruck, 1995; Olafson, 2007). This concern stems from the need for accuracy and from sensitivity to the impact of the process on children. The modifications in the investigative process that have been recommended, including minimizing unnecessary multiple interviews and the use of child advocacy centers, reflect the recognition that repeated questioning of children has the potential for affecting the quality of information as well as the child's experience (Faller, 2007). Although children report that the experience of multiple interviews is negative (Tedesco & Schnell, 1987; Quas et al., 2005), research efforts might focus on the impact of such interviews when they have been conducted in a child friendly, developmentally appropriate manner. It can be quite a relief for children to finally talk about ongoing abuse, a burden they often bear in secret. Also, children are fairly flexible when the reasons for adult actions are explained. Thus, if repeated interviews are necessary to gather or clarify relevant information, or to prepare for court, children might be able to handle them fairly well if they are done appropriately, the reason is explained, and the children understand the process.

Quas and McAuliff note that testifying appears to be the most stressful act of legal involvement for children. Testifying is difficult for both children and adults. A major source of stress for children in the courtroom is having to face the defendant. Facing the perpetrator – in sexual abuse cases it is most likely someone with whom the child has had a trusted relationship – is what children say is the most stressful part of being in court (Goodman et al., 1992). When children don't understand the protections that are in place, they may fear that the perpetrator may be able to approach them in the courtroom. Even when children recognize that they are physically safe in the courtroom, they worry about what the perpetrator may be able to do to them outside of court, which in some cases is not unrealistic. Since most of the child victim/witnesses who have been studied have been in extended abusive relationships with the perpetrator, they often continue to feel vulnerable and anxious even when their physical safety is assured. Aside from fear (realistic and unrealistic), child victim/witnesses often feel guilty about testifying against a parent, relative, or friend. Also, they are embarrassed about having to talk

about sexual matters in open court. Again, many of these factors are unique to the population most often studied.

Children are anxious about facing the perpetrator, even in therapeutic settings. However, particularly in sexual abuse cases, facing the perpetrator and expressing their distress about what happened to them is an important part of the healing process for victims. This process acknowledges the reality of the abuse and who is responsible for it. It is especially important that the non-offending parent, usually the mother, acknowledges the reality of the abuse, condemns it, and is supportive of the victim. When the perpetrator takes responsibility for his behavior and, hopefully, apologizes, it is even more therapeutic for the victim. That raises the question of whether or how testifying in court can attain some of these same therapeutic gains. It is possible that testifying in open court could be a way for the child to openly declare the reality of the experiences that they have had. It is also a way for adults to listen to and take seriously what the child has to say, with a very formalized procedure. Grown-ups are listening carefully to the child and asking questions to understand better. Even cross examination, which can be confusing for both adults and children, is an acknowledgment of what the child has said. If children can be taught how to manage difficult cross examination, that further validates what they have to say. Research that informs our ability to create procedures that support the child's ability to respond adaptively to cross examination would enhance the children's well-being and their ability to contribute to an effective process of adjudication.

A related issue that Quas and McAuliff note is the manner and question type used in cross examination. A major focus of training for those who investigate child abuse and child sexual abuse is how to talk to children in a developmentally appropriate, non-leading manner (Poole & Lamb, 1998). Cross-examination, if anything, is often the opposite. Questions can be confusing and highly suggestive. The language is often inappropriate for the child's age and experience. As they point out, these kinds of questions are often difficult for adults and beyond the ability of children to comprehend. Accommodations are already made for individuals who are deaf and for those who do not speak English. It might be worth studying what kinds of courtroom linguistic accommodations would promote the ability of children to testify as accurately and completely as possible. Presumably, such accommodations would also reduce confusion and therefore distress for those children. Professionals who provide expert testimony often pursue extensive training in preparing to testify effectively. Perhaps some analogous form of training would assist many children in increasing their level of accuracy and in reducing the amount of distress they experience.

One of the factors that impacts how well children react to testifying appears to be maternal support. Children who do not receive maternal support during legal proceedings function significantly more poorly over time (Goodman et al., 1992). Similarly, children who receive maternal support are likely to disclose sexual abuse earlier and experience less distress (Elliott & Briere, 1994; London, Bruck, Ceci, & Shuman, 2005; Olafson & Lederman, 2006; Shaw, Lewis, Loeb, Rosado, & Rodriguez, 2001). Previous research has found that children's perceptions of the legal process may very well be mediated by the perceptions of their caretakers

(Goodman et al., 1992). Thus, it is possible that some of the anxiety that children feel about testifying and their negative feelings about the process may be a reflection of what they are hearing from their parents or sensing about their parents' emotions. Although much consideration has focused on what to do for children directly, both during the investigative and testimony phase, it appears that a significant mitigator of distress throughout the legal process is the presence of a supportive adult, most usually the mother in child sexual abuse cases. Therefore, another important avenue for supporting children in legal settings should focus on the role of the parent or adult support person and on identifying the kinds of interventions that would enhance their effectiveness with the children. If parents are less anxious, if they thoroughly understand the legal process, and if they feel the process is fair, their attitudes will likely influence their children's perceptions. This would be particularly true for the youngest and therefore most vulnerable children.

Possible ways of preventing children from experiencing the stress of testifying in open court include the use of videotaped testimony or closed circuit television. Quas and McAuliff outline the research in this area and note that these accommodations, while possibly reducing the stress on children, remain highly controversial because they require significant modification of trial court proceedings and may impinge upon the right of the defendant to cross-examine the child. These rarely used modifications to courtroom procedures, while reducing immediate stress, may have longer term unintended consequences for children. As noted, children most often testify because they have been abused, most frequently in the form of sexual abuse. However, with any abuse, children typically feel guilty about what has happened to them. The abuse is usually kept secret which, aggravates its psychological effect on the child. The use of videotaped testimony which keeps the child out of court may eliminate the stress of the child having to appear in court, but may perpetuate the sense that what has happened to the child should be kept secret because it is shameful. The same concerns are relevant to the use of closed-circuit television to allow children to testify outside the open courtroom. It may reinforce the notion that children need to hide from both the perpetrator and the embarrassment of what has happened to them. Being able to testify in open court about what has happened to them may have the potential to be therapeutic for some children. In the studies from other countries that compared closed-circuit testimony with open court testimony, were the children who testified in open court properly prepared to do so? The degree and quality of preparation might substantially influence the relative stressfulness of testifying via closed-circuit television and of testifying in open court.

In their conclusion, Quas and McAuliff reference therapeutic jurisprudence and recognize that law is a social force that can bring about therapeutic or antitherapeutic outcomes for those involved. They note that we cannot eliminate all stress for children who participate in legal procedures. We should question, however, whether we should want to eliminate all stress. It is important in reflecting upon this question and this literature that we distinguish between stress and trauma. Often when we look at information on the impact of court procedures on children, stress and trauma seem to be used interchangeably. The mere fact that something creates anxiety or stress does not mean that it will cause trauma. Trauma "is an emotional wound or

shock that creates substantial, lasting damage to the psychological development of a person,…" (American Heritage, 2000). When individuals face stressful situations and are able master them, such experiences have the potential to increase coping skills and a sense of self-efficacy (Bandura, 1986). Therefore, we should ask whether the stress of legal procedures, specifically testifying, is necessarily bad for children if they have the proper tools with which to manage that stress? We should certainly modify those aspects of legal proceedings that cause unnecessary stress, such as unnecessary repeat interviews, lack of knowledge, and other sources of such unnecessary stress. However, children might be best served by teaching them how to cope with the distress and difficulties involved in dealing with the court process. Children also might be well served by educating their caretakers about how to cope with their child's stress and with their own. Therefore, assisting the children and their caretakers in managing the stress of testifying may substantially influence the long-term effects of participation in the legal process.

References

Atkins v. Virginia, 536 U.S. 304 (2002).

American Heritage Dictionary of the English Language, 4th Edition. (2000). Boston: Houghton Mifflin Company.

Baldus, D. C., Woodworth, G., Grosso, C. M., & Christ, A. M. (2002). Arbitrariness and discrimination in the administration of the death penalty: A legal and empirical analysis of the Nebraska experience (1973–1999). *Nebraska Law Review, 81,* 486–756.

Bandura, A. (1986). *Social foundations of thought and action.* New Jersey: Prentice-Hall.

Cardona, L. (1994). Behavioral approaches to pain and anxiety in the pediatric patient. *Child and Adolescent Psychiatric Clinics of North America, 3*(3), 449–464.

Ceci, S. J., & Bruck, M. (1995). *Jeopardy in the courtroom: A scientific analysis of children's testimony.* Washington, DC: American Psychological Association.

Diagnostic and statistical manual of mental disorders (DSM-IV). (1994). Washington, D.C.: American Psychiatric Association.

Elliott, D. M., & Briere, J. (1994). Forensic sexual abuse evaluations of older children: Disclosures and symptomatology. *Behavioral Sciences and the Law, 12,* 261–277.

Faller, K. C. (2007). *Interviewing children about sexual abuse: Controversies and best practice.* New York: Oxford University Press.

Goodman, G. S., Taub, E. P., Jones, D. P. H., England, P., Port, L. K., Rudy, L., & Prado, L. (1992). Testifying in criminal court. *Monographs of the Society for Research in Child Development, 57* (5, Serial No. 229).

London, K., Bruck, M., Ceci, S. J., & Shuman, D. W. (2005). Disclosure of child sexual abuse: what does the research tell us about the ways that children tell? *Psychology, Public Policy, and Law, 11,* 194–226.

Lyon, T. D. (2007). False denials: Overcoming methodological biases in abuse disclosure research. In M. E. Pipe, M. E. Lamb, Y. Orbach, & A. C. Cederborg (Eds.), *Child sexual abuse: Disclosure, delay and denial* (pp. 41–62). Mahwah, New Jersey: Lawrence Erlbaum Associates.

Melton, G. B., Limber, S., Jacobs, J. E., Oberlander, L. B., Berliner, L., & Yamamoto, M. (1992). *Preparing sexually abused children for testimony: Children's perceptions of the legal process* (Final report to the National Center on Child Abuse and Neglect, Grant No 90-CA-1274). Lincoln: University of Nebraska – Lincoln, Center on Children, Families, an the Law.

Olafson, E. (2007). Children's memory and suggestibility. In K. C. Faller, *Interviewing children about sexual abuse: Controversies and best practice* (pp. 10–34). New York: Oxford University Press.

Olafson, E., & Lederman, C. (2006). The state of the debate about children's disclosure patterns in child sexual abuse cases. *Juvenile and Family Court Journal, 57(1),* 27–39.

Pinto, R. P., & Hollandsworth, J. G. (1989). Using videotape modeling to prepare children psychologically for surgery: Influence of parents and costs versus benefits of providing preparation services. *Health Psychology, 8*(1), 79–95.

Poole, D. A., & Lamb, M. E. (1998). *Investigative interviews of children: A guide for helping professionals.* Washington, DC: American Psychological Association.

Quas, J. A., & McAuliff, B. D. (2009). Accommodating child witnesses in the criminal jsutice system: implications for death penalty cases. (Chapter 3 in this Volume).

Quas, J. A., Goodman, G. S, Ghetti, S., Alexander, K. W., Edelstein, R., Redlich, A. D., Cordon, I., & Jones, D. P. H. (2005). Childhood sexual assault victims: Long-term outcomes after testifying in criminal court. *Monographs of the Society for Research in Child Development, 70* (2, Serial No. 280).

Roesler, T. A., & Wind, T. W. (1994). Telling the secret: Adult women describe their disclosures of incest. *Journal of Interpersonal Violence, 9(3),* 327–338.

Roper v. Simmons, 543 U.S. 551 (2005).

Sgroi, S. (1982). *The handbook of clinical intervention in child sexual abuse.* Lexington, Massachusetts: D.C. Heath and Company.

Shaw, J. A., Lewis, J. E., Loeb, A., Rosado, J., & Rodriguez, R. A. (2001). A comparison of Hispanic and African-American sexually abused girls and their families. *Child Abuse & Neglect, 25,* 1363–1379.

Tedesco, J. F., & Schnell, S. V. (1987). Children's reaction to sexual abuse investigation and litigation. *Child Abuse & Neglect, 11,* 267–272.

Wexler, D. B., & Schopp, R. F. (1992). Therapeutic jurisprudence: A new approach to Mental Health Law. In D. K. Kagehiro & W. S. Laufer (Eds.), *Handbook of psychology and law* (pp. 361–379). New York: Springer – Verlag Press.

Winick, B. (2009). Determining when severe mental illness should disqualify a defendant from capitol punishment. (Chapter 2 in this Volume).

Part II
Judgments of Dangerousness and the Criminal Process

Chapter 5
Capital Punishment and Dangerousness

Christopher Slobogin

In an article entitled *A Jurisprudence of Dangerousness*[1] (since largely replicated in a book chapter[2]) I sketched out a set of principles that might govern the use of preventive detention based on assessments of dangerousness to others. In this Chapter 1 apply those principles to the ultimate form of prevention, capital punishment. More specifically, this chapter addresses the following issues: (1) whether dangerousness may be considered an aggravating factor that justifies imposition of a death sentence on a person convicted of capital murder; and, if so, (2) how dangerousness should be defined in that context; and (3) how to resolve the two-edged sword problem (which arises when ostensibly mitigating mental disability is also the cause of an individual's dangerousness).

My conclusions on these issues can be sketched out as follows. In theory, dangerousness is a legitimate aggravating factor in capital cases. In practice, however, it should virtually never form the basis for a death sentence, for two reasons: the government will seldom be able to demonstrate the level of risk it must demonstrate to justify the ultimate penalty nor will it usually be able to show that execution is the least restrictive means of achieving harm prevention in an individual case. Furthermore, on those rare occasions when the government is able to meet both of these stipulations, a death sentence might still be barred if serious mental illness contributed to the capital offense. While mental disability can cut both ways–supporting both an argument for reduced culpability and an argument for increased dangerousness–when it significantly impairs the individual's conduct at the time of the offense, retributive, and deterrence considerations bar imposition of the death penalty, regardless of how dangerous the individual might be.

Section 5.1 of this chapter describes in more detail the jurisprudence of dangerousness I have developed in other work. Section 5.2 explains the implications of that jurisprudence for dangerousness as an aggravating factor in death penalty

C. Slobogin (✉)
Vanderbilt University Law School Nashville, Tennessee
e-mail: c.slobogin@law.vanderbilt.edu

Stephen C. O'Connell Professor of Law, University of Florida Fredric G. Levin College of Law, Edwin A. Heafey Visiting Professor, Stanford Law School.

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_6, © Springer Science+Business Media, LLC 2009

cases. Section 5.3 analyzes the two-edged sword problem. Section 5.4 explains why serious mental disability should be an absolute bar to execution.

5.1 A Jurisprudence of Dangerousness

In *A Jurisprudence of Dangerousness*, I began by exploring four objections to long-term preventive detention of people considered dangerous to others: the unreliability objection; the legality objection; the punishment-in-disguise objection; and the dehumanization objection. I concluded that none of these objections, alone or combined, require a prohibition on preventive detention, but that each does impose limitations on its implementation. A synopsis of these views is provided here.

5.1.1 The Unreliability Objection

It is well-accepted that, even with recent advances in actuarial prediction and structured professional judgment instruments, we are not particularly good at identifying who will recidivate or when.[3] In light of our incompetence at assessing violence risk, some have argued that preventive detention is unconscionable.[4] The point is a simple one: Deprivations of liberty, especially when they also involve deprivations of life, should not be based on such suspect assessments.

There are several responses to this objection. First, when the goal is prevention of violence rather than its punishment, some relaxation in the required standard of proof is justifiable, a principle recognized in other legal contexts.[5] The adage that ten murderers should go free before one innocent person is convicted, while perhaps acceptable as an illustration of our commitment to justice, is much harder to swallow when we know that a sizeable proportion of the ten guilty persons will commit another murder if all of them are let go.[6] Second, while predictive judgments will always be suspect, the retrospective judgments necessary to implement the primary alternative to prevention–waiting until a criminal act has occurred and punishing it based on its relative culpability–are at least as flawed. *Mens rea* concepts–the primary means of grading responsibility for crime–are notoriously difficult to define and apply in a consistent fashion,[7] and legislatures and courts have experienced even more difficult developing an objectively neutral and coherent metric for measuring blameworthiness at sentencing; as a result, offenders with the same level of blameworthiness can easily receive wildly divergent verdicts and dispositions.[8]

Third, again comparing the two systems, mistakes about dangerousness are, at least in theory, much easier to correct than mistakes about culpability. For reasons described below,[9] preventive detention must continually be justified through periodic review, a requirement that can affect even the capital punishment process. In contrast, periodic review is inconsistent with the notion of punishing a person for his or her past conduct. An offender's culpability for a completed act does not

change. Furthermore, once culpability is determined at trial and affirmed on appeal, it is considered *res judicata*; the issue will never be revisited.

The conclusion that difficulties in measuring dangerousness do not preclude preventive detention does not mean, of course, that preventive detention is permissible upon any showing of risk. There should be both qualitative and quantitative restrictions on the government's efforts to prove the requisite level of dangerousness. In other work, I have argued that in trying to meet its proof burden regarding dangerousness, the government may rely only on previous criminal acts and expert testimony based on empirically derived and appropriately normed probability estimates, unless the subject of the prediction opens the door to non-statistical, "clinical" prediction testimony by relying on it to prove he or she is not dangerous.[10] This "subject-first" regime, I argued, "allows the government to prove dangerousness in the most accurate, least confounding manner, while permitting the offender–respondent to attack the state's attempt at preventive detention on the ground that the numbers do not accurately reflect his or her violence potential."[11]

In addition to this evidentiary restriction, the government's proof should have to meet the standard of proof dictated by what I have called the "proportionality principle."[12] That principle states that the degree of dangerousness required for preventive detention should be roughly proportionate to the degree of liberty deprivation the state seeks. For example, under the proportionality principle, greater proof of dangerousness would be required for imprisonment than for a stop and frisk designed to prevent street crime. Similarly, if incarceration occurs, the extent of proof required would increase with its duration.[13]

5.1.2 The Legality Objection

Even if the standard of proof for preventive detention is clearly established pursuant to the proportionality principle, dangerousness remains a vague term. In particular, clarification is necessary with respect to both the type of predicted harm that authorizes preventive detention (only physical violence, or theft and minor assaults as well?), and the type of act, if any, that triggers it (only serious crime, any antisocial act, or the presence of biological or environmental "static" risk factors as well?). Statutes that fail to provide such clarification can give rise to an objection based on the principle of legality: they give neither citizens nor government officials sufficient notice of the circumstances under which preventive detention can occur, and thus both chill innocent behavior by citizens and increase the potential for abuse by officials.[14]

This objection might lead to two further limitations on preventive detention, one having to do with its goal and the second having to do with its threshold. First, preventive detention should be aimed only at preventing serious harms.[15] Second, it should occur only after an individual has committed a criminal act or engaged in obviously risky behavior.[16] The legality rationale for these two limitations, stated briefly, is that preventive detention that is aimed at preventing minor antisocial

acts, or that is based on a person's static characteristics or on acts that are not obviously risky, would seriously undermine the rule of law. It would give government officials carte blanche to round up undesirables who are only trivially risky or who, even if they pose a significant threat, have not demonstrated, and may well not be aware of, any tendency to carry it out.[17]

Both of these limitations find further justification from principles developed below. The requirement that preventive *detention* be aimed at stanching serious harms is consistent with the least drastic means principle discussed in the next section. The requirement that antisocial conduct precede preventive detention is consistent with concerns raised by the dehumanization objection, because without that requirement we are sanctioning confinement based on status, not on a choice made by the individual.

5.1.3 The Punishment-in-Disguise Objection

Long-term prevention detention based on perceived dangerousness has traditionally been confined to people with serious mental illness.[18] A number of commentators, Justice Stevens among them, have expressed concern that allowing the government to engage in preventive detention beyond this limited sphere would lead to the "evisceration of the criminal law and its accompanying protections."[19] Stevens conjectured that a shadow criminal code would develop to deal with individuals thought to be prone to sexual offending, domestic violence, drunken assaults, and the like.[20] Furthermore, because such a shadow system would not constitute a "criminal prosecution" of the type referred to in the Sixth Amendment, the constitutional rules associated with criminal trial need not be followed, thus possibly increasing the potential for malfeasance by state actors.[21]

This objection is rightly concerned with the risk that a robust system of preventive detention could become the preferred method of liberty deprivation because of the perception that it places fewer obstacles in the government's way. But preventive detention need not be prohibited on this ground, or even reserved solely for those with serious mental illness, if it adheres to the admonition in the Supreme Court's decision in Jackson v. Indiana that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[22] If this due process principle is carefully followed, preventive detention of people who are not mentally ill should be permissible.

More specifically, preventive detention is constitutional under *Jackson* if three limitations are observed. First, the nature of the government's intervention must bear a reasonable relation to the harm contemplated. For instance, not all individuals who pose a risk require long-term institutionalization;[23] thus, preventive *intervention* more accurately describes the subject of this discussion (although I will continue to speak of preventive detention because that is the usual focus of analysis). Second, the duration of the intervention must be reasonably related to the harm predicted. Discharge is required when the individual no longer poses a danger, and treatment

is required if it will shorten the duration of confinement.[24] Third, to ensure these requirements are met, the individual is entitled to periodic review, at which the state must show the individual continues to pose the requisite risk (which, under the proportionality principle, should become increasingly difficult over time).[25]

The concern that such review proceedings will be too informal to act as a brake on abuses of discretion can also be answered. It is true that the Sixth Amendment rights to notice, counsel, confrontation, compulsory process, and public jury trial do not attach at such "civil" review proceedings. But any and all of these rights might still be required under the due process clause, a constitutional provision which, the Supreme Court's juvenile justice jurisprudence makes clear, is triggered whenever significant deprivations of liberty are contemplated.[26]

5.1.4 The Dehumanization Objection

The dehumanization objection is that, even if all of the other objections are met, preventive detention shows insufficient respect for the individual because it signals either that the person detained does not possess the capacity to choose the good or that, having such capacity, the person will not do so. Put in terms several moral philosophers have used, the dehumanization objection posits that people who have committed a criminal or obviously risky act (which the principle of legality requires even for preventive detention), have a right to be punished for that act, as a method of honoring their autonomous personhood.[27] Subjecting them instead to preventive detention insults their humanity because it ignores the fact that they have made a choice to do harm and, as Hegel put it, regards them not as "rational actor[s]" but "simply as… harmful animal[s] which must be rendered harmless."[28]

These types of concerns are difficult to evaluate because they are so abstract. In *A Jurisprudence of Dangerousness*, I argued that they are most potent when the government creates two systems of liberty deprivation for those who commit antisocial conduct–one designed to punish and the second designed to preventively detain individuals–and then chooses the latter option.[29] In this "two-track" situation, preventive detention palpably signals that the person is different, a "harmful animal" rather than a rational actor who has chosen to commit culpable harm.[30] A good example of this dehumanizing two-track regime is found in states that have adopted the "sexual predator" scheme–note the use of the animalistic word "predator"–which shunts the individual into a separate system either at the charging stage or after sentence is completed.[31]

The dehumanization objection is less powerful, however, when preventive detention is incorporated into the criminal justice system, as occurs with indeterminate sentencing. In such a setting, all offenders are evaluated along a continuum of dangerousness, thereby avoiding the explicit and stigmatizing "dangerous being" label that characterizes the separate sexual predator regime. Moreover, in contrast to the latter regime, detention based on dangerousness in a single-track criminal justice system occurs immediately after a conviction representing that the individual autonomously

chose to cause harm, and thus is closely associated with punishment based on desert. At the least, a "weak" version of the right to punishment is maintained in this latter scenario.[32]

Even a two-track system does not violate the right to punishment envisioned by Hegel and others when it is applied to an individual who should not be considered a "rational actor." This exception explains why people with serious mental illness can be subject to long-term preventive detention, either through civil commitment or after an acquittal by reason of insanity.[33] In *A Jurisprudence of Dangerousness*, I argued that the irrational actor exception also justifies detention of enemy combatants under orders to kill, terrorists, and extremely impulsive individuals, including sex offenders, who might colloquially be described as people who would commit their crimes even with a policeman at their elbow.[34] Unlike people with serious mental illness, these latter individuals can be considered autonomous individuals. But they do not deserve the right to punishment because they exercise their autonomy in the wrong direction even when faced with death or a significant punishment.[35]

The dehumanization objection, then, might lead to a prohibition on preventive detention as an alternative to, rather than an enhancement of, punishment, except when it is directed at individuals who are unaware they are engaging in criminal conduct (the seriously mentally ill) or who are extremely reckless with respect to the prospect of serious loss of liberty or death resulting from the criminal conduct (e.g., terrorists). Those in the first group are irrational in the classic sense captured by the typical insanity defense formulation.[36] Those in the second group are irrational in the sense that they choose to disregard society's most significant prohibitions. Another way to characterize these two groups is that they comprise the universe of individuals who are "undeterrable," i.e., those who are unaffected by the prospect of criminal punishment or significant harm.[37] An alternative regime of liberty deprivation is justifiable for these individuals because the dictates of the criminal justice system have little or no impact on them.[38]

5.1.5 Summary

Liberty deprivation based on dangerousness is permissible under five conditions, organized here somewhat differently than in the discussion above. The state must show: (1) that the level of risk is proportionate to the liberty deprivation contemplated, using methods of prediction that minimize inaccuracy; (2) that the harm predicted is substantial; (3) that the preventive intervention sought is no more restrictive than necessary to prevent the harm contemplated (a determination that should be subject to periodic review); and, when the preventive intervention is not part of a criminal sentence following conviction, (4) that the individual has engaged in obviously risky conduct; and (5) that the individual is undeterrable, either due to serious mental illness or to a preference for crime over freedom. The next section discusses the implications of these conditions for capital sentencing.

5.2 Dangerousness as an Aggravating Circumstance in Capital Cases

Approximately six states explicitly designate dangerousness as a "statutory" aggravating circumstance in capital cases, and another twenty-five or so make it a non-statutory aggravator, meaning that it can justify the death penalty if at least one statutory aggravator is also proven.[39] In these states, the prosecution is permitted to present testimony that a person who has been convicted of capital murder should be given a death sentence because he or she is dangerous, typically defined as "a probability that the individual will commit criminal acts of violence that constitute a continuing threat to society."[40] In Jurek v. Texas the Supreme Court upheld the constitutionality of death sentences based on this finding (which I will therefore call the *Jurek* formulation).[41]

If one subscribes to the five conditions under which dangerousness assessments may affect deprivations of liberty described at the end of Section 5.1, the *Jurek* formulation is deeply suspect. This is not to say dangerousness can under no circumstances constitute a ground for a death sentence. Unless one adopts Hegel's view that *any* type of preventive detention violates the right to punishment,[42] deathpenalty statutes that make dangerousness an aggravating factor do not trigger the dehumanization objection, because the prevention implemented through execution is part of a sentence demarcated by retributive principles and comes after a conviction. This latter fact also partially overcomes the legality objection, because it limits the potential for official abuse. In other words, conditions (4) and (5) are rendered moot in capital cases by the fact that the dangerousness finding follows conviction and is meant to enhance a criminal sentence.

However, the other three conditions, to varying degrees, pose significant problems for the *Jurek* formulation. First, as condition (2) recognizes, another consequence of the principle of legality is that government intervention may not occur simply to prevent minor harms. That should be especially so when execution is the contemplated intervention. To the extent the phrase "criminal acts of violence" in the *Jurek* formulation is construed broadly to include simple assaults and similar types of antisocial acts, this condition is violated.[43]

More significantly, in the usual case, condition (1) (requiring proof of dangerousness commensurate with the nature of the government intervention) and condition (3) (requiring that the intervention be limited to that necessary to achieve the government's aim) will be impossible to satisfy. Execution is obviously the most invasive form of prevention the state can impose on an individual, and thus, under proportionality reasoning, requires the strongest proof of dangerousness.[44] If, as the Supreme Court has held,[45] involuntary hospitalization through civil commitment requires clear and convincing evidence of dangerousness, capital punishment requires proof of dangerousness beyond a reasonable doubt. Thus, the *Jurek* formulation, which permits execution based on a mere "probability" that the offender will commit violent acts, may be inadequate on its face. While most state death penalty statutes require that this probability be proven beyond a reasonable doubt,[46] this standard of proof, combined with the definition of dangerousness, still permits execution based on a less than one-in-two chance the person will commit a violent

act.[47] That result is inconsistent with the fact that a mere arrest requires roughly the same degree of certainty.[48] Proportionality reasoning mandates that when dangerousness is the justification for imposing the ultimate penalty, it ought to be manifest, meaning that the state should have to show a very high potential for recidivism.[49] Given current prediction science,[50] that type of showing will be possible only in the rarest of cases.[51] Furthermore, given the periodic review requirement, such a showing must be made not only at the time of sentencing, but at the time of execution, which can sometimes occur years later.

Just as difficult will be the showing required by condition (3), which the *Jurek* formulation fails to reference. Even if the state can demonstrate beyond a reasonable doubt that a given individual represents a serious threat of harm, some intervention short of execution can usually prevent that harm from occurring. Isolation is the most obvious example of a less restrictive yet equally efficacious intervention,[52] although other dispositions, including some type of treatment, might be feasible (and would be required if they might reduce risk).[53] The periodic review requirement, while typically a protection for the individual, would also enable the government to monitor the individual's progress in this regard. In the unlikely event the state could show at such a hearing both the heightened degree of danger demanded by the proportionality principle and that alternatives to execution have not achieved its preventive aim, execution could take place.

5.3 The Two-Edged Sword Problem

Every capital sentencing scheme recognizes mental disability as a mitigating circumstance,[54] a stance that is almost certainly required by the Constitution.[55] Formulations of the various mental state mitigators differ, but most are patterned on the Model Penal Code's capital sentencing provision, which recognizes the following conditions as mitigating: extreme mental or emotional disturbance at the time of the offense; an impaired capacity to appreciate the wrongfulness of the crime or to conform conduct at the time of the crime to the requirements of the law; and circumstances that led the offender to believe the crime was morally justified or extenuated.[56] The scope of mental disability's potential mitigating impact is probably much broader, however, since the Supreme Court has emphasized that "the Eighth and Fourteenth Amendments require that the sentence, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, *any* aspect of a defendant's character… ."[57]

The two-edged sword problem arises when mental disability is associated not only with a mitigating factor but also with an aggravating circumstance. Dangerousness is one aggravating factor that could be linked with mental disability.[58] Another is the heinousness of the capital crime, which permits a death sentence to be imposed if the capital murder was committed in a heinous, vile, or wanton manner.[59] If a sentencer finds that an offender was substantially impaired in his ability to appreciate the wrongfulness of his act, but that this same lack of appreciation also makes him dangerous or contributed

to the vileness of the crime, how is the sentencer to analyze the offender's eligibility for a death sentence? Is it appropriate to consider both the mitigators and the aggravators that result from mental disability, or may only the mitigators be considered?

The Supreme Court has yet to answer these questions, despite appearances to the contrary. In Zant v. Stephens, the Court stated that giving aggravating effect to factors such as "race, religion or political affiliation or… conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness," is constitutionally impermissible.[60] And just this past term the Court insisted that the sentencing jury "must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future."[61] These pronouncements do not settle the matter, however. The quotation from *Zant* is dictum and is cautious in any event, and the language just quoted was simply aimed at ensuring that the jury is not given instructions that lead it to ignore mitigating evidence in jurisdictions where dangerousness is an aggravating circumstance.[62] Thus, these cases do not tell us whether a death sentence can be based on a finding of dangerousness caused by a mental condition or impairment that would otherwise be mitigating.

To begin to address this issue, consider how it might be analyzed if the aggravating circumstance in question were heinousness rather than dangerousness. Heinousness is relevant to assessing the culpability of the offender. Mental illness, when it is considered a mitigator, also addresses culpability. Thus, when the wanton nature of a murder is due to mental disability significant enough to be a mitigating circumstance (as could be the case, for instance, where the offender, due to psychosis, stabs the victim multiple times), permitting a jury to sentence the individual to death based on the heinousness aggravator would be illogical. For that result would mean the jury must have concluded that the mental disability simultaneously rendered the individual more culpable and less culpable.[63]

The dangerousness aggravator, in contrast, is not focused on a backward-looking culpability assessment; rather it measures future risk. A jury could logically conclude that an individual's mental disability both diminishes personal responsibility for the capital murder and increases the risk of a subsequent violent act. Thus, the jury can find both factors present and then decide which effect of mental disability merits more weight in the death penalty decision-making process.[64]

Certain types of mental disability, however, might be so significant in their mitigating effect that they trump any degree of aggravation, whether based on dangerousness or some other factor. This possibility is briefly addressed in the next section.

5.4 Mental Disability as a Bar to Execution

In Atkins v. Virginia,[65] the Supreme Court held that offenders with mental retardation may not be executed. A significant part of the holding was the Court's assessment that execution of people with retardation would not serve the state's

retributive and deterrence goals in the death penalty context. According to the Court, "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[66] Furthermore, "the same cognitive and behavioral impairments that make these defendants less morally culpable–for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses–… also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."[67]

Elsewhere I have argued that mental illness that contributes to the offense should likewise lead to exemption from the death penalty.[68] More specifically, I proposed that offenders who, at the time of the offense, "had a mental disorder that significantly impaired their capacity to appreciate the nature, consequences, or wrongfulness of their conduct or to exercise rational judgment in relation to the conduct" should not be eligible for the death penalty.[69] This language would exempt any individual who would be excused under the broadest formulations of the insanity defense that focus on cognitive impairment, as well as any offenders who do not meet those tests but were psychotic at the time of the offense.[70] Although one might expect that most of these offenders would be excused at trial on insanity grounds, in fact several death penalty states do not have an insanity defense, and many others have adopted very narrow versions of that defense.[71] Thus, an exemption to the death penalty based on the formulation described above would have concrete impact.

Just as in *Atkins* itself, the rationale for this proposal is based on retributive and deterrence concerns, not incapacitative ones. Offenders who meet the proposed definition of mental disorder at the time of the offense are at least as impaired as offenders with mental retardation (or adolescent offenders who were exempted from the death penalty in Roper v. Simmons[72]) and thus are no more culpable and similarly difficult to deter. Potential differences between mental retardation and serious mental illness–such as difficulties in determining who is disabled, the extent of the offender's responsibility for his or her condition, and the probability of recidivism–upon close examination either do not exist or are so insignificant they do not justify different treatment in the death penalty context.[73]

If that is so, a person with serious mental illness may not be executed even if the state can prove he or she is sufficiently dangerous to justify a death sentence and that execution is the only way to prevent further harm, and even though basing a dangerousness finding on mental illness is not per se impermissible. At the same time, dangerousness based on mental disability that falls short of the serious level of impairment described above may form the basis for a death sentence. In practice, this approach would mean that offenders with psychosis at the time of the offense may not be executed even if extremely dangerous, while offenders with most types of personality disorders may be,[74] assuming the other conditions noted above are met.

5.5 Conclusion

This chapter has argued that dangerousness may not form the basis of a death sentence unless the state proves beyond a reasonable doubt that the offender will commit serious acts of violence if not executed, and additionally effectively rebuts any claim that the offender was seriously mentally ill at the time of the offense. If these rules are made mandatory, they should effectively end death sentences based on dangerousness in those jurisdictions that recognize it as an aggravating circumstance.

So why not simply eliminate dangerousness as an aggravating circumstance, as many have argued? That is certainly one reasonable response to the foregoing discussion, particularly if one is not sanguine about the jury's ability to apply the proportionality and least drastic means principles in a fair manner. But one must also consider the multiple studies finding that juries routinely consider an offender's violence proneness in deciding whether to impose the death penalty even when they are legally prohibited from doing so.[75] If that is so, either dangerousness should be made an explicit aggravating factor, with the assumption that the rules described here will make reliance on it both transparent and de minimis, or the death penalty should be abolished on the ground it is impossible to implement fairly.

Notes

1. Christopher Slobogin, A Jurisprudence of Dangerousness, 98 Nw. U. L.Rev. 1 (2003).
2. Christopher Slobogin, Minding Justice: Laws that Deprive People with Mental Disability of Life and Liberty ch. 4 (Harv. U. Press, 2006). References throughout this paper will be to this chapter rather than the article, since the chapter reflects a slightly revised version of the article.
3. At one time, the violence prediction false positive rate (i.e., the rate at which predictions turned out to be wrong) was said to be stuck at about 60 or 70%. See John Monahan, The Clinical Prediction of Violent Behavior 47–49 (1981). Today, newer methodologies may have reduced those rates significantly, but they still hover around 50%, according to most studies. See John Monahan et al., An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders, 56 Psychiatric Services 810, 814 tbl.2 (2005) (49% false positive rate using modern risk assessment instrument).
4. See, e.g., Stephen J. Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered 54, 74–76 (1982); cf. Bruce J. Ennis & Thomas R. Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693, 701–08 (1974) (arguing that expert prediction testimony should be banned).
5. See, e.g., Terry v. Ohio, 392 U.S. 1, 22 (1967) ("[The] general interest… of effective crime prevention and detection… underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."); 2 Wayne R. LaFave, Substantive Criminal Law § 12.1(c) (2d ed. 2003) (noting that, despite controversy over the ease with which it can be proven, conspiracy continues to exist as a crime because it serves as a preventative means of dealing with those who have a disposition to commit crimes).
6. Michael J. Corrado, Punishment and the Wild Beast of Prey: The Problem of Preventive Detention, 8 J. Crim. L. & Criminol. 778, 793 (1996).

7. See Slobogin, supra note 2, at 165–166.
8. See Paul Robinson & John Darley, Justice, Liability and Blame: Community Views and the Criminal Law 226 (1995) (noting that in 20 percent of the scenarios that subjects were asked to rate in terms of culpability, the standard deviation on culpability ratings exceeded 3.50, a number suggesting extremely high disagreement).
9. See infra text accompanying notes 23–25.
10. Christopher Slobogin, Dangerousness and Expertise Redux, 56 Emory L.J. 275, 317–319 (2006).
11. Id. at 281. See generally, Christopher Slobogin, Proving the Unprovable: The Role of Law, Science and Speculation in Adjudicating Culpability and Dangerousness chs. 6 & 7 (Oxford U. Press, 2006).
12. Slobogin, supra note 2, at 143.
13. Id. at 143–45. A third limitation, suggested by Robert Schopp at the conference, is that only those risk factors that sound in retribution (e.g., a tendency to premeditate crime, prior bad acts) may be considered by the factfinder. However, as I have argued elsewhere, there is no *a priori* reason why retribution should drive the analysis when adjudication moves from the trial to the sentencing stage. See Slobogin, supra note 11, at 112–114.
14. For a good treatment of the principle of legality, see John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statues, 71 Va. L. Rev. 189, 196 (1985).
15. In fact, most civil commitment statutes so limit commitment on danger to other grounds. See, e.g., Fl. Stat. § 394.467 (1) (permitting police power commitment only when "[t]here is substantial likelihood that in the near future [the individual] will inflict serious bodily harm on himself or herself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm . . . .").
16. Cf. Lambert v. California, 355 U.S. 225 (1957) (striking down a conviction for failing to register as a felon upon entering Los Angeles). Professor Jeffries has argued that *Lambert* "stands for the unacceptability in principle of imposing criminal liability where the prototypically law-abiding individual in the actor's situation would have had no reason to act otherwise." Jeffries, supra note 14, at 211–212.
17. See Slobogin, supra note 2, at 119–112.
18. See, e.g., Foucha v. La., 504 U.S. 71, 82 (1992) (White J., plurality) (noting that, under the "present system," confinement can only occur after criminal conviction, with the exception of "permissible confinements for mental illness").
19. Allen v. Illinois, 478 U.S. 364, 380 (1986) (Stevens, J., dissenting).
20. Id.
21. The Sixth Amendment guarantees that in "all criminal prosecutions," the accused shall be entitled to the rights to notice, public jury trial, confrontation of accusers, compulsory process, and the assistance of counsel. U.S. Const. amend. VI.
22. 406 U.S. 715, 738 (1972).
23. The Supreme Court has indirectly recognized this principle in construing the American with Disabilities Act. See Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 600 (1999) (noting that "unjustified institutional isolation of persons with disabilities is a form of discrimination").
24. Christopher Slobogin et al., A Prevention Model of Juvenile Justice: The Promise of Kansas v. Hendricks for Children, 1999 Wis. L. Rev. 185, 213 (arguing that the Court's decision in Youngberg v. Romeo "could easily be parlayed into a robust right to treatment necessary to reduce prolonged confinement").
25. In Kansas v. Hendricks, the Court emphasized the periodic review feature of the sex predator statute at issue in coming to the conclusion that commitment under that statute is not punishment. 521 U.S. 346, 363–364 (1997).
26. See Mark R. Fondacaro et al., Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science, 57 Hastings L. J. 955, 963–966 (2005).
27. See generally Leo Katz et al., Foundations of Criminal Law 83–96 (1999) (concluding that "retributivists like Kant, Morris and Moore . . . believe that criminals have a right to be punished.").

28. G.W.F. Hegel, Elements of the Philosophy of Right 126 (Allen W. Wood ed., 1991).
29. Slobogin, supra note 2, at 125–126.
30. In fact, research suggests that designation as a sexual predator has both demoralizing and crimogenic effects. See, e.g., Vernon L. Quinsey, Review of the Washington State Special Commitment Center Program for Sexually Violent Predators, 15 U. Puget Sound L. Rev. 704, 705–707 (1992); Bruce Winick, Sex Offender Laws in the 1990s: A Therapeutic Jurisprudence Analysis, 4 Psychol. Pub. Pol'y & L. 534, 539 (1998).
31. See, e.g., Kan. Stat. Ann. §§ 59–29a01, 59–29a02(a) (1994) (establishing "a civil commitment procedure for the long-term care and treatment of the sexually violent predator," defined as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.").
32. Slobogin, supra 2, at 127–128 (contrasting weak and strong views of the right to punishment, with the latter concept prohibiting all forms of preventive detention based on Hegel's views).
33. See, e.g., Robert F. Schopp, Competence, Condemnation, and Commitment 149–150, 165–166 (2001).
34. Slobogin, supra note 2, at 136–138.
35. At the same time, when government is entitled to exercise either the punishment or the preventive detention option, I argued that the punishment route must be taken initially. Given the right to punishment, "it is sensible to presume that[[[…]]], everyone is deterrable" because this presumption "fits better with our legal system's preference for autonomy, and prevents unnecessarily unleashing the repugnant labeling effects associated with the preventive detention option." Id. at 139.
36. See, e.g., Model Penal Code § 4.01 ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.").
37. Slobogin, supra note 2, at 134–135.
38. Note, Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1201, 1233 (1974) (arguing that commitment is justified when it is limited to preventively detaining those who are "unaffected by the prospect of punishment").
39. Mitzi Dorland & Daniel Krauss, The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision Making, 29 L. & Psychol. Rev. 63, 64 nn.5, 12 (2005).
40. Tex. Code Crim. Proc. Ann. art. 37.071 2(b)(1) (Vernon 2006); Va. Code Ann. § 19.2–264.4C (2004).
41. 428 U.S. 262, 274–275 (1976).
42. If one follows Hegel's view that any type of preventive detention denigrates the individual's status as a rational actor, then execution would be a permissible form of prevention only for those who are undeterrable– people with serious mental illness and people who prefer crime over freedom. All members of the former group and perhaps some of those in the latter group should still be exempt from execution, however, for reasons developed further in Section 5.4.
43. Cf. Jones v. United States, 463 U.S. 354, 365 n.4 (1983) (suggesting that prevention of larceny might be a sufficient government interest to permit preventive detention).
44. See Slobogin, supra note 2, at 145.
45. Addington v. Texas, 441 U.S. 418, 431–432 (1979).
46. See Tex. Code Crim. Proc. Ann. Art. 37.071.2(c).
47. See generally John Monahan & David Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 L. & Hum Beh. 37 (1978).
48. When asked to quantify the degree of certainty represented by the phrase "probable cause," 166 federal judges gave, as an average response, 45.78%. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, 35 Vand. L. Rev. 1293, 1325 (1982).

49. Analogous to Judge Learned Hand's famous tort formula, the probability requirement could vary inversely with the magnitude of the predicted harm, so that if homicide is the predicted harm, the required risk could be fairly low. See Alexander Brooks, Dangerousness Defined, in Law, Psychiatry & Mental Health Systems 680 (1974). Even with that formulation, the certainty level should approach 50%, which is probably impossible to achieve. See infra notes 51–52.
50. See supra note 3.
51. If the government is limited to empirically derived probability estimates, as I propose, see supra text accompanying notes 10–11, such proof will extremely difficult because, even with well validated instruments, a risk level of over 75% is unusual. See Eric S. Janus Paul E. Meehl, Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings, 3 Psychol, Pub. Pol'y L. 33, 49, 58–59 (1997) (discussing the "upper limits" of prediction science); Grant T. Harris et al., Prospective Replication of the Violence Risk Appraisal Guide in Predicting Violent Recidivism Among Forensic Patients, 26 L. & Hum. Behav. 377, 385 (2002). Furthermore, it appears that prisoners on death row or sentenced to life without parole–the usual alternative to execution–have a very low recidivism rate (below .005), suggesting that any prediction of violence by first degree murderers is likely to be inaccurate. See Mark D. Cunningham, Dangerousness and Death: A Nexus in Search of Science and Reason, American Psychologist 828, 832–33 (Nov. 2006).
52. For instance, today there are 10,000 administrative security cells in Texas. The annual rate of serious assaults on staff on those units is .0006. Cunningham, supra note 51, at 836. In the general prison population, the potential for homicide of another inmate over a 40-year period is .02%. Id. at 833.
53. Even psychopathy, traditionally considered incorrigible, might be susceptible to treatment. See Psychopathy: Antisocial, Criminal and Violent Behavior 359–462 (Theodore Millon et al., eds. 1998).
54. Ellen Fels Berkman, Mental Illness as an Aggravating Circumstance in Capital Sentencing, 89 Colum. L. Rev. 291, 296–298 (1989).
55. Lockett v. Ohio, 438 U.S. 586, 604 (1978).
56. Model Penal Code § 210.6(4).
57. Lockett, 438 U.S. at 604 (emphasis added).
58. Mental illness is not a major predictor of crime, see James Bonta et al., The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta Analysis, 123 Psychological Bull. 123 (1998). But a large body of evidence suggests that, compared to the general population, individuals suffering form schizophrenia are from 4 to 8 times more likely to commit homicide. Taina Laajasaol & Helena Hakkanen, Offence and Offender Characteristics Among Two Groups of Homicide Offenders with Schizophrenia: Comparison of Early- and Late-Start Offenders, 16 J. For. Psychiatry & Psychology 41 (2005) (summarizing research).
59. See, e.g., Tenn. § 39–13–204(i)(5) (listing as an aggravating factor that the murder was "especially heinous, atrocious, or cruel in that it involved serious physical abuse beyond that necessary to produce death").
60. 462 U.S. 862, 885 (1983).
61. Abdul-Kabir v. Quarterman, 127 S.Ct. 1654, 1664 (2007).
62. In *Quarterman*, the trial judge refused to give instructions that would have told the jury to consider the offender's mitigating evidence as a rebuttal to the state's claim that he was dangerous. Had the instructions been given, the Court probably would have found no error. Id. at *15.
63. In Huckaby v. State, 343 So.2d 29 (Fl. S. Ct. 1977), the Florida Supreme Court so held. Id. at 34.
64. For an elaboration of this argument, see Slobogin, supra note 2, at 90–92.
65. 536 U.S. 304 (2002).
66. Id. at 319.
67. Id. at 320.

68. Christopher Slobogin, What *Atkins* Could Mean for People with Mental Illness, 33 New Mex. L. Rev. 293 (2003). See also, Slobogin, supra note 2, at 64–87.
69. Id. at 82.
70. Id. at 82–83. The American Bar Association, the American Psychiatric Association and the American Psychological Association have since endorsed a resolution so stating. For the ABA's action on the resolution, see www.abanet.org/crimjust/policy/am06122a.pdf.
71. See Christopher Slobogin, Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations, 54 Cath. U. L. Rev. 1133, 1145–1156 (2005).
72. 543 U.S. 551 (2005).
73. Slobogin, supra note 2, at 75–80.
74. A tough question is whether psychopathy fits in the first or the second group. There is good evidence to suggest that at least some people with psychopathy literally cannot "appreciate" the wrongfulness of their actions, which would make them ineligible for the death penalty under my formulation. See Robert D. Hare, Without Conscience: The Disturbing World of the Psychopaths Among Us 34, 44 (1993) (stating that psychopaths "seem unable to 'get into the skin' or 'walk in the shoes' of others, except in a truly intellectual sense. . . . [They] are glib and superficial, lack remorse or guilt, lack empathy, have shallow emotions and lack responsibility.").
75. See Aletha Claussen-Schultz et al., Dangerousness, Risk Assessment, and Capital Sentencing, 10 Psychol. Pub. Pol'y & L. 471, 480 (2004) (finding, in a study using mock jurors, that concerns about future violent conduct accounted for more variance in the sentencing decision than did other aggravating circumstances); John Blume et al., Future Dangerousness in Capital Cases: Always "At Issue," 86 Cornell L. Rev. 397, 398 (2001); Austin Sarat, Violence, Representation, and Responsibility in Capital Trials: The View from the Jury, 70 Indiana L. J. 1103, 1131–1133 (1995).

Chapter 6
Limited Expertise and Experts: Problems with the Continued Use of Future Dangerousness in Capital Sentencing

Daniel A. Krauss, John G. McCabe, and Sarah McFadden

Since the United States Supreme Court ruled almost four decades ago in Furman v. Georgia (1972) that the death penalty as applied in those cases violated the Eighth Amendment, many fundamental changes have occurred in capital sentencing jurisprudence. Perhaps most notably, the execution of the mentally retarded (Atkins v. Virginia, 2002) and adolescents who commit their offense while under the age of 18, (Roper v. Simmons, 2005) have been found unconstitutional by the Court, and have accordingly been abolished. More recently, the Court clarified the time frame in which defendants can bring forth claims regarding the defendant's competency to be executed, and elaborated on the constitutional requirements for these claims. In Panetti v. Quarterman (2007), the Court held that a mentally ill defendant must possess something more than a mere awareness of the link between his crime and punishment for him to meet competency requirements for execution.

Despite wholesale changes in some areas of death penalty jurisprudence, other areas have remained relatively unchanged in the post-*Furman* era. Since the 1976 Jurek v. Texas decision that re-established the death penalty in Texas, almost every state's death penalty sentencing scheme has continued to rely on a defendant's future dangerousness as a primary or an important consideration in capital sentencing. In fact, during the last half century, the use of a defendant's future dangerousness in legal decision-making has expanded both within and outside of capital sentencing law. For example, future dangerousness is a pre-eminent consideration in decisions ranging from the civil commitment of mentally ill individuals (e.g., O'Connor v. Donaldson, 1975) to the more recent post-jail detention of sexual predators (e.g., Kansas v. Hendricks, 1997; Kansas v. Crane, 2002). In each of these situations, the expert testimony of mental health professionals serves as the primary means by which evidence of future dangerousness is introduced into the courtroom.

Since its first use in capital sentencing, however, considerable controversy has surrounded the "expertise" of mental health professionals in their evaluations of

D.A. Krauss (✉)
Department of Psychology, Claremont McKenna College, Claremont, CA
e-mail: Dkrauss@claremontmckenna.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_7, © Springer Science+Business Media, LLC 2009

future dangerousness and their putative ability to reliably differentiate between those who will and will not commit future violent acts. In Barefoot v. Estelle (1983), the Court considered the constitutional validity of mental health professionals' predictions of a defendant's future dangerousness during capital sentencing. At issue in the case was the expert testimony of two psychiatrists on the issue of "whether there was a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (Tex. Crim. Code Art. 37.071, 2(b)(1), 2004).[1] This so-called future dangerousness inquiry was required by Texas' death penalty sentencing scheme. In *Barefoot*, an amicus curiae brief submitted by the American Psychiatric Association argued that the existing research on the ability of mental health professionals to predict future dangerousness demonstrated that such predictions were incorrect two out of three times (Monahan, 1981), and concluded that "the unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession" (APA, 1983, p. 4). Nevertheless, one of the two psychiatric experts who testified at trial opined that there was a "one hundred percent and absolute chance" that Barefoot would be a future danger to society (Barefoot, 1983, p. 919). The jury, based upon this evidence, sentenced Barefoot to death. Not only did this expert fail to interview the defendant, but his opinion relied almost entirely on a review of the defendant's records.

In the end, however, the Court was unconvinced by the existing empirical evidence that demonstrated the inaccuracy of mental health predictions of future dangerousness, and upheld the death sentence of the defendant. In holding that such expert testimony was not so unreliable as to be unconstitutional, the Court placed its faith in the adversary system, confident that the jury would recognize the weaknesses of this potentially unreliable expert testimony. They reasoned "we are not persuaded that such testimony is almost entirely unreliable and that the fact finder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings" (Barefoot v. Estelle, p. 3398) (emphasis added).[2]

Although subsequent legal decisions uniformly accepted the ability of mental health professionals to predict future dangerousness, law and psychology scholars have questioned the ethics (e.g., Edens, Buffington-Vollum, Keilin, Roskamp, &

[1] At the time of *Barefoot*, this question needed to be unanimously answered in the affirmative for the defendant to receive the death penalty in Texas. Two additional questions were also required to be unanimously answered in the affirmative by the jury. These questions asked: (a) whether the conduct of the defendant that caused the death of the deceased was caused deliberately and with the reasonable expectation that the death of the deceased or another would result and (b) if raised by evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to provocation, if any, by the deceased (Tex. Crim. Pro. Code art 3701b (1985)). These two questions were not at issue in the *Barefoot* case. The Texas death penalty sentencing instructions were later found unconstitutional by the Supreme Court in Penry v. Lynaugh (1989), and have since been modified by the Texas legislature to allow for the presentation of mitigation evidence by the defendant. However, the current Texas death penalty instructions still require a showing of dangerousness before a defendant can be executed.

[2] The assumptions underlying this statement will be explored later in this chapter.

Anthony, 2005), the validity (e.g., Dorland & Krauss, 2005), and the effects that these potentially unreliable expert predictions have on jury decisions in these life and death determinations (e.g., Krauss & Sales, 2001). In spite of such concerns, mental health professionals have continued to offer potentially inaccurate predictions of future dangerousness in capital sentencing hearings. Further, although in the past 20 years significant advances in risk assessment research have occurred, the content of expert testimony offered in capital sentencing appears to have changed very little from that which was proffered in *Barefoot*.[3] For example, a psychiatrist opined in a 2005 federal death penalty sentencing hearing that it was "significantly more likely than not" that the defendant would be "a continuing and serious threat to the lives and safety of others" (U.S. v. Fields, 2007; APA, 2005, p 1). This expert testimony was admitted by the court even though: (a) it was based exclusively on a records review of the defendant's previous conduct; and (b) the expert acknowledged that he was unaware of any "standard psychiatric or medical procedures used in arriving at a determination or predicting future dangerousness" (APA, 2005, p. 2).

Yet, while considerable research and scholarship has focused on mental health practitioners' ability or inability to predict future dangerousness, an important normative element of Texas' and other states' future dangerousness schemes has been largely ignored in the literature. Experts are asked by these capital sentencing formulations to testify whether there exists a probability that the defendant will commit future violent acts. Although somewhat dependent on the reliability of experts' prediction of future dangerousness, the question of whether a proffered expert probability rises to the level necessary to constitute a continuing threat to society is a normative rather than factual question answerable only by the jury. Nonetheless, empirical studies discussed later in the chapter show that jurors' reliance on questionable expert testimony on the probability of future dangerousness bears on their answer to this normative question.

Given the importance of death penalty decision-making, the problems inherent in accurate risk prediction, and the likelihood of injustice occurring, the question remains whether future dangerousness remains a viable criterion in capital sentencing. In this chapter, we will: (a) briefly describe the ways in which future dangerousness is used in capital sentencing and its importance in these decisions; (b) explain advances that have occurred in mental health professionals' ability to predict future dangerousness and the weaknesses that still exist; (c) explore the extant research on how these expert predictions of future dangerousness are likely to affect jury decisions; and (d) offer a critique of possible solutions to the use of future dangerousness in capital sentencing.

[3] We are aware of no systematic study of the content of expert testimony offered by mental health practitioners in capital sentencing hearings, but available anecdotal reports suggest few modifications over time. Future research is needed to determine whether the nature of such expert testimony has changed and whether its composition would suggest a different psycho-legal analysis than that offered by this chapter.

6.1 The Use of Future Dangerousness in Capital Sentencing

In Jurek v. Texas, the United States Supreme Court upheld the constitutionality of Texas' death penalty sentencing statute that required a determination of the defendant's future dangerousness. Since that decision, future dangerousness has become a mainstay of state death penalty sentencing. It is important to recognize that there are many different means by which a state can include future dangerousness predictions in capital sentencing. States may: (a) explicitly list future dangerousness as an aggravating or primary sentencing factor; (b) explicitly list the absence of future dangerousness as a statutory mitigating factor; (c) allow future dangerousness as a non-statutory aggravating factor; or (d) allow prosecutors to present evidence of future dangerousness in rebuttal or mitigation of evidence presented by the defense which suggests the defendant does not pose a risk of future dangerousness.[4] Regardless of how states use future dangerousness, expert testimony of mental health professionals is the most common means by which this evidence is brought before the court (Beecher-Monas, 2003). This chapter will focus on mental health professionals' predictions of future dangerousness in the first and third of these four possibilities.[5]

Currently, six states explicitly recognize future dangerousness as a primary statutory factor (Dorland & Krauss, 2005), and 21 of the 38 death penalty states recognize it as an acceptable non-statutory aggravating factor (Cunningham & Reidy, 1998). In addition, the federal death penalty allows for expert testimony regarding a defendant's dangerousness as a non-statutory aggravating factor. In the six states that list future dangerousness as a primary statutory aggravating factor (Texas, Oregon, Virginia, Wyoming, Idaho, & Oklahoma), a determination of future dangerousness alone in the absence of significant evidence in mitigation is sufficient to impose the death penalty. Even among these six states, however, there are significant differences in the ways in which future dangerousness is used. In Texas and Oregon, a finding of future dangerousness is required for a determination of death.[6] In contrast, Virginia requires a finding of future dangerousness or a finding that the offense was "outrageously or wantonly vile, horrible or inhuman" for a defendant to receive a death sentence (VA. Code Ann 19.2–264.2, 2004). In Idaho, Oklahoma, and Wyoming, future dangerousness is one of a number of explicitly listed statutory aggravating factors, and any one of these factors, if proven, is sufficient in the absence of mitigating circumstances

[4] Further discussion of the various ways jurisdictions use future dangerousness is beyond the scope of this chapter. For a review of this issue see Dorland & Krauss (2005).

[5] Slobogin in Chapter 5 explores the legal ramifications of allowing all of these different possibilities.

[6] Unlike most states, Texas and Oregon do not employ the typical aggravating and mitigating framework for death penalty sentencing. Instead, they require that the jury respond to a series of special issues. One of these questions pertains to defendant's future dangerousness and another asks whether the death penalty should be imposed considering mitigating evidence.

to warrant a death sentence (Dorland & Krauss, 2005). It is important to note that even though future dangerousness is not only the aggravating criteria listed in these states, it is one of the most commonly used. For example, one study of Oklahoma capital sentencing between 1990 and 2004 found that in over 70% cases that led to execution, the defendant was determined by the jury to be a continuing threat to society (Dorland, 2004).

Although future dangerousness is only explicitly listed in these six states, it does play an important role in other states (Blume et al., 2001). Furthermore, the six states that do explicitly recognize it are responsible for the majority of executions in the post-*Furman* era. Since 1976, Texas, Virginia, and Oklahoma are responsible for 402, 98, 86 executions respectively, which places them first, second, and third in executions among states with the death penalty. Further, these six states are responsible for over 53% of the 1095 executions in the post-*Furman* era (Death Penalty Information Center, 2007), and for over 16% of the current death row inmate population. As these statistics clearly suggest, expert testimony on a defendant's future dangerousness has played a critical role in the capital sentencing of defendants in the last 30 years. We now turn to the advances that have occurred in risk assessment research since the *Barefoot* decision.

6.2 Advance in Risk Assessment Research

The psychiatrists' in *Barefoot* relied upon their knowledge, skill, and experience, not scientifically derived research in forming their expert opinion concerning the defendant's dangerousness. Subsequent research, however, has demonstrated that such unstructured clinical judgments are not as inaccurate as APA's amicus brief in *Barefoot* portrayed.[7] Moreover, recent research suggests that such judgments are appreciably better than chance for most long-term predictions, and may be even more accurate for some short-term, contextual violence predictions (Gardner, Lidz, Mulvey, & Shaw, 1996; McNeil, Sanders, & Binder 1998; Mossman, 1994).

There are a number of reasons why, however, such unstructured judgments are still likely to be inaccurate and over-estimate an individual's likelihood of future violence. Mental health professionals making these assessments commonly engage in a variety of well-documented cognitive biases or heuristics (mental short cuts). These heuristic problems include: (a) ignoring base rate information (i.e., not knowing or not using the rate at which the predicted event occurs in the population of interest); (b) assigning non-optimal weights to factors (i.e., combining and weighing

[7] There were number of methodological problems with the studies that were cited in the *Barefoot* amicus brief, including: (a) artificially low base rates of violence in the studied sample; (b) poor outcome measures of violence; and (c) the use of administrative as well as clinical decisions to release the sample population. All these issues in combination led to significant over-estimation of the inaccuracy of unstructured clinical predictions of dangerousness. For further discussion of this issue see Krauss & Sales (2001).

factors based on intuitive judgments rather than on empirical research); and (c) employing the representativeness heuristic (i.e., the tendency to make decisions or judge information in a manner that fits preconceived categories or stereotypes of a situation) (Krauss & Lieberman, 2007; see Grove & Meehl, 1996; Tversky & Kahneman, 1982, for an extensive discussion of these issues). For example, a mental health professional might incorrectly place excessive weight on the horrendous torture the defendant inflicted on the victim (a factor not commonly associated with a greater risk of future violence) in reaching a decision that the defendant is likely be a future danger.

In addition, research performed on jurors' decisions based on mental health practitioners' predictions of future dangerousness in real Texas capital sentencing cases has both highlighted the inaccuracies of these predictions and the overestimation problems suggested by the decision-making literature. Edens, et al. (2005)[8] found that only five percent of a sample of Texas death sentenced inmates actually engaged in a serious assaultive act over a 10-year period in prison.[9] In other words, only one of twenty defendants judged by a jury to possess a probability of being a continuing threat to society based, at least in part, on testimony by a mental health practitioner went on to commit a serious act of violence. While some mental health professionals continue to rely on their unstructured clinical judgment in determining dangerousness (e.g., the psychiatric expert in the *Fields* case mentioned previously), a number of promising alternative techniques have been developed which limit the impact of an individual's cognitive biases in estimating a defendant's future risk.

6.2.1 Actuarial Risk Assessment

Actuarial-based prediction instruments are created from empirically verified risk factors that have demonstrated predictive ability for specific outcomes and populations (Monahan, 2003). Risk factors are created through the longitudinal collection of data and outcomes on the population of interest. Factors which demonstrate predictive ability are subsequently combined in a manner that maximizes their accuracy in predicting the targeted outcome (e.g., serious violence).

In the risk assessment area, the Violence Risk Appraisal Guide (VRAG) is an actuarial instrument that has demonstrated substantial accuracy in predicting future violence (e.g., Harris, Rice, & Cormier, 2002; Rice & Harris, 1995). The VRAG consists of twelve variables: the Hare Psychopathy Checklist (PCL-R), elementary school maladjustment, age of present offense, diagnosis of personality disorder (DSM-III), separation from parents under the age of 16, failure in prior conditional release, criminal history for property offenses, marital status,

[8] This study will be discussed in more detail in the section of this chapter discussing jurors' reaction to expert testimony on future dangerousness.

[9] The issue of prison violence versus societal violence will be explored further in the next section.

diagnosis of schizophrenia (DSM-III), victim injury in present offense, history of alcohol abuse, and female victim in present offense. The VRAG was created based upon 618 Canadian mentally ill individuals who had committed at least one serious violent offense. This cohort was followed for 7–10 years, with 31% committing a violent act over that time period. Risk factors were subsequently selected and combined in a manner that maximally predicted this group's violent recidivism. A number of studies have found the VRAG's classification accuracy to be relatively high, approximately 75%, in predicting serious acts of future violence (e.g., Harris et al., 2002).

Another actuarial approach, the iterative classification tree (ICT), has been used to forecast future dangerousness among released civilly committed patients (Monahan et al., 2001). The ICT approach differs from the VRAG approach in that the evaluator's assessment of the individual on each question affects what factor is assessed next. All respondents are initially assessed on the factor most predictive of future violence. Then, based upon their categorization following this initial response, different determinations are made in a manner that best discriminate between recidivators and non-recidivators. The ICT approach demonstrated exceptional predictive accuracy (classification accuracy greater than 80%) for both its development and validation sample (Monahan, et al., 2001).

Actuarial-based risk predictions have demonstrated superiority over unstructured clinical judgments in a small number of comparisons (Gardner, Lidz, Mulvey, & Shaw 1996; Harris et al., 2002), and a substantial empirical literature has shown them to be generally superior to clinical judgment in a wide variety of decision-making realms (Grove & Meehl, 1996). Grove and Meehl's (1996) meta-analysis found actuarial-based predictions to be significantly better in 64 of the 128 studies sampled and in only eight cases did clinical judgment outperform actuarial approaches. Yet, it remains an empirical question that has received too little attention whether clinical judgment in the risk prediction arena has improved in recent years. Given the weight of previous research, the burden of proof rests on clinicians to prove their judgment has indeed improved.

Nevertheless, actuarial instruments have been criticized both in regards to their general predictive abilities and specifically with regard to their abilities to predict future dangerousness. First, scholars have questioned the generalizability of these instruments beyond the sample on which they were derived. For example, the VRAG was created based upon a group of Canadian offenders who had committed one serious violent offense. It is unclear whether the same risk factors that were predictive for a Canadian sample will be accurate when forecasting the risk of American defendants. Second, actuarial risk instruments have been criticized for their failure to incorporate very rare but important risk or protective factors. That is, a factor that greatly increases (e.g., making a direct threat of violence) or reduces an individual's risk (e.g., becoming a paraplegic), but which do not occur sufficiently frequently in the population group on which the instrument was created. Third, actuarial instruments to date have rarely incorporated dynamic factors, which are risk factors that change over time (e.g., successful alcohol treatment). The absence of dynamic factors in existing schemes makes it unlikely that changes will occur in

an individual's assessed risk over time.[10] This particular criticism, however, is less relevant to future dangerousness predictions in capital sentencing because these decisions do not allow for later changes in risk. They are relevant to risk prediction in other areas, such as civil commitment, where the individual's release may be controlled by a subsequent risk assessment (Krauss, 2004; Monahan, 2003).

Due to these problems with actuarial risk assessment, some scholars have suggested that evaluators modify actuarial instruments estimates based upon the evaluator's assessment of individualized dynamic, rare, or protective factors (e.g., Monahan, 2003). Yet this practice remains controversial because it would allow evaluators to potentially re-introduce all the cognitive biases that the actuarial instruments were intended to limit (Harris et al., 2002). Future research is necessary to determine whether allowing for individualized modification of actuarial instruments leads to better or worse decision-making. Currently, one study has explored individualized modification of an actuarial risk prediction instrument with federal judges, and found a significant decrease in predictive accuracy caused by the judges' intuitive modifications (Krauss, 2004; Krauss & Lieberman, 2007). One study has also specifically examined this issue with regard to mental health practitioners' predictions of future risk. McKee, Harris, and Rice (2007) found that when practicing clinicians use actuarial assessments in conjunction with their own judgments; they supplant scientifically derived results with their own less accurate judgments. It remains to be seen, however, whether more extensive research on better trained risk assessment evaluators will demonstrate the accuracy of an actuarial-based risk assessment instruments are improved with the addition of clinical judgment (Krauss & Lieberman, 2007).

Additionally, Hart, Michie, and Cook (2007) have criticized the use of actuarial instruments for individual risk predictions. They argue that there is an astonishingly high rate of error associated with actuarial instruments when they are applied to individual cases because their original validation samples were too small. These error rates are fine for group level prediction, but they increase dramatically when used to forecast the behavior of one individual. As a result, these instruments are either unhelpful or irrelevant to predictions for a specific individual. This view remains controversial among law and psychology scholars with many researchers questioning the assumptions of Hart et al. (e.g., Harris & Rice, 2007).

6.2.2 Guided Professional Judgment Instruments

As an alternative to the generalizability and inflexibility problems of actuarial assessment techniques, other risk assessment devices have been developed which allow for greater clinical input. These instruments are commonly referred to as guided

[10] It should be noted that a number of researchers are currently devising risk assessment instruments that use more dynamic factors.

professional judgments or aide-memoires (Webster, Douglas, Eaves, & Hart, 1997). Risk factors chosen for these instruments were found in the empirical literature, but were not specifically collected on a particular population nor designed to predict a specific outcome variable. These tools do not specify how much weight should be afforded each factor nor do they specify how such factors should be combined to reach an eventual judgment. They also allow the evaluator to include rare, protective, or dynamic factors. Lastly, because these instruments were not developed on a particular population, they do not suffer from the potential individual prediction problem noted by Hart et al., (2007).

The HCR-20 is a guided professional judgment instrument created to evaluate risk of future violence (Webster et al., 1997). It consists of a checklist of twenty items, ten of which assess "Historical" factors related to risk, five which measure "Clinical" risk factors, and five evaluating future "Risk" factors. Each item is scored 0 (absent), 1 (possibly or partially present), or 2 (definitely present). After scoring the twenty items and evaluating protective factors, the evaluator is instructed to intuitively combine the items and assign the individual to low, medium, or high risk (Webster et al., 1997). The HCR-20 has demonstrated significantly above chance accuracy in a number of studies, and has outperformed unstructured clinical judgments in predictions of future dangerousness (Douglas & Webster, 1999; Douglas, Ogloff, Nicholls, & Grant, 1999).

Yet the greatest strength of these tools, the allowance of clinical judgment, is also their greatest weakness (Krauss & Lieberman, 2007). Clinicians have the possibility of assigning non-optimal weights to factors and combining factors in a subjectively appealing but inaccurate manner. Future research is necessary to determine if clinicians *in practice* utilize these tools in a way that leads to sufficient accuracy. There is little doubt, however, that these tools are likely to be a significant improvement over unstructured clinical judgment.

6.2.3 Potential Problems for These Instruments' Use in Capital Sentencing

Given these more formalized assessment tools provide greater predictive accuracy in determining a defendant's "[[[…]]]probability the defendant will commit future acts of criminal violence", there still remain unanswered questions concerning their use in capital sentencing decision-making. First, several changes in sentencing policy and prison conditions potentially make their use during death penalty sentencing problematic. In the past 20 years, almost all death penalty states (New Mexico is the lone exception) have adopted life without the possibility of parole (LWOP) as an alternative to death (DPIC, 2007). This adoption raises the question of what "society" jurors are evaluating the defendant's future dangerousness in? If individuals not found to be a future danger spend the rest of their lives in prison barring the relatively rare occurrence of escape, pardon, or commutation, should not that "society" be "prison society" (Edens, et al., 2005)?

Almost all jurisdictions recognize the importance of "prison society" when determining the likelihood of future dangerousness, with the federal system making clear that it is the only "society" of interest for this prediction. Other jurisdictions, like Texas, however, refuse to define "society" for jurors and have recognized outside "society" as also being important (Dorland & Krauss, 2005). One could argue that a broader "society" inquiry is necessary because the future dangerousness standard is concerned with the hypothetical return of the defendant to society and not his actual conduct in prison (Krauss & Lieberman, 2007). This is a question that courts and legislatures need to answer. Although jurors in every jurisdiction can be told of the LWOP alternative sentence, it is highly unlikely that they necessarily will appreciate the distinction between a future dangerousness assessment based on "prison society" versus one based on regular "society".

An exclusively "prison society" answer to the "which 'society' question", raises a number of fundamental problems for the future dangerousness standard. A complete discussion of these difficulties is beyond the scope of this chapter, but one of these issues that relates to the very purpose of the future dangerousness formulation should at least be mentioned. Assuming that the purpose of this standard is to prevent future harm and given that prisons can always be modified to decrease the likelihood of a prisoner's future violence (e.g., a prisoner could be isolated from other prisoners and guards 24 hours a day), does it make logical sense to condition the imposition of the death penalty on a factor that prisons to a large extent can control and change? In effect, a more secure prison environment could always be created, and its creation could obviate the need to execute any defendant. Resolution of this issue is especially problematic for Texas and Oregon where future dangerousness must be found for execution to occur.

The issue of the appropriate "society" for future dangerousness predictions would be relatively unimportant if the factors that predicted violence and the rates of violence within and outside prison were identical. Unfortunately, they are not. A substantial body of research suggests that prison violence rates are exceptionally low and that LWOP rates are even lower (Edens et al., 2005). For example, Sorensen and Pilgrim (2002) forecasted, based on existing rates of violence in a sample of 6,390 Texas inmates that had been convicted of murder, that approximately 16% would commit another murder in prison over the next 40 years, but that only 2% of capital defendants would kill again.

Moreover, the factors that predict violence in the outside world do not seem well-suited to its prediction in prison. For instance, there are numbers of studies suggesting that psychopathy as measured by the Psychopathic Checklist-Revised (PCL-R) is not an accurate predictor of serious prison violence (e.g., DeMatteo & Edens, 2006). Psychopathy is, however, an essential component of the previously described formal risk assessment tools (i.e., the VRAG and the HCR-20), and is found in nearly every risk assessment instrument. Unfortunately, this issue has not stopped prosecutors from offering expert testimony on psychopathy and the PCL-R as a means to prove future dangerousness even in federal death penalty cases where violence outside of prison is not an issue (DeMatteo & Edens, 2006).

A somewhat related concern of existing formal risk assessment devices is their creation based upon targeted outcomes that were not necessarily seriously violent in nature (Edens, et al., 2005). These less than serious acts were included to increase the base rate of violence in the sample so that more accurate predictions could occur. It is important to note that, generally, while low base rates of violence in a population makes prediction more difficult, increases in base rates (up to 50%) enhance the predictive accuracy of assessment tools. If the acts targeted were not truly seriously violent, it makes little sense to use instruments that are best at predicting less serious behaviors. This criticism is especially valid for risk prediction instruments that were originally designed to aid in placing inmates in appropriate security levels (i.e., the Level of Service Inventory-Revised (LSI-R) (Andrews & Bonta, 1995)) rather than predicting serious violent behavior (Edens, et al., 2005).

To combat these problems, some researchers have attempted to develop actuarial prediction devices that are specific to the prison environment (Cunningham, Reidy, & Sorensen, 2005). While potentially more accurate than existing actuarial instruments in predicting serious prison violence, such instruments would have to overcome the problems associated with low base rates of serious prison violence. There would also be questions about the generalizability of these devices beyond the specific prison environment on which they were developed. This is likely to be a substantial concern because death row conditions, environments, and procedures differ significantly between jurisdictions. For instance, Babcock (2006) found that among the death penalty states, many varied on such items as single celled isolation time, group recreation, and occupational training/work opportunities for death row inmates.

Given these difficulties, it remains questionable whether more formal risk prediction techniques could achieve sufficient accuracy that their use in capital sentencing future dangerousness assessments would be appropriate. Yet, even with these problems, more formalized assessment instruments are still likely to be more accurate than the more commonplace and inaccurate clinical predictions of future dangerousness in death penalty sentencing.[11] The next section will explore what effects expert testimony on future dangerousness has on real and mock jurors' decision-making in capital sentencing.

6.3 Research on Jury Decision-Making in Capital Sentencing

Concerns regarding mental health practitioners' predictions of future dangerousness in capital cases would be unwarranted were it not for evidence of the importance of this factor in actual jury decisions. Research, based upon both

[11] As previously mentioned, it remains an open question whether clinical judgments of future dangerousness have improved in recent years. However, given the large body of evidence suggesting that such predictions are likely to be inaccurate, substantial work needs to be completed to demonstrate their reliability.

analyses of official data and naturalistic studies, has demonstrated that this evidence is critical to these decisions. In the naturalistic studies, researchers conducted post-trial interviews with capital jurors and found that the issue of future dangerousness played an important role in their deliberations. This effect was present regardless of whether jury instructions specifically mandated its consideration.

For instance, in Texas between 1974 and 1988, 75% of convicted capital offenders were judged "a continuing threat to society" and ultimately sentenced to death (Sorenson & Marquart, 1991). Blume, Garvey, and Johnson's (2001) findings from the Chicago Jury Project on capital jurors in South Carolina, indicate that consideration of a defendant's future dangerousness is second only to considerations of the crime itself in jury decisions. Most provocatively, a majority of the jurors who were interviewed, including those in cases where the prosecutor did not mention the defendant's potential future dangerousness, discussed the issue and judged the defendant's future dangerousness as an important consideration in their deliberations. Blume and colleagues attributed some of the jurors' emphasis on future dangerousness to overestimations of the possibility of the defendant's eventual release (see Bowers & Steiner, 1999).

Furthermore, Costanzo and Costanzo (1994) interviewed 27 capital jurors in Oregon and found similar results. Like Texas, Oregon's statute directs jurors to consider only three issues in their deliberations: (a) whether the crime was deliberate, (b) whether the defendant's behavior was unreasonable, in response to any provocation by the victim, and (c) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing treat to society. The jurors interviewed reported that the third issue, involving future dangerousness, garnered the most attention and was critical to their eventual decisions. In sum, research evidence suggests that the answer to the question of whether capital jurors are considering future dangerousness in their decisions is a qualified "yes."

Given that jurors are considering future dangerousness as a factor in determining whether the defendant poses a continuing threat to society and therefore should be condemned, we must ask what effect this expert testimony has on jurors' normative decisions on whether there is a probability the defendant will be a future danger. If, for instance, the jury was convinced that only 5% of capital murder defendants will go on to commit a future violent act, the jury may still find that this level is sufficient to consider the defendant a future threat to society. Or, given the facts of their particular case, the jury may find that the defendant in their case is most likely within the five percent. Unfortunately, most research has focused on questions surrounding the gulf between experts' predictions and actual base rates of future violence by capital defendants. Though clearly important, many questions remain regarding how such testimony is used in jurors' normative judgment regarding whether the defendant poses a "continuing threat to society." Moreover, no study has determined the factors which differentiate between when juries find the defendant poses a continuing threat to society and when they do not.

However, given that one of the goals of considering future dangerousness was to narrow the class of individuals subject to capital punishment and limit arbitrary and capricious sentencing, existing research suggests that this goal has not been met. Marquart, Ekland-Olson, and Sorenson (1989) compared a group of Texas death row inmates to a control group of high security inmates, as well as to the entire Texas Department of Corrections population, over a 15-year period. The first group of death row inmates ($n=92$) had been deemed by a jury at sentencing, under the third element of the directed considerations above, to pose a "continuing threat to society." Nonetheless, these inmates had their sentences commuted or reversed. The second group ($n=107$) had been convicted of murder but sentenced to life in prison, and were similar to the first in terms of past criminal history and nature of their crimes. The second group of inmates was comprised of inmates who were considered by their juries *not* to pose a risk of future dangerousness. In comparison to this group, the high security prison population and the entire prison population, the commutees were actually less likely to commit future prison violent acts.

Following Marquart et al. (1989), Edens et al. (2005) sought to compare similar groups, only restricting their sample to those inmates in whose trials experts affirmed their risk of future dangerousness. Edens et al. compared death row inmates whose sentences were reduced ($n=48$) to current death row inmates ($n=42$) and executed inmates ($n=65$). The overall rate of what Edens et al. termed "serious assaultive behavior" (operationalized as needing more than first aid) was 5.2%. When less severe forms of assault (including minor violations such as spitting or threatening another inmate or officer) were included, the rate of violence was 31.6%. Yet, more than 20% of these groups had no documented violations at all. In addition, Edens et al. pointed out that expert testimony on the future dangerousness of a convict had no impact on the housing conditions or level of supervision of the inmate post-conviction. "It's only purpose was to support an argument for a death sentence" (p. 63).

Further, in a summary of violent misconduct in prison, Reidy, Cunningham and Sorenson (2001) found the overall rates of assault among death row and life imprisonment inmates were relatively low (between 0 and 31%). Research has been unable to find evidence of verifiable differences in rates of violent behavior between those sentenced to death and those sentenced to life with or without the possibility of parole (Edens et al., 2005; Marquart et al., 1989; Reidy et al., 2001). This is the case regardless of whether expert testimony on future dangerousness was adduced at the sentencing hearing. Moreover, given that the base rate of death row inmates' serious violent behavior is low, predictions of their violent behavior are more likely to include false positives (Monahan, 1981). If the experts in these cases were correct in their predictions, we would expect to see at least some difference in the rates of violent behaviors between these populations. Therefore, there is little evidence that predictions of future dangerousness arrived at by juries, with or without the aid of an expert witness, have led to a narrowing of the class of individuals who are executed. An examination of academic research into how jurors in trial simulations are influenced by expert testimony regarding future dangerousness is where we turn next.

6.3.1 Trial Simulation Research – Actuarial Versus Clinical Expert Testimony

Research has produced somewhat inconsistent results regarding whether jurors use evidence provided by experts in an inappropriate manner (Vidmar et al., 2000). Although limited empirical research exist examining juries in trial simulations of capital cases, the research that does exist demonstrates that jurors are inappropriately influenced by expert testimony on future dangerousness. Krauss and Sales (2001) conducted trial simulations based on the Texas capital sentencing procedures, and found that jurors were significantly affected by expert testimony in their decisions. Mock jurors were shown testimony by experts using either clinical or actuarial methodologies for assessing the defendant's future dangerousness. Results demonstrated that jurors were influenced by both, increasing their ratings of the future risk the defendant posed regardless of the type of expert testimony. However, these mock jurors were more influenced by the less accurate and less scientific unstructured clinical expert testimony than potentially more accurate and scientific actuarial testimony. This bias remained despite adversarial procedures such as cross-examination and competing defense expert testimony. These results were replicated by Krauss and Lee (2003) and the effects remained even after juror deliberations.[12]

One possible explanation for the apparent appeal of clinical expert testimony over actuarial forms involves dual process models of cognitive processing such as Cognitive Experiential Self Theory (CEST) (Epstein, 1994; Epstein & Pacini, 1999). CEST posits two parallel and partially independent information processing systems: experiential and rational. The experiential system is preconscious, effortless, and associated with affect, and related to the use of heuristics. This gut-level processing serves as the default cognitive processing system. In contrast, the rational processing system is conscious, effortful, and analytic. Rational processing involves deliberate analysis that requires justification through logic and evidence. Behavior is influenced by the relative input of both systems (Donovan & Epstein, 1997) and situational factors (Denes-Raj & Epstein, 1994). Several empirical studies lend support to CEST's semi-independent and interactive systems (e.g. Denes-Raj & Epstein, 1994; Epstein, Pacini, Denes-Raj, & Heier, 1996). Using the CEST framework, clinical testimony should be more appealing than actuarial testimony for those processing in the default experiential mode because clinical testimony relies on the clinician's intuition.

To test this explanation, Krauss, Lieberman, and Olson (2004) studied whether mock jurors who were motivated to process in the effortful, rational mode would be

[12] A study by Guy and Edens (2003), however, did not find differences between the effects of actuarial and unstructured clinical expert testimony in a sexually violent predator civil commitment. It remains to be seen whether these divergent findings were a result of different methodologies, a different legal context, or other differences. Future research needs to explore the generalizability of these findings in a wide variety of cases.

less biased toward actuarial assessments of future dangerousness than those motivated to process in the experiential mode. To do this, mock jurors in a death penalty case were directed to adopt either a rational or experiential mode of processing by performing either math problems (rational) or a free drawing exercise (experiential) prior to the mock trial. As predicted by CEST, results showed that those jurors who were motivated to process in a rational mode were more influenced by actuarial testimony, while those motivated to process in an experiential mode were more influenced by clinical testimony on the defendant's future dangerousness. Lieberman, Krauss, Kyger, and Lehoux (2007) replicated and extended these findings to the use of future dangerousness expert testimony in the civil commitment hearings of sexually violent predators. In this study, though, more ecologically valid means of manipulating mock jurors' processing mode were used (i.e., manipulations were embedded in the judge's instructions) and the results were similar.

6.3.2 Expert Testimony Based on Guided Professional Judgment

Given the greater influence unstructured clinical judgment expert testimony has had on jurors in existing trial simulations research, some have proposed that expert testimony based on guided professional judgment instruments might offer a better alternative to actuarial-based expert testimony. Krauss et al. (2004) examined the impact of the HCR-20 in a trial simulation based on Texas's death penalty sentencing procedures. Participants heard one of three forms of expert testimony, actuarial, clinical, or the HCR-20. Despite being described as superior to both actuarial and clinical testimony by many mental health scholars, results showed participants were not persuaded by the HCR-20 testimony. Like the more scientifically accurate but less persuasive actuarial testimony, the HCR-20 was less persuasive than the less accurate clinical expert testimony. Despite the potential greater accuracy of these instruments, they may not be combining the best elements of actuarial and clinical assessments (scientific accuracy and persuasiveness) in the eyes and ears of death penalty jurors. Rather, early evidence points to the possibility that this testimony may be viewed by jurors as a weakened combination of actuarial and clinical expert testimony.

Despite various trial simulation studies, possible solutions to the problems of future dangerousness expert testimony remain elusive. Research has revealed that adversarial procedures, cross-examination and competing experts do not appear to help. Moreover, guided professional judgment instruments developed to increase the scientific accuracy of risk predictions while incorporating some clinical judgments may fair worse in the jurors' eyes than either the unscientific clinical or unpersuasive actuarial assessments.

To summarize the existing albeit limited research on jurors' reactions to mental health professionals' predictions of future dangerousness in capital sentencing, several disturbing facts emerge. First, capital sentencing jurors spend considerable time discussing future dangerousness in reaching their decisions even in jurisdictions where it is not a statutorily created aggravating factor. Second, when future

dangerousness is a necessary factor in capital sentencing (e.g., Oregon and Texas), research indicates jurors perform exceptionally poorly in discriminating between death penalty eligible defendants who will and will not commit a serious violent act in prison. Third, mental health expert testimony does not appear to improve jurors' ability to make this discrimination accurately, and if anything causes jurors to vastly over-estimate a defendant's likelihood of serious prison violence. Fourth, trial simulations demonstrate that jurors are un-persuaded by potentially more accurate predictions of future dangerousness, and prefer to rely on the least scientifically accurate form of expert testimony. This research also suggests that the adversary procedures the court relied on in *Barefoot* (i.e., cross-examination, and competing experts) do not alleviate this problem. Taken together, this research clearly indicates the vast problems associated with the use of future dangerousness in capital sentencing, and the substantial likelihood of injustice occurring. We next turn to possible solutions to these problems.

6.4 Solutions to the Continued Use of Future Dangerousness

6.4.1 Defining "… Continuing Danger to Society"

Perhaps most importantly, jurisdictions need to be clear on what they mean by "… a continuing danger to society", and in formulating this definition, courts and legislatures need to be cognizant of changes in prison security and the LWOP alternative sentence. If future danger truly means likelihood of future violence in prison, as the federal system has made clear and a number of legal and psychology scholars have argued (e.g., Cunningham 2006; Edens, et al., 2005), there may be very little "expertise" that mental health practitioners can add to these determinations. Without substantial research examining the factors that are predictive of the extremely low base rate of serious prison violence among death penalty eligible prisoners, there is almost nothing a mental health practitioner can legitimately offer other than the fact that the defendant is unlikely to be violent in the future. Further, given the low base rates of serious prison violence and differences in custodial conditions among prisons, it is unlikely that a generalizable and suitably accurate predictive instrument could be created. And, even if such an instrument was developed, prison conditions could always be further modified for an individual defendant so that a less restrictive alternative and more secure environment was created. In addition, even if an appropriately predictive form of expert testimony existed, it is unlikely to be as persuasive to a capital sentencing jury as more unreliable clinical expert testimony on future dangerousness is.

The problems with the "… continuing danger to society" standard are further exacerbated by capital sentencing jurors' fixation on this issue even when this question is not specifically raised by attorneys or capital sentencing schemes. Existing evidence suggests, at the very least, that the intended narrowing of the population of those deserving capital punishment has not occurred as a result of its use. Clearly,

additional research is necessary to understand the impact of expert's future dangerousness testimony on jury's normative determinations of who is a continuing danger to society. In the end, juries may still find defendants pose "a continuing danger" regardless of the expertise offered by mental health practitioners. Yet, by defining "society" as "prison society," states would at least begin to place some conceptual boundaries around the jury's ultimate determination.

If, on the other hand, jurisdictions decide that "society" refers to a defendant's hypothetical return to normal society, mental health practitioners' potentially possess more expertise. However, problems with the accuracy of existing actuarial and guided professional judgment instruments even for this outcome raise the question of whether these instruments are sufficiently reliable for life and death decision-making. In other words, are instruments that might under the most favorable analysis achieve seventy-five percent accuracy good enough for jurors to base these irreversible decisions on? Moreover, given that research suggests that the more scientifically accurate expert testimony is less influential in persuading jurors than less accurate clinical judgments and that adversary procedures do not ameliorate this effect, it is questionable whether the addition of potentially more reliable expert testimony solves the existing problems with the future dangerousness standard.

6.4.2 Limiting Inaccurate Expertise that Reaches the Jury

The legal system could potentially solve the problem of jurors' bias toward inaccurate clinical expertise or unreliable expert testimony based on misapplied actuarial assessment (i.e., applying an actuarial instrument to a population or to an outcome on which it was not sufficiently normed) by limiting the expert testimony that reaches the jury.[13] Recently, the federal courts, as well as many state courts, have adopted a potentially more stringent standard for the admissibility of expert testimony. In Daubert v. Merrell Dow Pharmaceutical (1993), General Electric v. Joiner (1996), and Kumho v. Carmichael (1999) (commonly referred to as the *Daubert* trilogy), the United States Supreme Court introduced a new standard for the admissibility of expert testimony. The *Daubert* decision held that evidentiary admissibility decisions should be focused on the scientific validity or evidentiary reliability[14] of expert testimony being offered. The decision also offered a non-exhaustive list of flexible criteria that courts could use in evaluating expert testimony's evidentiary reliability, including: falsifiability, peer review, error rate, and general acceptance of the

[13] Another related solution would be to limit expert testimony in these matters to the base rates of violent behaviors of capital offenders in the prison system. Rather than exposing jurors to dubious predictions of an individual's behavior, testimony could be limited to more scientifically valid and reliable base rates of violent prison behavior and/or escape rates.

[14] The *Daubert* court intended to use the term "reliability" in the legal sense and not in the scientific one. They make this point clear in a footnote of the opinion "in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity" (Daubert, p. 591).

evidence. If applied appropriately, the *Daubert* standard could potentially prohibit less than scientific or inappropriately applied expert testimony from reaching the jury.[15]

Unfortunately, a number of factors suggest that judicial evidentiary admissibility adjudications are unlikely to be the solution to the problems of future dangerousness in capital sentencing. First, not all jurisdictions have adopted *Daubert*, and even in ones that have, it has not been uniformly applied to all forms of expert testimony (Bernstein & Jackson, 2004). Some courts have chosen not to apply *Daubert* to more clinically based forms of expert testimony, such as clinical expert testimony (Sales & Shuman, 2007). Second, judges have demonstrated a reluctance to stringently apply *Daubert* criteria to certain areas of expert testimony, such as mental health practitioner's future dangerousness predictions. Slobogin (2007) has argued that this bias occurs most commonly to evidence that favors the prosecution in criminal proceedings and in areas where such expert testimony has traditionally been admitted. Third, even in states that have fully adopted the *Daubert* trilogy of cases, rarely has the *Daubert* standard been applied to expert testimony proffered at sentencing hearings.[16] Almost all states apply relaxed standards of evidence at sentencing, and allow testimony that would be inadmissible at trial to be admitted (e.g., hearsay evidence, evidence of past criminal actions, etc.). Recently, in United States v. Fields (2007), the 5th circuit court rejected the argument that *Daubert* applied to evidentiary admissibility decisions in federal death penalty sentencing, and further noted that no circuit court to date has applied *Daubert* to expert testimony offered at sentencing. So, unless a legal sea change occurs, *Daubert* is unlikely to prohibit poor quality future dangerousness expert testimony from being admitted at sentencing.

Even if the legal system is unwilling to limit mental health professionals' expert testimony on future dangerousness, such testimony could be limited by mental health professionals themselves. Several commentators have argued that it is an ethical violation for psychologist to offer expert testimony of such dubious accuracy (e.g., Edens, et al., 2005). Yet, there is no evidence to date that mental health practitioners are being charged with ethical violations for offering less than scientific expert testimony on future dangerousness in capital sentencing hearings. Perhaps if mental health practitioners lost their license for offering this expert testimony, the legal system would be less receptive to its use. However, Dr. Grigson, the psychiatrist known as "Dr. Death," who notoriously testified on the defendant's future dangerousness in over 150 Texas capital sentencing hearings and always found the defendant a future danger, serves as an example of state and professional organizations'

[15] A discussion of this issue is beyond the scope of the chapter but there is reason to believe that judges may have difficulty applying the *Daubert* standard effectively. See Krauss, Cassar, and Strother (2007) for a more detailed examination of this issue.

[16] Texas may be the lone exceptions to this rule. In a somewhat confusing decision, State v Nenno (1995), the Texas Court of Appeals appears to have applied a *Daubert*-like standard to an FBI agent's prediction of future dangerousness in a capital sentencing hearing. However, even in this instance, the court admitted what appeared to be an unstructured clinical judgment, reasoning that it passed the jurisdiction's *Daubert* requirements.

unwillingness to restrict their members' professional practice. Dr. Grigson was eventually expelled from the American Psychiatric Association, but he never lost his license and he continued to testify in capital sentencing hearings subsequent to his expulsion.

6.4.3 Removing Future Dangerousness as a Death Penalty Sentencing Aggravating Factor

Given the myriad problems associated with the continued use of future dangerousness in capital sentencing and mental health practitioners' continued willingness to offer low quality expert testimony on this issue, some have suggested that it should simply be removed as a capital sentencing consideration (Edens, et al., 2005; Cunningham, 2006). They argue that this standard asks a question, what is the likelihood that a defendant will be a future danger in prison?, that mental health professionals simply do not have the expertise to address. Further, they argue it relies on outdated and incorrect notions of: parole (i.e., defendants will eventually be released); prison security (i.e., prisons are a violent place where serious assaults happen frequently); and mental health practitioners' ability to predict future events.

The continued use of future dangerousness in capital sentencing also presents a more fundamental problem. It allows a means for a defendant to be executed that has little to do with the explicit standard being evaluated. Given that almost no defendant is a future danger in prison, it allows the jury to use future dangerousness as a pretext for some other illegitimate factor in their decision-making (e.g., heinousness of the crime, revenge, disgust, etc.). One would expect that if future dangerousness were being used in a legitimate manner that the defendants' found to be a future danger in Texas, where future dangerousness is required, would differ substantially from capitally sentenced defendants' in other jurisdictions. That appears not to be the case. One recent study found that the crimes committed by defendants' sentenced to the death penalty in Texas did not differ significantly from those committed by a representative sample of capitally sentenced defendants nationally. In addition, the number of crimes involving multiple victims also did not substantially differ between the two samples (Bessette, in press, cited in Dorland & Krauss, 2005). In the end, it appears that the explicit use of future dangerousness does little to change the crimes that receive the death penalty, and may be reflecting something other than the defendant's future dangerousness. If the standard is simply pretextual, then it makes sense to replace future dangerousness with something that better symbolizes society's and juror's justification for their death penalty decisions.

6.4.4 Final Conclusions

In light of the critical importance of future dangerousness in post-*Furman* capital sentencing, there is little evidence to support its prominent role. In the six

jurisdictions responsible for over one-half of post-*Furman* executions, it remains an explicit and sometimes required aggravating factor, and in the remaining jurisdictions it remains a factor that jurors commonly discuss. Yet, while jurors tend to focus their attention on this issue, these same jurors in practice show little ability to discriminate between those who will and will not be dangerousness in future.

To make matters worse, mental health practitioners continue to play a complicit role in this often inaccurate but consequential decision-making. The existing research examining mental health practitioners' ability to predict future dangerousness indicates that even using the best methodology currently available, these predictions often lack sufficient scientific accuracy for the gravity of interests at stake. Compounding this problem is additional research suggesting that jurors are likely to overly rely on the least scientific and least accurate forms of mental health expert testimony in these life and death decisions. In the end, it currently appears that mental health practitioners have very little "expertise" to offer these courts in these matters, and that it would behoove the field to re-consider their current role in these proceedings.

Likewise, it is time for courts and legislatures to re-examine the continued use of future dangerousness in capital sentencing. In so doing, they should be cognizant of changes in parole, security, and alternative sentences that make its continued use problematic. Finally, they should be aware that future dangerousness may simply serve as a convenient explicit pretext for jurors to utilize other implicit notions of justice in their decisions concerning execution.

References

American Psychological Association, (2005). *Brief of amicus curiae in United States v. Fields.* Case No. 04–50393 (5th circuit).

American Psychological Association, (1983). *Brief of amicus curiae in Barefoot v. Estelle.* Case No. 82–6080 (Texas Court of Criminal Appeals).

Andrews, D., & Bonta, J. (1995). *LSI-R: The level of service inventory-revised.* Toronto, Canada: Multi-Health Systems.

Atkins v. Virginia, 536 U.S. 304 (2002).

Babcock, S. (2006). *Death row conditions.* Death Penalty Information Center. http://www.deathpenaltyinfo.org/article.php?&did=1397. last visited 9/26/07.

Barefoot v. Estelle, No. 82–6080, 463 U.S.880 (S.Ct. 1983).

Beecher-Monas, E. (2003). The epistemology of prediction: Future dangerousness testimony and intellectual due process. *Washington and Lee Law Review*, *60*(2), 353–416.

Bernstein, D., & Jackson, H. (2004). The *Daubert* trilogy in the states. *Jurimetrics, 44*, 1–16.

Blume, J., Garvey, S., & Johnson, S. (2001). Future dangerousness in capital cases: Always "At Issue". *Cornell Law Review, 86*, 397–410.

Bowers, W. J. & Steiner, B. D. (1999). Death by default: An empirical demonstration of false and forced choices in capital sentencing. *Texas Law Review*, *43*, 605–717.

Costanzo, S., & Constanzo, M. (1994). Life or death decisions: An analysis of capital jury decision making under the special issues sentencing framework. *Law and Human Behavior, 18,* 151–170.

Cunningham, M. D. (2006). Dangerousness and death: A nexus in search of science and reason. *American Psychologist, 61*, 828–839.

Cunningham, M. D., & Reidy, T. J. (1998). Integrating base rate data in violence risk assessment at capital sentencing. *Behavioral Science and the Law*, 16, 71–83.
Cunningham, M.D., Sorensen, J.R., & Reidy, T.J. (2005). An actuarial model for assessment of prison violence risk among maximum security inmates. *Assessment, 12*, 40–49.
Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (S.Ct.1993).
Death Penalty Information Center (2007). Facts about the death penalty. http://www.deathpenaltyinfo.org. last visited 9/21/07.
Denes-Raj, V., & Epstein, S. (1994). Conflict between intuitive and rational processing: When people behave against their better judgments. *Journal of Personality and Social Psychology*, *66,* 819–829.
DeMatteo, D., & Edens, J.F. (2006). The role and relevance of the psychopathy checklist revised in court: A case law survey of U.S. courts (1991–2004). *Psychology, Public Policy, and Law, 12*(2), 214–241.
Donovan, S., & Epstein, S. (1997) The difficulty of the Linda conjunction problem can be attributed to its simultaneous concrete and unnatural representation, and not to conversational implicature. *Journal of Experimental Social Psychology, 33,* 1–20.
Dorland, M. (2004). *Aggravating circumstances in Oklahoma: Executed offenders.* Unpublished manuscript, Claremont, CA: Claremont McKenna College.
Dorland, M., & Krauss, D. (2005). The danger of dangerousness in capital sentencing: exacerbating the problem of arbitrary and capricious decision-making. *Law and Psychology Review, 29*, 63–104.
Douglas, K., Ogloff, J., Nicholls, T., & Grant, I. (1999). Assessing risk for violence among psychiatric patients: The HCR-20 violence risk assessment scheme and the Psychopathic Checklist: Screening Version. *Journal of Consulting and Clinical Psychology, 67*, 917–930.
Douglas, K., & Webster, C. (1999). The HCR-20 violence risk assessment scheme: Concurrent validity in a sample of incarcerated offenders. *Criminal Justice and Behavior, 26*, 3–19.
Edens, J., Buffington-Vollum, J., Keilin, A., Roskamp, P., & Anthony, C. (2005). Predictions of future dangerousness in capital murder trials: is it time to "disinvent the wheel?" *Law and Human Behavior, 29*, 55–87.
Epstein, S. (1994). Integration of the cognitive and the psychodynamic unconscious. *American Psychologist*, *49*, 709–724.
Epstein, S., & Pacini, R. (1999). Some basic issues regarding dual-process theories from the perspective of cognitive-experiential self-theory. In S. Chaiken & Y. Trope (Eds.) *Dual process theories in social psychology* (pp. 462–483). New York: The Guilford Press.
Epstein, S., Pacini, R., Denes-Raj, V., & Heier, H. (1996). Individual differences in intuitive-experiential and analytical-rational thinking styles. *Journal of Personality and Social Psychology*, *71*, 390–405.
Furman v. Georgia, 408 U.S. 238 (1972).
Gardner, W., Lidz, C., Mulvey, E., & Shaw, E. (1996). Clinical versus actuarial predictions of violence in patients with mental illness. *Journal of Consulting and Clinical Psychology, 64*, 602–609.
General Electric v. Joiner 522 U.S. 136 (S.Ct. 1996)
Grove, W., & Meehl, P. (1996). Comparative efficiency of informal (subjective, impressionistic) and formal (mechanical, algorithmic) prediction procedures: The clinical-statistical controversy. *Psychology, Public Policy, & Law, 2*, 293–323.
Guy, L., & Edens, J. (2003). Juror decision-making in a mock sexually violent predator trial: Gender differences in the impact of divergent types of expert testimony. *Behavioral Science and the Law, 21*, 215–237.
Hart, S.D., Michie, C., & Cook, D.J. (2007). Precision of actuarial risk assessment instruments: Evaluating the "margins of error" of group v. individual predictions of violence. *British Journal of Psychiatry, 190*, 60–65.
Harris, G.T., & Rice, M.E. (2007). Characterizing the value of actuarial violence risk assessment. *Criminal Justice and Behavior.*
Harris, G., Rice, M., & Cormier, C. (2002). Prospective replication of the Violence Risk Appraisal Guide in predicting violent recidivism among forensic patients. *Law & Human Behavior, 26*, 377–394.

Jurek v. Texas, 428 U.S. 262 (1976).
Kansas v. Hendricks, 521 S.Ct. 2072 (1997).
Kansas v. Crane 534 U.S. *407* (S.Ct. 2002).
Krauss, D. (2004). Adjusting risk of recidivism: Do judicial departures worsen or improve recidivism prediction under the Federal Sentencing Guidelines? *Behavioral Sciences and the Law,* 6, 731–750.
Krauss, D., Cassar, D., & Strother, A. (in press). The admissibility of expert testimony in the United States, the commonwealth and elsewhere. In D. Krauss, & J. Lieberman (Vol. Eds.), Expert testimony: Vol. II. *A two volume edited work in the series: Psychology, Crime, & Law* (D. caner series Ed.) Aldershot: Ashgate.
Krauss, D., & Lee, D. (2003). Deliberating on dangerousness and death: Jurors' ability to differentiate between expert actuarial and clinical predictions of dangerousness. *International Journal of Law and Psychiatry*, *26*, 113–137.
Krauss, D., & Lieberman, J. (2007). Expert testimony on risk and future dangerousness. In M. Costanzo, D. Krauss & K. Pezdek, (Eds.), *Expert testimony for the courts* (pp. 227–250). Mahwah, NJ: Lawrence Erlbaum Associates.
Krauss, D. A., Lieberman J. D., & Olson, J. (2004). The effects of rational and experiential information processing of expert testimony in death penalty cases. *Behavioral Sciences and the Law*, *22*, 801–822.
Krauss, D., & Sales, B. (2001). The effects of clinical and scientific expert testimony on juror decision-making in capital sentencing. *Psychology, Public Policy, & Law, 7*, 267–310.
Kumho Tire v. Carmichael 526 U.S. 137 (S.Ct.1999).
Lieberman, J., Krauss, D., Kyger, M., & Lehoux, M. (2007). Determining dangerousness in Sexually Violent Predator evaluations: Cognitive-experiential self-theory and juror judgments of expert testimony. *Behavioral Sciences and the Law, 25*, 507–526.
Marquart, J., Ekland-Olson, S., & Sorensen J. (1989). Gazing into the crystal ball: Can jurors actually predict dangerousness in capital cases? *Law & Society Review, 23*, 449–468.
McKee, S. A., Harris, G. T., & Rice, M. E. (2007). Improving forensic tribunal decisions: The role of the clinician. *Behavioral Sciences and the Law,* 25, 485–506.
McNeil, D., Sanders, D., & Binder, R. (1998). The relationship between confidence and accuracy in clinical predictions of psychiatric patients' potential for violence. *Law and Human Behavior, 25*, 655–671.
Monahan, J. (1981). *The clinical prediction of violent behavior.* Beverly Hills, CA: Sage.
Monahan, J. (2003). Violence risk assessment. In I. B. Weiner (Series Ed.) & A. Goldstein (Vol. Ed.), *The handbook of psychology: Vol. 11. forensic psychology* (pp. 527–542). Hoboken, NJ: John Wiley & Sons, Inc.
Monahan, J., Steadman, H., Silver, E., Appelbaum, P., Robbins, P., Mulvey, E., Roth, L., Grisso, T., & Banks, S. (2001). *Rethinking risk assessment: The MacArthur study of mental disorders and violence.* New York: Oxford University Press.
Mossman, D. (1994). Assessing predictions of violence: Being accurate about accuracy. *Journal of Consulting and Clinical, 62*, 783–792.
Nenno v. State, 970 SW.2d 544 (Tx Crim. App. 1998).
O'Connor v. Donaldson, 422 U.S. 563 (S.Ct. 1975).
Panetti v. Quarterman, U.S. LEXIS 8667 (2007).
Penry v. Lynaugh, 492 U.S. 302 (1989).
Reidy, T. J., Cunningham, M. D., & Sorenson, J. (2001). From death to life: Prison behavior of former death row inmates in Indiana. *Criminal Justice and Behavior*, *28*, 62–83.
Rice, M., & Harris, G. (1995). Violent recidivism: Assessing predictive validity. *Journal of Consulting and Clinical Psychology, 63*, 737–748.
Roper v. Simmons, 543 U.S. 551 (2005).
Sales, B., & Shuman, D. (2007). Science, experts, and law: Reflections on the past and future. In M. Costanzo, Krauss, D., & K. Pezdek (Eds.) Expert testimony for the courts (pp. 9–31). Mahwah, NJ: Lawrence Erlbaum Associates.

Slobogin, C. (2007). *Proving the unprovable.* American Psychology-Law Society Society Series. Oxford: Oxford University Press.

Sorenson, J. R., & Marquart, J. W. (1991). Prosecutorial and jury decision-making in post-Furman Texas capital cases. *New York University Review of Law and Social Change*, *18*, 743–776.

Sorensen, J.R., Pilgrim, R.L. (2001). An actuarial risk assessment of violence posed by capital murder defendants. *Journal of Criminal Law and Criminology*, 90, 1251–1270.

Texas Criminal Code, Article 37.071, 2(b)(1) (2004).

Tversky, A., & Kahneman, D. (1982). Judgments of and by representativeness. In D. Kahneman, P. Slovic & A. Tversky (Eds.), *Judgment under uncertainty: Heuristics and biases* (pp. 84–100). New York: Cambridge University Press.

United States v. Fields No 04-50393 483 F.3d 313 (5th Circuit).

Vidmar, N., Lempert, R., Diamond, S., Hans, V., Landsman, S., MacCoun, R. et al. (2000). Amicus Brief: Kumho Tire v. Carmichael. *Law and Human Behavior*, *24*, 387–400.

Webster, C., Douglas, K., Eaves, D., & Hart, S. (1997). *HCR-20: Assessing risk for violence.* Burnaby, British Columbia, Canada: Simon Fraser University, Mental Health, Law, and Policy Institute.

Chapter 7
Psychopathy, Culpability, and Commitment

Stephen D. Hart

Psychopathy or psychopathic personality disorder is referred to as antisocial personality disorder in the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-IV*; American Psychiatric Association [APA], 1994, 2000) and as dissocial personality disorder in the tenth edition of the *International Statistical Classification of Diseases and Related Health Problems* (*ICD-10*; World Health Organization [WHO], 1992). Previously, it was referred to as sociopathy or sociopathic personality disorder.

In this chapter, I discuss the role of psychopathy in legal decisions regarding culpability (i.e., responsibility for past behavior) and commitment (i.e., incapacitation based on risk for violence in the future), building on recent discussions by people such as Fine and Kennett (2004) and Schopp and Slain (2000), as well as discussions regarding personality disorder more generally (Hart, 2001). In Part 1, I analyze what is known about psychopathy as a mental disorder and its (potential) legal relevance. In Part 2, I synthesize this information and present some recommendations for psycholegal evaluation in which psychopathy may be a factor, focusing on long-term civil commitment. My intent throughout is to highlight the inherent complexity and uncertainty of such evaluations, rather than to offer a simplistic, cookie-cutter approach to the practice of forensic mental health.

S.D. Hart (✉)
Department of Psychology, Simon Fraser University, University of Bergen,
Burnaby, British Columbia, Canada
e-mail: hart@sfu.ca

Thanks to Robert Schopp for the invitation to present a paper in Lincoln and write this chapter based on it, as well as for his endless patience and helpful guidance while I prepared the chapter.

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_8, © Springer Science+Business Media, LLC 2009

Part 1: Analysis

7.1 The Nature of Psychopathy

Symptoms of personality disorder, including psychopathy, are maladaptive personality traits (APA, 1994, 2000; WHO, 1992). Personality traits, by definition, reflect a person's characteristic or usual adjustment. They are stable across time and situations and are distinct from, although they may be exacerbated by, acute mental disorder or physical illness. Personality traits become maladaptive when they are extreme, fixed, or rigid and as a consequence interfere with the fulfillment of social roles and obligations.

According to clinical descriptions over the past 200 years (Arrigo & Shipley, 2001; Berrios, 1996), psychopathy is characterized by a broad range of symptoms in several major domains of personality functioning. These can be summarized as follows (Hart, 2007, in press; Hart & Cooke, 2007). In the domain of *behavioral organization*, they include lack of perseverance, unreliability, recklessness, restlessness, disruptiveness, and aggressiveness. The *emotionality* domain includes lack of anxiety, lack of remorse, lack of emotional depth, and lack of emotional stability. The domain of *interpersonal attachment* includes detachment, lack of commitment, and lack of empathy or concern for others. The domain *interpersonal dominance* includes antagonism, arrogance, deceitfulness, manipulativeness, insincerity, and glibness or garrulousness. The *cognitive* domain includes suspiciousness, inflexibility, intolerance, lack of planfulness, and lack of concentration. Finally, the *self* domain includes self-centeredness, self-aggrandizement, self-justification, and a sense of entitlement, uniqueness, and invulnerability.

7.1.1 Assessment and Diagnosis

In the *DSM-IV* and *ICD-10*, the diagnostic criteria for psychopathy focus primarily on symptoms from the behavioral organization domain, especially those related to violation of explicit social norms. In many civil psychiatric settings, these diagnostic criteria have adequate reliability (e.g., stability or consistency across evaluators and time) and validity (e.g., prognostic value with respect to poor treatment response, institutional misbehavior, or community violence). In forensic settings, however, the *DSM-IV* and *ICD-10* criteria are less useful (Widiger & Corbitt, 1995). Their heavy focus on criminality leads to a very high prevalence rate – typically 50–75% or higher – in correctional offenders and forensic psychiatric patients. For this reason, many forensic mental health professionals prefer more comprehensive diagnostic criteria, such as the *Hare Psychopathy Checklist-Revised* (*PCL-R*; Hare, 1991, 2003) or its progeny, such as the *Screening Version* of the *PCL-R* (*PCL:SV*; Hart, Cox, & Hare, 1995).

7.1.2 Course

Symptoms of psychopathy may emerge as early as age 6–10, and it is common for adults with psychopathy to have been diagnosed in childhood or adolescence as suffering from one of the disruptive behavior disorders (Robins, Tipp, & Przybeck, 1991). Indeed, the *DSM-IV* diagnostic criteria for antisocial personality disorder require that the person met criteria for a conduct disorder before age 15 (APA, 1994). But the majority of children or adolescents diagnosed with conduct disorder – 50–75% or more – spontaneously desist antisocial behavior and do not go on to develop psychopathy as adults. Consequently, it is recommended not to diagnose psychopathy before the beginning of early adulthood, at least 18 years old or possibly even 25 years old (APA, 1994; WHO, 1992).

The course of the disorder during adulthood is characterized by relative stability. For example, there is evidence of moderate diagnostic stability across periods of several months to several years (Alterman, Cacciola, & Rutherford, 1993; Rutherford, Cacciola, Alterman, McKay, & Cook, 1999; Schroeder, Schroeder, & Hare, 1983), persistence of symptoms across adulthood (Hare, McPherson, & Forth, 1988), and long-term risk for negative health outcomes such as morbidity and mortality (Repo-Tiihonen, Virkkunen, & Tiihonen, 2001). But there is also evidence that symptom severity may fluctuate substantially over time.

7.1.3 Prevalence

Epidemiological research in the United States indicates that the lifetime prevalence of psychopathy in the general population, according to *DSM-IV* or similar criteria, is about 1.5–3.5%; in correctional offenders, the rate is 50–75% (Grant et al., 2004; Lenzenweger, Lane, Loranger, & Kessler, 2007; Robins et al., 1991). When more comprehensive diagnostic criteria are used, the prevalence rate is considerably lower. For example, research using the *PCL-R* and *PCL:SV* with correctional offenders and forensic psychiatric patients in the United States has reported lifetime prevalence rates of about 15–25% – about 1/3 the rate observed using the *DSM* criteria (Hare, 1991, 2003).

Lifetime prevalence rates of psychopathy vary across three major group factors: gender, age, and culture. First, with respect to gender, the male:female sex ratio in diagnosis typically is about 3:1 (Grant et al., 2004; Lenzenweger et al., 2007; Robins et al., 1991). This gender difference is not limited to a few clinical features, but is evident across the full range of symptomatology. Second, with respect to age, some epidemiological research in the United States using *DSM-III* and *DSM-III-R* criteria has reported a cohort effect, with higher lifetime prevalence rates in younger generations than in older generations (Robins et al., 1991). Third, with respect to culture, anthropological and epidemiological research indicates that psychopathy is found across cultures, but there is evidence of cross-cultural differences in prevalence (Cooke, 1996). The explanation for these group differences is unclear, but

may include some combination of cultural facilitation and inadequacies in existing diagnostic criteria (Cooke, Michie, Hart, & Clark, 2005).

7.1.4 Etiology

The etiology of psychopathy is unknown. Most theoretical models have focused on the potential causal influence of biological factors, as research has failed to identify any childrearing experiences, familial dysfunctions, or other adverse life experiences that are found both frequently and specifically in people with psychopathy compared to people with other mental disorders. As noted previously, however, sociocultural factors certainly appear to play a role in the expression of the disorder. With respect to biological factors, researchers have reported elevated rates of prenatal trauma, neurotransmitter abnormalities, and structural abnormalities of the brain associated with symptoms of psychopathy (Coccaro, 2001; Neugebauer, Hoek, & Susser, 1999; Raine, Lencz, Bihrle, LaCasse, & Colletti, 2000; Raine & Yang, 2006), but none of these factors is clearly pathognomonic. Also, some adoption research has reported that the heritability of psychopathy is substantial (Cadoret, Troughton, Bagford, & Woodworth, 1990), but molecular genetic research has not identified genetic markers. A common theme underlying many etiological theories that focus on biological factors is that psychopathy is associated with impaired ability to experience emotions and integrate them in executive functions; this core emotional deficit results in a failure of attachment to others, inattention to cues of impending punishment, and insensitivity to reward or punishment (Blair, 2003, 2006; Fowles & Dindo, 2006; Hiatt & Newman, 2006).

A few theoretical models reject the notion that psychopathy is a mental abnormality at all. First, some interpersonal and behavioral genetic theories view psychopathy as an extreme variant of the same personality traits found in all people (Livesley, 1998; Miller, Lynam, Widiger, & Leukefeld, 2001). According to these theories, psychopathy is not associated with any unique or specific causal influences and any differences between people with versus without the disorder are quantitative rather than qualitative in nature – that is, a matter of degree rather than of kind. Second, some sociobiological and evolutionary theories view psychopathy as a specific adaptation to environmental conditions (Mealey, 1995). According to these theories, the human species has the genetic capacity to express traits associated with psychopathy. In sociobiological theories, the genetic disposition for psychopathy exists in only a minority of humans and its manifestation is only partially dependent on environmental circumstances; but the genetic disposition confers an advantage in terms of enhanced reproductive success for affected individuals. In evolutionary theories, the genetic disposition exists in all humans, and its manifestation is highly dependent on specific environmental triggers; the genetic disposition confers an advantage in terms of reproductive success for the species as a whole – or, at least, conferred an advantage for the species at some point during human evolution.

7.2 The Legal Relevance of Psychopathy

7.2.1 Mental Disorder and the Law

Law, most generally, is a set of rules and procedures designed to regulate the behavior of people (e.g., Melton, 1985). The fundamental goal of the law is to prevent and resolve, in a principled manner, interpersonal conflict. The law's usual response to conflict assumes that the people involved are true agents, able to think and act in a reasoned, deliberate manner (Morse, 2004). When people's agency is disturbed and their behavior is irrational or involuntary – that is, when they suffer from some kind of cognitive or volitional impairment – as a direct consequence of mental disorder, the law may respond differently by permitting the state to exercise its powers of control over citizens (Morse, 2002, 2004; Schopp, 2001; Slobogin, 2007; Verdun-Jones, 1989). The rationale for exercising power is to ensure the safety and well being either of people suffering from mental disorder (in the case of *parens patriae* powers) or of the general public (in the case of police powers).

But how does the law determine when a person's cognitive or volitional abilities are sufficiently impaired by mental disorder to trigger the need for special care or control? Analyses of this issue by numerous psycholegal scholars – including Grisso (2003) Melton, Petrila, Poythress, and Slobogin (2007), Morse (2004), and Schopp (2001) – concur that three general requirements must be met (see Fig. 7.1). First, the person must suffer from a *bona fide* mental disorder. Second, the person must suffer an impairment of legally relevant cognitive or volitional functions.[1] And third, the impairment of cognitive or volitional functions must be due *at least in part* to the mental disorder – or, put differently, there must exist a discernible causal nexus between the mental disorder and the impairment of cognitive or volitional functions.

Schopp (2001, p. 46) summarized the requirements as follows:

Persons are not eligible for legal status S if and only if:

1. they suffer impairment of psychological capacities
2. rendering them unable to competently perform
3. psychological operations O.

Let us now examine the first two requirements in greater detail, especially insofar as they relate to psychopathy.

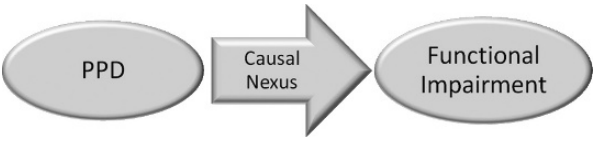

Fig. 7.1 Three conditions necessary for psychopathic personality disorder (PPD) to be legally relevant

[1] Although the law often is vague concerning the cognitive or volitional functions that are legally relevant (Schopp, 2001).

7.2.2 Is Psychopathy a Mental Disorder?

Mental disorder is defined differently in law than in the mental health professions (Melton et al., 2007; Schopp, 2001). The legal definition is not bound by the diagnostic criteria contained in any specific nosological system in psychology or psychiatry. It may be considered broader than the mental health definition in the sense that the legal definition typically is defined as an abnormality of the mind or mental functions. But it is also narrower in the sense that it includes only conditions that are internal (reside within the person), intransient (persistent), and involuntary (are outside his or her control), thereby excluding problems stemming from ephemera, environmental factors, or bad decisions (Verdun-Jones, 1989). In practice, this means that some abnormalities or conditions recognized by mental health professionals and included in the *DSM-IV* may not be considered *bona fide* mental disorders in the law (e.g., simple intoxication resulting from voluntary ingestion of a psychoactive substance).

According to this analysis, psychopathy meets the legal criteria for mental disorder. It is an abnormality of personality functions recognized in official nosological systems. It is persistent. It reflects something more than simply social deviance or bad choices. A few statutes have attempted to specifically exclude psychopathy as a legally recognized mental disorder on the grounds that the diagnosis merely reflects repeated antisocial acts (e.g., the proposed standard for legal insanity in the Model Penal Code; American Law Institute, 1962), a view shared by some legal commentators (e.g., McSherry, 1997, 1999); but, as is clear from the previous discussion, this is an inaccurate characterization. Psychopathy comprises a broad range of symptoms, and repeated antisocial conduct is not considered sufficient – and may not even be necessary – for diagnosis.

7.2.3 Can Psychopathy Impair Cognitive or Volitional Functions?

Cognitive functions are construed in broad terms in the law as those related to the capacity for rational thought, including the abilities to perceive the outside world accurately, to weigh or consider information, and to appreciate meaning or consequences of interpersonal behavior; in contrast, volitional functions are related to people's ability to exercise their agency, intentionality, or instrumentality – that is, their the capacity for voluntary and purpose behavior, including the abilities to choose goals, make and implement plans, and evaluate and revise plans (e.g., Denno, 2003; Malle & Nelson, 2003; McSherry, 2003; Morse, 2002, 2004; Shuman, 2002). The law is interested in a person's ability to make decisions, discharge responsibilities, or self-regulate behavior only in very specific contexts. Also, the law is interested only when people have major functional impairments in these areas; people need only to demonstrate some basic or minimal capacity in the relevant domains (Melton et al., 2007; Verdun-Jones, 1989).

There is considerable scientific evidence supporting the view that psychopathy is associated with some impairment of cognitive functioning. The primary finding

from experimental research indicates that psychopathic offenders have problems perceiving and processing abstract and emotional information, especially linguistic information. For example, compared to non-psychopathic controls, psychopathic offenders have difficulty recognizing abstract and emotional words in lexical decision tasks; exhibit little differentiation between emotional and non-emotional words on behavioral tasks and measures of cortical activity; do not discriminate well between various facial expressions of emotion; and have problems interpreting metaphors (e.g., Hastings, Tangney, & Stuewig, 2008; Hervé, Hayes, & Hare, 2003; Kiehl et al., 2006; Kiehl, Hare, McDonald, & Brink, 1999; Verona, Patrick, Curtin, Bradley, & Lang, 2004; Williamson, Harpur, & Hare, 1991). The corpus of relevant research comprises literally scores of studies conducted by scores of independent investigators working in dozens of countries over the past 20 years.

There is also considerable evidence indicating that psychopathy is associated with impairment of volitional functioning. The findings from experimental research here indicate that psychopathic offenders have problems evaluating the potential consequences of their actions, inhibiting impulses, implementing plans, and learning from punishment. For example, compared to non-psychopathic controls, psychopathic offenders show little anticipatory anxiety in the face of an impending aversive stimulus; over-focus on cues of potential reward, ignoring cues of potential punishment; and have trouble sustaining attention (Blair et al., 2004; Hiatt, Schmitt, & Newman, 2004; Mitchell et al., 2006). The corpus of relevant research is even older and larger than that supporting cognitive impairment, comprising hundreds of studies over almost 50 years.

7.2.4 Is the Impairment Sufficient to Mitigate Culpability?

Anglo-American legal tradition holds that people are culpable and therefore deserving of denunciation or punishment only when they engaged in proscribed behavior voluntarily and knowingly (Golding, Skeem, Roesch, & Zapf, 1999; Melton et al., 2007; Morse, 2002; Schopp, 2001; Slobogin, 2007; Verdun-Jones, 1989). This leads to two potential ways in which culpability can be mitigated. First, people accused of crimes can claim that their behavior was not voluntary because they had not real choice or were incapable of deliberation. If this claim is accepted, then the *actus reus* element of the offense has been negatived; in essence, they have been found not to have engaged in intentional, purposive behavior because they could not formulate, choose, and implement plans. Second, people accused of crimes can claim that they did not understand or appreciate the nature, consequences, or wrongfulness of their actions. Acceptance of this claim means that the *mens rea* element of the offense has been negatived; they have been found not to have had evil intent when engaging in the proscribed behavior because they could not attend to, perceive accurately, or think rationally about the environment. Depending on the law of the land and the nature and severity of the functional impairment stemming from it, mental disorder may be recognized as a factor that can negative either the *actus reus* or the

mens rea. The mitigation of culpability may be complete, resulting in acquittal, or it may be partial, resulting in reduced punishment. Deciding this issue requires a retrospective assessment of mental state, an evaluation of the person's psychological functioning at some time in the past.

We have seen that psychopathy is recognized in the law as a mental disorder that can impair cognitive or volitional functions. But is the nature and severity of functional impairment associated with psychopathy sufficient to mitigate culpability? Many different courts have grappled with this question over the years, and most have concluded that the answer is no (DeMatteo & Edens, 2006; Golding et al., 1999; Lyon & Ogloff, 2000; Rudnick & Levy, 1994; Walsh & Walsh, 2006).

With respect to cognitive functions, the impairment associated with psychopathy may be characterized as restricted in nature or scope and moderate in severity. People with psychopathy have fundamental difficulties perceiving or reasoning about the emotional and interpersonal consequences of their actions. There is little doubt that cognitive impairment of this sort is likely to influence their behavior on a day-to-day basis. Yet their understanding of the physical consequences of their actions is intact; they can use this ability to compensate for or overcome their impairment (at least to some extent), and the law expects them to do so. To illustrate, a person with psychopathy knows that strangling another person for the sheer fun of it has the potential to cause serious injury or death, yet may be indifferent as to the impact of these consequences for self or others. In simple terms, the person with psychopathy knows such an act is considered immoral and illegal and has consequences that are considered bad or harmful by others, even though he or she may be rather sanguine about the act. The law typically holds that people with psychopathy are capable of and can reasonably be expected to use their intact cognitive skills and abilities to overcome their impairments when making decisions with potentially serious consequences (Campbell, 1992; Fine & Kennett, 2004; McSherry, 1997, 1999; Schopp & Slain, 2000; Verdun-Jones, 1989). Similarly, the law expects that people with serious color blindness should be aware of and compensate for their handicap – knowing they may have difficulty discriminating between red and green traffic lights, they should either avoid driving or develop strategies to ensure they can drive safely.

With respect to volitional functions, the impairment associated with psychopathy may also be characterized as restricted in nature or scope and moderate in severity. People with psychopathy have fundamental difficulties maintaining attention or interest and exerting effort with respect to goal-directed activity. Again, although there is little doubt that volitional impairment of this sort influences behavior on a day-to-day basis, it is possible for people with psychopathy to perceive alternative courses of action, make choices, and compensate for or overcome their volitional impairment (at least to some extent) using other skills or abilities. Another illustration: A person with psychopathy may find working for a living very tedious and have fantasies of robbing a bank, but experiences the idea of bank robbery as a choice or possible future that requires effort or planning rather than as an unavoidable destiny or irresistible impulse. Thus, although they may want to engage in antisocial activity more often than do others, people with psychopathy are capable of exercising true agency with respect to this decision and the law expects them to do so.

7.2.5 Is the Impairment Sufficient to Justify Commitment?

Here, commitment – that is, civil commitment – refers to the preventive detention of people based on risk for future harm to others.[2] In contrast to culpability, deciding the issue of commitment requires an assessment of current mental state with an eye toward the future, that is, an evaluation of the person's likely psychological functioning in the foreseeable future. Two types of commitment are permitted under the civil law of various Anglo-American jurisdictions (Melton et al., 2007; Schopp, 2001; Slobogin, 2007). The first is traditional civil commitment under mental health statutes. It typically does not require that people have any history of violent behavior, but instead requires they pose an imminent risk for violence due to acute mental disorder. The commitment generally is short-term in nature, with a time horizon of days to weeks (although it may be extended). The second, newer form of civil commitment is under specialized statutes, such as sexually violent predator or (proposed) dangerous and severe personality disorder statutes, that target offenders nearing release from a custodial sentence for a violent offense (Buchanan & Leese, 2001; Janus, 2000). It typically requires that people have committed serious violence or sexual violence in the past, and they also pose a persistent risk for future (sexual) violence due to chronic mental disorder. The term of commitment here generally is long-term, with a time horizon of years, and may even be indefinite. Although statutes differ in terms of the specific type and quantum of risk that must be posed to justify commitment, a common element is that all require the state to demonstrate that the violence risk is due (at least in part) to mental disorder. Before the state can commit, it must prove that the person has a mental disorder that impairs cognitive or volitional functions in a way that increases violence risk, and continued commitment requires the state provides people treatment (or management) for mental disorder and regularly evaluates them to determine whether they should be released because they are no longer pose a violence risk due to mental disorder (i.e., their mental disorder remits, their cognitive or volitional impairments are remediated, or the risks they pose are no longer considered serious). (For further discussion, see Janus, 2000; Morse, 2002; Schopp, 2001.)

Psychopathy is a mental disorder that impairs cognitive or volitional functions; but is the impairment sufficient to justify commitment? Courts that have grappled with this question typically concluded that the answer is no with respect to traditional or short-term commitment, but yes with respect to indefinite or long-term commitment (DeMatteo & Edens, 2006; Lyon & Ogloff, 2000; Walsh & Walsh, 2006; Zinger & Forth, 1998).

It is not entirely clear why psychopathy generally is considered insufficient as a basis for short-term civil commitment. Based on the previous discussion, it appears inarguable that psychopathy is associated with cognitive or volitional impairment,

[2] Civil commitment also can be justified purely on *parens patriae* grounds due to risk of harm to self through suicide or self-neglect (Melton et al., 2007; Schopp, 2001), but our focus here is on violence risk.

and even though this impairment may be restricted in scope and only moderate in severity, it is certainly associated with a substantially increased risk for serious crime or violence and poor response to community-based strategies designed to manage or reduce this risk. There are at least two possible explanations. The first is that courts may view short-term civil commitment as requiring a very high level of cognitive or volitional impairment – a gross disturbance of perception, reasoning, or behavioral regulation – to avoid excessive use of police powers by the state, especially in cases where the person may have no history of actual, attempted, or threatened harm of another person. Because psychopathy is typically associated with cognitive and volitional impairment that is restricted in nature or scope and moderate in severity, as discussed previously, it may simply not meet the level of impairment typically required by courts. The second possible explanation focuses on the risks associated with psychopathy. Perhaps courts view psychopathy as meeting the criterion for commitment with respect to level of impairment, but do not accept that it is associated with an imminent risk of harm. Because psychopathy is a chronic condition, courts may believe the violence risk stemming from it is also chronic, rather than acute or limited in duration to the near future. Whatever the explanation, courts and evaluating experts appear to have had little difficulty determining that psychopathy can justify long-term commitment, either on its own or as a co-factor (Jackson & Richards, 2007; Levenson & Morin, 2006; Sreenivasan, Weinberger, & Garrick, 2003). Apparently even the restricted, moderate severity cognition and volitional impairment associated with psychopathy is sufficient to conclude that the disorder may elevate risk over the long-term – at least in cases where the person has perpetrated (sexual) violence in the past.

Part 2: Synthesis

7.3 Role of Psychopathy in Culpability and Commitment Decisions

To summarize the analysis presented in Part 1:

1. Psychopathy is considered a *bona fide* mental disorder in the fields of clinical and experimental psychopathology;
2. Psychopathy also meets the general legal criteria for a mental disorder, that is, it is an abnormality of the mind that is internal, intransient, and involuntary;
3. Psychopathy is associated with an impairment of some specific cognitive and volitional functions – especially cognitive functions related to and volitional impairments related to – that may be characterized as relatively restricted in nature and moderate in severity;
4. The nature and severity of the functional impairments associated with psychopathy is not generally considered sufficient to mitigate culpability; and,
5. The nature and severity of the functional impairments associated with psychopathy is not generally considered sufficient to justify traditional, short-term civil

commitment (which does not require that the person also has committed violence in the past), but is sufficient to justify newer, long-term civil commitment (which does require that the person also has a history of violence or sexual violence).

The law's view of some mental disorders is quite complex. Conditions such as schizophrenia, depression, or dementia have a broad range of symptoms that vary greatly in severity and fluctuate over time; they may be considered legally relevant as aggravating factors in commitment decisions, but also as mitigating factors in culpability decisions. In contrast, the law's view of psychopathy is unambiguously negative: It causes chronic functional impairment that is serious enough to be considered a potential aggravating factor for the purposes of some commitment decisions, but not enough to be a potential mitigating factor in culpability decisions. According to the law, people with psychopathy may have problems fully appreciating the emotional meaning or consequences of their actions and using their emotions to make choices and plans, but they ought to know better than to commit serious crime and violence.

7.3.1 Emergent Issues: Individualized Inquiry and Temporal Focus

One important issue emerging from the analysis in Part 1 is that although mental disorder such as psychopathy may be considered potentially relevant to legal decisions, one cannot base decisions in an individual case on stereotypical views of the "average" or "typical" person suffering from a disorder. To mitigate culpability or justify commitment based on mental disorder, it is necessary to demonstrate to the satisfaction of the trier of fact that *this person* suffers from a mental disorder, that *this person* suffers a legally relevant impairment of cognitive or volitional functions, and that the mental disorder caused the functional impairments in *this person.*

A second emergent issue is that psycholegal evaluations of culpability and commitment are fixed or focused on a critical point in time: A time in the past, for culpability decisions; or in the present and future, for commitment decisions (Schopp, 2001). As mental disorder, functional impairment, and any causal nexus between them are dynamic in nature and fluctuate over time, one cannot take the status of these factors at one time and use this to infer status at other times. To mitigate culpability or justify commitment based on mental disorder, it is necessary to demonstrate that the three elements (mental disorder, functional impairment, and causal nexus between them) existed, exists, or will exist at the critical time.

Let us focus of the remainder of our discussion on decisions regarding long-term civil commitment, which, according to the analysis in Part 1, are typically most relevant to psychopathy. Assume that Mr. A has been referred for a civil commitment as a sexually violent predator based on the claim that he poses a risk for future sexual violence due to psychopathic personality disorder. Assume further that, according to relevant statutory and case law, civil commitment requires the state to prove that Mr. A "currently suffers from a mental disorder that impairs his emotional or volitional controls to an extent beyond that observed in the ordinary

or typical criminal in such a way that he is more likely than not to commit sexual violence in the future, if not confined to a secure facility."[3] As part of a psycholegal assessment, the evaluator, Dr. B, must answer the following specific questions:

1. *Is there evidence that Mr. A currently suffers from psychopathy?* Answering this question requires the evaluator to assess the presence of *active* symptoms of psychopathic personality disorder. The scientific and professional literatures provide some guidance for Dr. B concerning the symptoms she should consider and how to assess them. Dr. B then must review Mr. A's history to determine which of these symptoms have ever been present and how they have fluctuated over time, but the key issue is whether there is any evidence these symptoms are still present. Dr. B cannot assume that once a symptom has been present, it is (and always will be) active; or that once the symptoms have been sufficient to constitute a full-blown mental disorder, they still (and always will) do so.
2. *Is there evidence that Mr. A currently suffers from a substantial impairment of cognitive or volitional functions due to psychopathy?* Answering this question requires the evaluator to directly assess both the presence and the severity of functional deficits at the time of assessment – and, arguably, to consider whether they will persist into the foreseeable future. The legal and professional literatures provide guidance for Dr. B concerning which deficits are relevant to the specific legal issues being decided, how they may be assessed, and the degree of impairment that is required for the deficits to be considered legally relevant. Dr. B must avoid the dangerous assumptions that (a) functional deficits must be present if Mr. A suffers from psychopathy, and (b) functional deficits evident in Mr. A's history must be present at the time of assessment.
3. *Is there evidence of a causal nexus between psychopathy and impairment of cognitive or volitional functions in the case of Mr. A?* This is the most complex and difficult question of all to answer, and one for which Dr. B will find little guidance in the scientific, professional, or legal literatures. Her task is to determine the extent to which Mr. A's legally relevant functional deficits can be attributed to (i.e., are caused by or the result of) psychopathy. But a causal nexus does not exist physically, and cannot be proved or disproved through physical evidence. Rather, it is an explanation, interpretation, or account of evidence whose plausibility is judged according to the extent it coheres with the facts of the case, common sense views of the world, and (where applicable) scientific research and theory. This explanation must be based on something more than the mere co-occurrence of psychopathy and functional impairment; in this way, the law avoids the stereotypical, discriminatory, and absurd result that everyone who suffers from psychopathy is impaired. Instead, Dr. B must attempt to rule out

[3] This hypothetical legal standard is intended to reflect the U.S. Supreme Court decisions in *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002), as well as the sexually violent predator statutes used in various states (e.g., Janus, 2000; Schopp, 2001).

other plausible explanations, such as chance or the presence of some other factor responsible for the functional deficits.[4]

7.4 Recommendations for Practice

The preceding section attempted to clarify the questions that forensic mental health professionals must answer when conducting psycholegal evaluations relevant to culpability and commitment decisions. But how are professionals to answer these questions? What assessment procedures should they use (or avoid using) in their evaluations? Let us now make recommendations for practice, focusing again specifically on psychopathy as it pertains to the issue of long-term civil commitment. These recommendations flow directly from the analysis in Part 1 and synthesis in Part 2, but also take into account more general discussions of forensic mental health assessment, the assessment of personality disorder, and the assessment of psychopathy.

7.4.1 Recommendation #1: Use Standardized Psychological Tests Measures to Assess Lifetime Presence of Psychopathic Symptomatology

Psychological tests with established reliability and validity have been developed to provide a comprehensive assessment of psychopathic symptomatology. The most widely used tests for assessing psychopathy in the context of civil long-term commitment evaluations are the *PCL-R* and *PCL:SV.* Both tests are symptom construct rating scales intended for use by expert observers. Ratings are based on all available clinical data, including collateral information such as documentary records and other third party information; this makes them particularly well-suited for evaluations in forensic contexts, where reliance on unsubstantiated self-report is highly problematic. The test manuals provide instructions for calculating continuous scores and interpreting them relative to norms from various reference groups; they also provide cutoffs for making categorical diagnoses. The *PCL-R* is most appropriate for assessment of people who are repeat offenders; the *PCL:SV* is best suited for people with no history or a limited history of arrest, charge, or conviction.

Evaluators should avoid heavy reliance on the *DSM-IV-TR* diagnostic criteria for antisocial personality disorder, which focus to a large extent of overt antisocial acts. A history of antisocial behavior may be of considerable diagnostic significance in civil psychiatric settings, where only a minority of patients has been charged with or convicted of criminal offenses. But antisocial behavior obviously has little

[4] This example is not meant to imply that commitment as a sexually violence predator requires a diagnosis of psychopathy. The same logic applies, *mutatis mutandis*, if Mr. A is presumed to be suffering from some other mental disorder, such as paraphilic disorder, mental retardation, or schizophrenic disorder.

diagnostic significance in forensic settings, where virtually everyone has record of arrests (APA, 1994, 2000).

Evaluators also should avoid heavy reliance on self-report scales or inventories to assess psychopathy. Self-report measures have at best moderate concurrent validity with respect to clinical assessments made using the *PCL-R*, *PCL:SV*, or *DSM-IV-TR* criteria (Edens, Hart, Johnson, Johnson, & Olver, 2000; Hemphill & Hart, 2003).

7.4.2 Recommendation #2: Use Unstructured Clinical Judgment to Assess Current Psychopathic Symptomatology

Using the *PCL-R* or *PCL:SV* to assess the presence of lifetime psychopathic symptomatology is a good start, but it is actually not directly relevant to the legal issue underlying long-term civil commitment, which is concerned with current symptomatology. Unfortunately, there exist no assessment procedures with established validity or reliability that can be used to assess current psychopathic symptomatology. This means that evaluators should use the *PCL-R*, *PCL:SV*, or some other set of comprehensive diagnostic criteria – such as those in the *ICD-10*, the Psychopathy Criterion Set from the *DSM-IV* Antisocial Personality Disorder Field Trial (Hare, Hart, Forth, Harpur, & Williamson, 1998), or the Comprehensive Assessment of Psychopathic Personality Disorder (Hart, 2007) criteria – as a conceptual framework for evaluating current symptomatology, looking for evidence (in the form of overt behavioral indicators) that symptoms were present within the past few months or perhaps years. Although this approach makes good sense, evaluators must be prepared to admit that there is no scientific support for it.

If evaluators find evidence of possible current psychopathic symptomatology, they should try to rule out other potential explanations or causes, such as comorbid acute mental disorder or physical illness or situational exacerbation of "normal" personality traits. But once again, there are no standardized procedures that can be used for this purpose, and evaluators are left to use unstructured clinical judgment, guided only by theory, experience, and common sense.

7.4.3 Recommendation #3: Use Unstructured Clinical Judgment to Assess Current Functional Impairment

After evaluators have determined which psychopathic symptoms are currently present, they should attempt to identify current cognitive or volitional impairment that may be associated with these symptoms. Once again, the major hurdle for evaluators is a total lack of standardized assessment procedures. Part 1 suggests some "hot leads" concerning the types functional impairment evaluators are most likely to encounter, such as problems perceiving and processing abstract and emotional information or problems evaluating the potential consequences of actions, inhibiting impulses, implementing

plans, and learning from punishment. But in any given case, other functional impairments may be present instead of or in addition to these likely candidates. With respect to long-term civil commitment, the most relevant functional impairment is probably volitional in nature. When evaluators find evidence of possible functional impairment, they then need to determine its severity (e.g., relative to those observed in typical offenders) and whether it is present currently (e.g., in the past few months or perhaps years).

7.4.4 Recommendation #4: Use Structured Professional Judgment to Formulate a Causal Explanation of Risk for Future Sexual Violence

After evaluators have determined that both psychopathic symptoms and functional impairment are present, their next task is to evaluate the presence of a causal nexus between the two – and, yet again, the evaluation is bedeviled by the lack of standardized assessment procedures.

Although there is no valid and reliable way of directly assessing the causal nexus, it is possible to formulate and evaluate competing causal explanations, relying in large part on structured professional judgment procedures such as the Sexual Violence Risk-20 (Boer, Hart, Kropp, & Webster, 1997) and the Risk for Sexual Violence Protocol (RSVP; Hart et al., 2003). The SVR-20 and RSVP are designed to guide comprehensive assessments of risk for sexual violence. They ensure evaluators assess all the primary risk factors for sexual violence identified in the scientific and professional literatures. Once all the major risk factors present in the case at hand have been identified, as well any unusual or case-specific risk factors, evaluators should try to develop one or more theories to explain how and why the person being evaluated made choices about sexual violence in the past – why he or she decided to commit sexual violence at some times, or against some people, or for some reasons, but not at other times or against other people or for other reasons (e.g., Hart et al., 2003). As discussed previously, the plausibility of the various causal explanations can be judged on logical grounds, according to the extent they cohere with the facts of the case, common sense views of the world, and scientific research and theory.

Once the implausible causal explanations have been rejected, evaluators should examine the survivors to determine whether psychopathic symptoms and their associated functional deficits play one or more causal roles (e.g., as motivating, disinhibiting, or destabilizing factors). To the extent that plausible causal explanations rely on psychopathy, then the existence of a causal nexus is supported; but if one or more plausible causal explanations do not rely on psychopathy, then the existence of a causal nexus is questionable. Note that long-term civil commitment laws do not require that psychopathy is the only or even the primary causal factor, merely that it plays some important causal role.

Finally, evaluators should consider whether the plausible explanations for past sexual violence can be projected into the future. A “good” causal explanation will

not only account for the past, but also for perceived risk for future sexual violence. Unless the (putative) causal nexus is likely to persist into the foreseeable future, it cannot be used as a basis for long-term civil commitment.

Two points are worth discussing here. First, it is important that evaluators consider multiple or competing causal explanations for sexual violence. Philosophers and cognitive scientists have long warned us of the problems with trying to confirm theories, rather than trying to disconfirm them or pitting them against each other. The plausibility or verisimilitude of a particular causal explanation must be judged *vis-à-vis* alternatives. Second, it is important for evaluators to keep in mind that their causal explanations are not direct observations of a physical phenomenon or deductions based on strong theory; they are simply inferences from and limited by available evidence. Evaluators should advance causal explanations with humility, acknowledging they are uncertain and the cause of sexual violence in the case at hand are unknown and ultimately unknowable.

7.5 Conclusion

I hope it is clear from this chapter that we know quite a bit about psychopathy and its legal relevance; but everything we know is complex, uncertain, and grossly outweighed by what we do not know. Pity the poor forensic mental health professionals who must assess psychopathy as part of culpability or commitment decisions! We scientists and legal scholars have done precious little to help them conduct good evaluations –we have not done the relevant research, developed the standardized assessment procedures, or written explicit guidelines.

The benefits of further work in this area could be tremendous. They have the potential to clarify our thinking beyond the legal issues of culpability and commitment, and beyond psychopathy to other mental disorders; indeed, they have the potential to clarify some of the theoretical foundations of mental health law.

References

Alterman, A. I., Cacciola, J. S., & Rutherford, M. J. (1993). Reliability of the Revised Psychopathy Checklist in substance abuse patients. *Psychological Assessment, 5,* 442–448.

American Law Institute. (1962). *Model Penal Code.* Philadelphia: Author.

American Psychiatric Association. (1994). *Diagnostic and statistical manual of mental disorders* (4th ed.). Washington, DC: Author.

American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4th ed., Text Revision). Washington, DC: Author.

Arrigo, B. A., & Shipley, S. (2001). The confusion over psychopathy (I): Historical considerations. *International Journal of Offender Therapy and Comparative Criminology*, *45*, 325–344.

Berrios, G. E. (1996). *The history of mental symptoms: Descriptive psychopathology since the nineteenth century.* Cambridge, UK: Cambridge University Press.

Blair, R. J. R. (2003). Neurobiological basis of psychopathy. *British Journal of Psychiatry, 182*, 5–7.

Blair, R. J. R., Mitchell, D. G. V., Leonard, A., Budhani, S., Peschardt, K. S., & Newman, C. (2004). Passive avoidance learning in individuals with psychopathy: Modulation by reward but not by punishment. *Personality and Individual Differences*, *37*, 1179–1192.

Blair, R. J. R. (2006). Subcortical brain systems in psychopathy: The amygdala and associated structures. In C. J. Patrick (Ed.), *Handbook of psychopathy* (pp. 296–312). New York: Guilford.

Boer, D. P., Hart, S. D., Kropp, P. R., & Webster, C. D. (1997). *Manual for the Sexual Violence Risk – 20: Professional guidelines for assessing risk of sexual violence.* Vancouver, British Columbia: British Columbia Institute on Family Violence and Mental Health, Law, & Policy Institute, Simon Fraser University.

Buchanan, A., & Leese, M. (2001). Detention of people with dangerous severe personality disorders: A systematic review. *Lancet*, 358, 1955–1959.

Cadoret, R., Troughton, E., Bagford, J., & Woodworth, G. (1990). Genetic and environmental factors in adoptee antisocial personality. *European Archives of Psychiatry & Neurological Sciences*, *239*, 231–240.

Campbell, E. (1992). The psychopath and the definition of "mental disease or defect" under the Model Penal Code test of insanity: A question of psychology or a question of law? In J. R. P. Ogloff (Ed.), *Law and psychology: The broadening of the discipline* (pp. 139–170). Durham, NC: Carolina Academic Press.

Coccaro, E. F. (2001). Biological and treatment correlates. In W. J. Livesley (Ed.), *Handbook of personality disorders: Theory, research and treatment* (pp. 124–135). New York: Guilford.

Cooke, D. J. (1996). Psychopathic personality in different cultures: What do we know? What do we need to find out? *Journal of Personality Disorders*, *10*, 23–40.

Cooke, D. J., Michie, C., Hart, S. D., & Clark, D. A. (2005). Searching for the pan-cultural core of psychopathic personality disorder: Continental Europe and North America compared. *Personality and Individual Differences*, *39*, 283–295.

DeMatteo, D., & Edens, J. F. (2006). The role and relevance of the Psychopathy Checklist-Revised in court: A case law survey of U.S. courts (1991–2004). *Psychology, Public Policy, and Law*, *12*, 214–241.

Denno, D. W. (2003). A mind to blame: New views on involuntary acts. *Behavioral Sciences and the Law*, *21*, 601–618.

Edens, J. F., Hart, S. D., Johnson, D. W., Johnson, J. K., & Olver, M. E. (2000). Use of the Personality Assessment Inventory (PAI) to assess psychopathy in offender populations. *Psychological Assessment*, *12*, 132–139.

Fine, C., & Kennett, J. (2004). Mental impairment, moral understanding and criminal responsibility: Psychopathy and the purposes of punishment. *International Journal of Law and Psychiatry*, *27*, 425–443.

Fowles, D. C., & Dindo, L. (2006). A dual-deficit model of psychopathy. In C. J. Patrick (Ed.), *Handbook of psychopathy* (pp. 14–34). New York: Guilford.

Golding, S. L., Skeem, J. L., Roesch, R., & Zapf, P. A. (1999). The assessment of criminal responsibility: Current controversies. In I. B. Weiner & A. K. Hess (Eds.), *Handbook of forensic psychology* (2nd ed., pp. 379–408). New York: Wiley.

Grant, B. F., Hasin, D. S., Stinson, F. S., Dawson, D. A., Chou, S. P., Ruan, W. J., & Pickering, R. P. (2004). Prevalence, correlates, and disability of personality disorders in the United States: Results from the National Epidemiologic Survey on Alcohol and Related Conditions. *Journal of Clinical Psychiatry*, *65,* 948–958.

Grisso, T. (2003). *Evaluating competencies: Forensic assessment and instruments.* New York: Kluwer Academic/Plenum Publishing.

Hare, R. D. (1991). *Manual for the hare psychopathy checklist – revised.* Toronto, Canada: Multi Health Systems.

Hare, R. D. (2003). *Manual for the hare psychopathy checklist – revised* (2nd ed.). Toronto, Canada: Multi Health Systems.

Hare, R. D., Hart, S. D., Forth, A. E., Harpur, T. J., & Williamson, S. E. (1998). Psychopathic personality disorder: Development of a criteria set for use in the DSM-IV antisocial personality

disorder field trials. In T. A. Widiger, A. J. Frances, H. A. Pincus, R. Ross, M. B. First, W. Davis, & M. Kline (Eds.), *DSM-IV sourcebook* (Vol. 4, pp. 331–341). Washington, DC: American Psychiatric Association.

Hare, R. D., McPherson, L. E., & Forth, A. E. (1988). Male psychopaths and their criminal careers. *Journal of Consulting and Clinical Psychology, 56*, 710–714.

Hart, S. D. (2001). Forensic issues. In J. Livesley (Ed.), *The handbook of personality disorders* (pp. 555–569). New York: Guildford.

Hart, S. D. (2007, July). *Developing a new model of psychopathy: The Comprehensive Assessment of Psychopathic Personality (CAPP).* Paper presented at the Third International Congress of Psychology and Law, Adelaide, Australia.

Hart, S. D. (in press). Psychopathy. In A. Jamieson & A. Moenssens (Eds.), *Wiley encyclopedia of forensic science.* New York: Wiley.

Hart, S. D., & Cooke, D. J. (2007). Antisocial personality disorder. In E. Simonsen, E. Ronningstam, & T. Millon (Eds.), *WPA/ISSPD educational program on personality disorders* (pp. 60–66). Geneva, Switzerland: World Psychiatric Association. Access: http://www.wpanet.org/education/docs/isspdeduprogrammarch07.pdf

Hart, S. D., Cox, D. N., & Hare, R. D. (1995). *Manual for the Hare Psychopathy Checklist: Screening Version (PCL:SV).* Toronto: Multi-Health Systems.

Hart, S. D., Kropp, P. R., Laws, D. R., Klaver, J., Logan, C., & Watt, K. A. (2003). *The Risk for Sexual Violence Protocol (RSVP): Structured professional guidelines for assessing risk of sexual violence.* Burnaby, British Columbia: Mental Health, Law, and Policy Institute, Simon Fraser University; Pacific Psychological Assessment Corporation; and the British Columbia Institute Against Family Violence.

Hastings, M. E., Tangney, J. P., & Stuewig, J. (2008). Psychopathy and identification of facial expressions of emotion. *Personality and Individual Differences*, *44*, 1474–1483.

Hemphill, J. F., & Hart, S. D. (2003). Forensic and clinical issues in the assessment of psychopathy. In I. Weiner (Series Ed.) and A. M. Goldstein (Vol. Ed.), *Comprehensive handbook of psychology: Vol. 11. Forensic psychology* (pp. 87–107). New York: Wiley.

Hervé, H. F., Hayes, P. J., & Hare, R. D. (2003). Psychopathy and sensitivity to the emotional polarity of metaphorical statements. *Personality and Individual Differences*, *35*, 1497–1507.

Hiatt, K. D., & Newman, J. P. (2006). Understanding psychopathy: The cognitive side. In C. J. Patrick (Ed.), *Handbook of psychopathy* (pp. 334–352). New York: Guilford.

Hiatt, K. D., Schmitt, W. A., & Newman, J. P. (2004). Stroop tasks reveal abnormal selective attention among psychopathic offenders. Neuropsychology, 18, 50–59.

Jackson, R. L., & Richards, H. J. (2007). Diagnostic and risk profiles among civilly committed sex offenders in Washington state. *International Journal of Offender Therapy and Comparative Criminology*, *51*, 313–323.

Janus, E. S. (2000). Sexual predator commitment laws: Lessons for law and the behavioral sciences. *Behavioral Sciences and the Law, 18*, 5–21.

Kansas v. Crane, 122 S. Ct. 867 (2002.)

Kansas v. Hendricks, 521 U.S. 346 (1997).

Kiehl, K. A., Bates, A. T., Laurens, K. R., Hare, R. D., Pearlson, G., & Liddle, P. F. (2006). Brain potentials implicate temporal lobe abnormalities in criminal psychopaths. *Journal of Abnormal Psychology*, *115*, 443–453.

Kiehl, K. A., Hare, R. D., McDonald, J., & Brink, J. (1999). Semantic and affective processing in psychopaths: An event-related potential (ERP) study. *Psychophysiology, 36*, 765–774.

Lenzenweger, M. F., Lane, M. C., Loranger, A. W., & Kessler, R. C. (2007). DSM-IV personality disorders in the National Comorbidity Survey Replication. *Biological Psychiatry*, *62*, 553–564.

Levenson, J. S.; & Morin, J. W. (2006). Factors predicting selection of sexually violent predators for civil commitment. *International Journal of Offender Therapy and Comparative Criminology*, *50*, 609–629.

Livesley, W. J. (1998). The phenotypic and genotypic structure of psychopathic traits. In D. J. Cooke, A. E. Forth, & R. D. Hare (Eds.). *Psychopathy: Theory, research, and implications for society* (pp. 69–79). Dordrecht, The Netherlands: Kluwer.

Lyon, D. R., & Ogloff, J. R. P. (2000). Legal and ethical issues in psychopathy assessment. In C. B. Gacono (Ed.), *The clinical and forensic assessment of psychopathy: A practitioner's guide* (pp. 139–173). Mahwah, NJ: Erlbaum.

Malle, B. F., & Nelson, S. E. (2003). Judging *mens rea*: The tension between folk concepts and legal concepts of intentionality. *Behavioral Sciences and the Law*, *21*, 563–580.

McSherry, B. (1997). The reformulated defence of insanity in the Australian Criminal Code Act 1995 (Cth). *International Journal of Law and Psychiatry*, *20*, 183–197.

McSherry, B. (1999). Mental impairment and criminal responsibility: Recent Australian legislative reforms. *Criminal Law Journal*, *23*, 135–144.

McSherry, B. (2003). Voluntariness, intention, and the defence of mental disorder: Toward a rational approach. *Behavioral Sciences and the Law*, *21*, 581–599.

Mealey, L. (1995). The sociobiology of sociopathy: An integrated evolutionary model. *Behavioral and Brain Sciences, 18*, 523–599.

Melton, G. B. (Ed.) (1985). *Nebraska symposium on motivation: Vol. 33. The law as a behavioral instrument.* Lincoln: University of Nebraska Press.

Melton, G. B., Petrila, J., Poythress, N., & Slobogin, C. (2007). *Psychological evaluations for the courts: A handbook for attorneys and mental health professionals*, 3rd ed. New York: Guilford.

Miller, J. D., Lynam, D. R., Widiger, T. A., & Leukefeld, C. (2001). Personality disorders as extreme variants of common personality dimensions: Can the Five-Factor Model adequately represent psychopathy? *Journal of Personality*, *69*, 253–276

Mitchell, D. G. V., Fine, C., Richell, R. A., Newman, C., Lumsden, J., Blair, K. S., & Blair, R. J. R. (2006). Instrumental learning and relearning in individuals with psychopathy and in patients with lesions involving the amygdala or orbitofrontal cortex. *Neuropsychology*, *20*, 280–289.

Morse, S. J. (2002). Uncontrollable urges and irrational people. Virginia Law Review, 88, 1025–1078.

Morse, S. J. (2004). Preventive confinement of dangerous offenders. *Journal of Law, Medicine, and Ethics*, *32*, 56–72.

Neugebauer, R., Hoek, H. W., & Susser, E. (1999). Prenatal exposure to wartime famine and development of antisocial personality disorder in early adulthood. *Journal of the American Medical Association*, *282*, 455–462.

Repo-Tiihonen, E., Virkkunen, M., & Tiihonen, J. (2001). Mortality of antisocial male criminals. *Journal of Forensic Psychiatry*, *12*, 677–683.

Raine, A., Lencz, T., Bihrle, S., LaCasse, L., & Colletti, P. (2000). Reduced prefrontal gray matter volume and reduced autonomic activity in antisocial personality disorder. *Archives of General Psychiatry*, *57*, 119–127.

Raine, A., & Yang, Y. (2006). The neuroanatomical bases of psychopathy: A review of brain imaging findings. In C. J. Patrick (Ed.), *Handbook of psychopathy* (pp. 278–295). New York: Guilford.

Robins, L. N., Tipp, J., & Przybeck, T. (1991). Antisocial personality. In L. N. Robins & D. Regier (Eds.), *Psychiatric disorders in America: The Epidemiologic Catchment Area study* (pp. 258–290). New York: Free Press.

Rudnick, A., & Levy, A. (1994). Personality disorders and criminal responsibility: A second opinion. *International Journal of Law and Psychiatry, 17*, 409–420.

Rutherford, M., Cacciola, J. S., Alterman, A. I., McKay, J. R., & Cook, T. G. (1999). The 2-year test-retest reliability of the Psychopathy Checklist-Revised in methadone patients. *Assessment, 6,* 285–291.

Schopp, R. F. (2001). *Competence, condemnation, and commitment: An integrated theory of mental health law.* Washington, DC: American Psychological Association.

Schopp. R. F., & Slain, A. J. (2000). Psychopathy, criminal responsibility, and civil commitment as a sexual predator. *Behavioral Sciences and the Law*, *18*, 246–274.

Schroeder, M. L., Schroeder, K. G., & Hare, R. D. (1983). Generalizability of a checklist for assessment of psychopathy. *Journal of Consulting and Clinical Psychology, 51,* 511–516.

Shuman, D. W. (2002). Competence and mental impairment. In R. I Simon & D. W. Shuman (Eds.), *Retrospective assessment of mental states in litigation: Predicting the past* (pp. 425–443). Washington, DC: American Psychiatric Press.

Slobogin, C. (2007). *Proving the unprovable: The role of law, science, and speculation in adjudicating culpability and dangerousness.* New York: Oxford University Press.

Sreenivasan, S., Weinberger, L. E., & Garrick, T. (2003). Expert testimony in sexually violent predator commitments: Conceptualizing legal standards of "mental disorder" and "likely to reoffend." *Journal of the American Academy of Psychiatry and the Law*, *31*, 471–485.

Verdun-Jones, S. N. (1989). *Criminal law in Canada: Cases, questions and the Code.* Toronto: Harcourt Brace Jovanovich.

Verona, E., Patrick, C. J., Curtin, J. J., Bradley, M. M., & Lang P. J. (2004). Psychopathy and physiological response to emotionally evocative sounds. *Journal of Abnormal Psychology*, *113*, 99–108.

Walsh, T., & Walsh, Z. (2006). The evidentiary introduction of *Psychopathy Checklist-Revised* assessed psychopathy in U.S. courts: Extent and appropriateness. *Law and Human Behavior*, *30*, 493–507.

Widiger, T. A., & Corbitt, E. M. (1995). Antisocial personality disorder in DSM-IV. In J. Livesley (Ed.), *DSM-IV personality disorders* (pp. 127–134). New York: Guilford.

Williamson, S. E., Harpur, T. J., & Hare, R. D. (1991). Abnormal processing of affective words by psychopaths. *Psychophysiology, 28*, 260–273.

World Health Organization. (1992). *ICD-10: International statistical classification of diseases and related health problems,* 10th rev. Geneva, Switzerland: Author.

Zinger, I., & Forth, A. (1998). Psychopathy and Canadian criminal proceedings: The potential for human rights abuses. *Canadian Journal of Criminology, 40*, 237–276.

Chapter 8
Quagmire Ahead!: The Sticky Role of Behavioral Science in Capital Sentencing

Mario J. Scalora

Professors Slobogin and Krauss et al.'s chapters provide detailed as well as complementary reviews and commentary regarding the role of behavioral science data regarding dangerousness within capital sentencing contexts. Before describing some observations regarding the role of behavioral scientists, particularly clinicians, within capital cases, some comments concerning both papers are in order.

8.1 Jurisprudence of Dangerousness

Throughout his captivating work related to the "Jurisprudence of Dangerousness" in which the legal and policy underpinnings of utilizing risk related considerations for legally impactful circumstances are examined, Professor Slobogin detailed several objections to utilizing dangerousness determinations for the substantial deprivations of liberty. One of the more scientifically relevant is the "unreliability objection" through which he highlights questions regarding mental health practitioners' ability to accurately and reliably predict future dangerousness pertinent to the legal deprivation in question. He further argues for the government to be restricted on the nature of qualitative and quantitative information that is presented to prove the requisite level of dangerousness. Slobogin asserts that the government should only be permitted, when meeting its burden of proof regarding dangerousness, to rely upon previous criminal acts and expert testimony based on empirically derived probability estimates. He suggests that the government should be allowed to enter non-statistical, offender-centered data only when the defendant opens the door to non-statistical testimony by relying on it to prove he or she is not dangerous. Slobogin argues that this approach "allows the government to prove dangerousness in the most accurate, least confounding manner, while permitting the offender-respondent to attack

M.J. Scalora (✉)
Department of Psychology, University of Nebraska-Lincoln, 238 Burnett Hall, Lincoln, NE 68588-0308
e-mail: mscalora1@unl.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_9, © Springer Science+Business Media, LLC 2009

the state's attempt at preventive detention on the ground that the numbers do not accurately reflect his or her violence potential" (Slobogin, Chapter 5, this volume). Such an argument, though captivating, has not been embraced by decision makers. One reason for the lack of enthusiastic response to this proposal may be due to the assumption inherent in this argument that observational or non-statistical testimony may be of limited value related to determinations of dangerousness.

Regarding the "future dangerousness" criteria utilized as an aggravating factor in many capital punishment jurisdictions, Professor Slobogin asserts convincingly that substantially higher levels of proof should be required than typically required in such sentencing contexts. Through the "proportionality principle," he notes that the degree of dangerousness required for preventive detention should be roughly proportionate to the degree of liberty deprivation the state seeks. On a related note, Slobogin also argues for a higher standard of proof contrary to that accepted by the courts in capital sentencing based upon the proportionality of the liberty deprivation.

8.2 Limited Expertise and Experts

A central tenet in Professor Krauss, Lieberman, and Olson's paper challenges the ability of mental health professionals to reliably and accurately predict a defendant's future risk in capital sentencing contexts, especially if such formulations are based upon clinical experience. Such scientific limitations are particularly troubling given research indicating that juries are often focused on the defendant's future dangerousness as well as particularly swayed by the least reliable forms of expert testimony on this issue.

Professor Krauss et al. detailed the majority of states' continued reliance upon a defendant's future dangerousness as an aggravating circumstance in capital sentencing. He also details the recent pertinent literature related to the violence and prediction of such within correctional settings arguing substantial overestimation by mental health practitioners (Edens, Buffington-Vollum, Keilin, Roskamp, & Anthony, 2005). Professor Krauss is also correct in noting that factors that predicted violence and the rates of violence within and outside prison are not identical, especially given lower base rates within correctional settings (Edens et al., 2005). The evaluation protocols utilized in many correctional settings tend to focus upon less serious behaviors with the aim of placing inmates in appropriate security levels (i.e., the Level of Service Inventory-Revised (LSI-R) (Andrews & Bonta, 1995)) rather than predicting serious violent behavior (Edens, et al., 2005).

Professor Krauss summarizes the limited research on jurors' reactions to mental health professionals' predictions of future dangerousness in capital sentencing. He notes that in addition to sentencing jurors spending considerable time discussing future dangerousness, mental health expert testimony does not appear to improve jurors' ability to accurately determine a defendant's likelihood of serious prison violence. Professor Krauss also cites trial simulation research demonstrating that jurors are less persuaded by potentially more accurate predictions of future

dangerousness, and prefer to rely on the least scientifically accurate form of expert testimony. He described several potential solutions to address such difficulties.

8.2.1 The Role of Mental Health Professionals in Capital Sentencing

While both scholars adeptly detail the multitude of unresolved legal, policy, and scientific issues in utilizing dangerousness as a criterion pertinent to capital sentencing, additional consideration from a clinical perspective is worthwhile. As several commentators have noted, capital sentencing contexts provide rather unique ethical considerations not typically encountered in other forensic evaluations due to the stakes involved. Several commentators have noted that capital sentencing cases provide unique practice-based and ethical challenges not typically encountered in most forensic contexts (Cunningham, 2006; Marczyk, Knauss, Kutinsky, DeMatteo, & Heilbrun., 2008). These ethically complex situations are enhanced by the fact that clinicians can be drawn into these circumstances through a variety of roles. Cunningham (2006) referred to such roles as teaching witness, evaluating without direct assessment of the defendant, and evaluating with direct assessment of the defendant. However, practitioners may also be called as witnesses to speak of prior evaluation or treatment activity unrelated to the criminal context, but later called as witnesses in the capital context (e.g., correctional psychologist describing results of intelligence or personality testing performed upon defendant upon entrance into prison, school psychologist detailing results of prior intelligence testing performed several years prior). While a greater number of ethical demands and requirements have been described as relevant to prosecution-retained experts (e.g., Cunningham, 2006, Edens et al., 2005), several of the issues detailed below are pertinent across the range of expertise roles.

8.3 What Is the Nature of "Future Dangerousness" Being Predicted?

Both authors, through different perspectives, appropriately raised the policy and practical problems with the definition of dangerousness being a vague and undefined term. As Professor Slobogin noted, clarification is necessary with respect to both the type of predicted harm and type of act warranting extreme punishment as opposed to alternatives to capital punishment. The dearth of efforts to define dangerousness is in contrast to the significant attention to definition of mental retardation post-*Atkins* (DeMatteo, Marczyk, & Pich, 2007). These definitions of mental retardation both overlap with and display significant variance from accepted clinical standards pertaining to such developmental disorders.

The empirical literature addressing the prediction of violence within correctional settings is not only hampered by the lack of thresholds for what constitutes dangerousness, the correctional contexts in which dangerous acts could occur, but also vary

substantially across jurisdictions. In addition to varying levels of physical security and staff supervision, states vary regarding the level of inmate access to programming as well as access to other inmates when dealing with violent offenders. Despite increased use of alternatives to incarceration as well as reduced growth rates, the number of inmates in federal and state prisons remains quite substantial (Sabol & Couture, 2008), making inmate programming and housing decisions difficult. Further confounding this issue is that correctional institutions utilize broad definitions of inmate misconduct when classifying inmates for the purpose of housing and programming. Consideration of such a broad range of behavior (e.g., verbal threats, gambling, possession of contraband, as well as physically aggressive behavior) is critical for maintaining the order of institutions. Substantial efforts have been made over the past several decades regarding inmate classification for the purpose of maintaining safety and order within correctional institutions (Hardyman et al., 2002). As Cunningham & Sorensen (2007) demonstrated, several factors, including younger inmate age, shorter sentence, prison gang affiliation, prior prison violence, and prior prison term were predictive of violent institutional misconduct. However, the thresholds within correctional institutions to both define an act as violent as well as administrative standards of proof to verify such acts can by necessity be much lower in comparison to definitions utilized in community violence research.

In addition to more research being necessary to address the specific nature of correctional practices (structured and otherwise) utilized to predict inmate adjustment, more detailed assessment of the institutional and structural factors that mitigate violent inmate behavior (e.g., housing, movement restrictions) will be necessary to inform risk assessment activity if dangerousness remains as an aggravating standard for capital sentencing. Regardless, this author also concurs with Professor Krauss et al. that courts and legislatures should provide more detailed normative guidance by defining the relevant "society" (prison or general) as well as by defining thresholds of violence sufficient to qualify as dangerous for the purpose of capital sentencing. In this manner, they would inform both predictive and deliberative decision making made in capital sentencing contexts.

8.4 What Is Clinical Decision Making?

Consistent with many commentators in the area, Professors Slobogin and Krauss make reference to clinical decision making as mental health professionals displaying a common practice of relying upon "unstructured clinical judgment" in determining dangerousness within capital sentencing. Their commentary suggests that practice in this area reflects two dichotomous set of activities constituting either structured actuarial assessment versus unstructured clinical judgment—often favoring the use of actuarial or structured approaches rather than the less empirically supported forms of clinical judgment. However, the nature of practice ranges across both extremes as often portrayed within the literature. While it is not uncommon to find correctional professionals using any number of objective standardized assessment

instruments (e.g., Wormith, Olver, Stevenson, & Girard, 2007), the actual nature of what constitutes clinical judgment has been poorly described and defined. As Hart and colleagues (Hart, Michie, & Cook, 2007) have noted, clinicians often span a range of practices related to the integration of scientifically validated factors and instrumentation within predictive decision making. When utilizing actuarial measures, mental health practitioners must first determine the appropriateness of the instrument for the specific context utilized as well as the appropriateness of the application of the results to the subject in question. They must determine, for example, whether an instrument is appropriately normed for the individual in question. Though the violence prediction literature has often favored actuarial approaches, Hart, Michie, & Cook (2007) have raised concerns regarding the use of group-based actuarial instruments for individual risk predictions. Contrary to much of the discussion regarding actuarial instruments, these researchers assert a substantially high rate of error associated with actuarial instruments when they are applied to individual cases because their original validation samples were too small. These error rates are acceptable for group level prediction, but they increase dramatically when used to forecast the behavior of one individual. As a result, these instruments can be either unhelpful or irrelevant to predictions for a specific individual. Though this view is challenged by other researchers (e.g., Harris & Rice, 2007; Harris, Rice, & Quinsey, 2008), they raise a valid point regarding the interplay between subject-related factors pertinent to risk when compared to group-derived nomothetic data in high stakes situations.

Regardless of how structured the decision making approach utilized, Professor Krauss et al. note that more structured clinical approaches may not be as well received by jurors. Though more research is needed to address deliberative processes regarding such information, Krauss notes that jurors were often more swayed by unstructured expert testimony despite adversarial procedures such as cross-examination and competing defense expert testimony.

Regardless of how clinicians balance subject related versus group-oriented risk factors, Professors Krauss and Slobogin noted some potential structural legal solutions to the use of risk assessment data by capital jurors. Among the most promising suggested by recent research involves the use of cognitive instructions in advance of deliberations. For example, Krauss and colleagues (2004) studied whether mock jurors who were motivated to process risk assessment data in a rational versus experiential mode would be less biased toward actuarial assessments of future dangerousness. Mock jurors in a death penalty case were directed to adopt either a rational or experiential mode of processing by performing either math problems (rational) or a free drawing exercise (experiential) prior to the mock trial. Jurors who were motivated to process in a rational mode were more influenced by actuarial testimony, while those motivated to process in an experiential mode were more influenced by clinical testimony on the defendant's future dangerousness. Such results were replicated by Lieberman, Krauss, Kyger, and Lehoux (2007) with jurors' use of future dangerousness expert testimony in the civil commitment hearings of sexually violent predators.

Another solution proposed by Professor Slobogin involves the adoption of the more demanding Daubert criteria within sentencing, placing more accountability

upon mental health practitioners who provide opinions concerning predictions of violence to provide more scientific rationale for their assertions. However, as Professor Slobogin notes, courts have generally been resistant to reduce the flexibility of information accessible to them within the sentencing phase in general.

A more controversial solution identified by Professor Krauss et al. involves the dramatic step of charging mental health professionals with ethical violations for offering less than scientific expert testimony on future dangerousness in capital sentencing hearings due to the limitations within the scientific literature described earlier (see Edens, et al., 2005). The rationale for this strategy is that the threat of mental health practitioners facing the tangible loss of their licenses for offering such expert testimony would result in the profession policing itself. Not only is such a dramatic step rather difficult to enforce given problems discerning a bright line concerning when an ethical violation took place, it also appears to be mainly focused upon practitioners who provide assistance to prosecutors versus the defense. Is there not dubious support for mitigation data provided also? In addition, such a strategy may also ignore other contexts when practitioners could be called to testify related to previous assessment or treatment contacts with the defendant. Regardless, this author agrees that forensic experts must still provide opinions consistent with the nature and quality of the data and scientific support available.

8.5 Dual-Edged Sword of Mental Illness as a Mitigating Factor – Briar Patch of Mitigation

Given the dual-edged nature of mental illness as a aggravating and mitigating factor, even less research or guidance is available addressing the scientific or clinical notions of mitigation. If scientifically derived notions of risk assessment still overlap tenuously with the normative features of sentencing values inherent within capital sentencing, such conflict with normative values is more pronounced at the intersection between the diagnostic formulations of mental illness pertinent to mitigation of criminal acts.

Fabian (2003) defines mitigation within forensic evaluations as offering assistance with the objective to understand how the offence could have occurred in light of the defendant's background or mental functioning. While much has been published concerning the various methods through which practitioners produce risk assessment formulations (e.g., actuarial versus clinical, etc.), there is a substantial dearth of literature concerning the conceptualization of factors inherent within mitigation across a range of clinical and legal decision makers. Given the concerns that risk assessment data in certain forms may not necessarily meet Daubert evidentiary standards related to relevance or to validity or reliability objections, similar and substantial misgivings may also exist related to diagnostic formulations and their described relevance to the alleged criminal acts.

The concept of mitigation within forensic contexts has been extensively discussed from a theoretical as opposed to empirical points of view (e.g., Buchanan, 2000;

Martinovski, 2006). However, there is a substantial need for further scientific investigation in the area of assessing criminal responsibility given the dearth of literature (Stafford & Ben-Porath, 2002). Nicholson and Norwood (2000) performed one of the few studies assessing specific practices of forensic practitioners in criminal forensic evaluations, although they addressed adjudicative competence and criminal responsibility but not the specific issue of capital sentencing. Some have detailed recommendations for consideration and evaluation of childhood trauma and disorders as mitigating factors for capital cases (Goldstein, Goldstein, & Kalbeitzer, 2006). Substantial research attention is therefore needed regarding clinician and legal decision maker formulations pertaining to conceptual underpinnings of mitigation.

The limited empirical research available suggests that jurors may consider mitigation related factors to favor the defendant. In simulated juror research, Tetterton and Brodsky (2007) found that increasing the number of psychological disturbances and psychosocial circumstances presented resulted in higher perceptions of mitigating value by mock jurors. In addition, extended periods of childhood abuse suffered by the defendant were associated with an increase in juror compassion. Gordon and Brodsky (2007) found that mock jurors were more likely to be lenient in capitol sentencing in the presence of victim impact statements when there were mitigating circumstances such as mental retardation, hospitalization for a mental illness, schizophrenia, or sexual abuse as a child.

As Professors Krauss et al. and Slobogin both indicate, some jurisdiction may allow for consideration of mental illness as a mitigating factor in capital sentencing as insanity defense options may be legislatively curtailed at the adjudication level. Research assessing the impact of more permissive insanity criteria upon capital litigation would also be valuable. As Slobogin frames the question: "If a sentencer finds that an offender was substantially impaired in his ability to appreciate the wrongfulness of his act, but that this same lack of appreciation also makes him dangerous or contributed to the vileness of the crime, how is the sentencer to analyze the offender's eligibility for a death sentence? Is it appropriate to consider both the mitigators and the aggravators that result from mental disability, or may only the mitigators be considered?" (Chapter 5, this volume).

Part of the dual-edged sword inherent with mental illness is the notion of personality disorder, particularly antisocial personality disorder, which is prevalent across criminal populations (Fabian, 2003). Such comorbid conditions, as both Professors Slobogin and Krauss noted, may either limit the value of mitigation provided by other diagnoses of mental illness or be viewed as aggravating factors in their own right.

Given the over-representation of minorities within the criminal justice system and the documented underserved quality of mental health screening and intervention services to minority communities, it is not unusual for minority defendants to have been under-diagnosed regarding mental conditions relative to other populations (e.g., Abram, Teplin, & McClelland, 2003; Teplin, Abram, McClelland, Washburn, & Pikus, 2005). As a result, diagnostic indications of serious mental illness may first emerge during sentencing. Continued research in the area of mental health conditions of defendants across various legal contexts remains worthwhile.

8.6 The Need for Caution

At a minimum, the overwhelming scientific and policy literature suggests that mental health practitioners must exercise both significant deliberation concerning their role as well as substantial caution regarding their opinions when involved in capital sentencing. Significant research across a variety of domains is required for forensic practitioners to best serve decision makers regarding such profound issues.

In addition to numerous valuable points throughout their chapters, both Professors Slobogin and Krauss et al. suggest the value of removing future dangerousness as a standard within capital sentencing. In addition to the extensive technical and ethical challenges inherent in such a poorly defined concept, significant questions emerge from the research literature concerning whether the interpretation of such a standard by mental health and legal professionals as well as by jurors may be reflecting something other than the defendant's future dangerousness. Further, capital sentencing exacerbates the significance of the limitations within the already limited scientific literature concerning the nature of forensic professional's decision making related to mitigation as well as to dangerousness.

References

Abram, K. M., Teplin, L. A., & McClelland, G. M. (2003). Comorbidity of severe psychiatric disorders and substance use disorders among women in jail. *American Journal of Psychiatry*, *160*, 1007–1010.

Andrews, D., & Bonta, J. (1995). *LSI-R: The level of service inventory-revised.* Toronto, Canada: Multi-Health Systems.

Buchanan, A. (2000). *Psychiatric aspects of justification, excuse and mitigation: The jurisprudence of mental abnormality in Anglo-American criminal law.* London, England: Jessica Kingsley Publishers.

Cunningham, M. D. (2006). Informed consent in capital sentencing evaluations: Targets and content. *Professional Psychology: Research and Practice*, *37*, 452–459.

Cunningham, M. D., & Sorensen, J. R. (2007). Predictive factors for violent misconduct in close custody. *The Prison Journal*, *87*, 241–253.

DeMatteo, D., Marczyk, G., & Pich, M. (2007). A national survey of state legislation defining mental retardation: Implications for policy and practice after Atkins. *Behavioral Sciences & the Law*, *25*, 781–802.

Edens, J., Buffington-Vollum, J., Keilin, A., Roskamp, P., & Anthony, C. (2005). Predictions of future dangerousness in capital murder trials: is it time to "disinvent the wheel?" *Law and Human Behavior, 29*, 55–87.

Fabian, J. M. (2003). Death penalty mitigation and the role of the forensic psychologist. *Law & Psychology Review*, *27*, 73–120.

Goldstein, A. M., Goldstein, N. E., & Kalbeitzer, R. (2006). Assessing childhood trauma and developmental factors as mitigation in capital cases. In S. N. Sparta, G. P. Koocher (Eds.), *Forensic mental health assessment of children and adolescents.* (pp. 365–380). New York : Oxford University Press.

Gordon, T. M., & Brodsky, S. L. (2007). The influence of Victim Impact Statements on sentencing in capital cases. *Journal of Forensic Psychology Practice*, *7*, 45–52.

Harris, G. T., & Rice, M. E. (2007). Characterizing the value of actuarial violence risk assessments. *Criminal Justice and Behavior*, *34*, 1638–1658.

Harris, G. T., Rice, M. E., & Quinsey, V. L. (2008). Shall evidence-based risk assessment be abandoned? *British Journal of Psychiatry*, *192*, 154.

Hardyman, P. L., Austin, J., Alexander, J., Johnson, K. D., Tulloch, O. C. (2002). Internal Prison Classification Systems: Case studies in their development and implementation. http://www.nicic.org/pubs/2001/017381.pdf. National Institute of Corrections. NCJ 194660.

Hart, S. D., Michie, C., & Cook, D.J. (2007). Precision of actuarial risk assessment instruments: Evaluating the "margins of error" of group v. individual predictions of violence. *British Journal of Psychiatry, 190*, 60–65.

Krauss, D. A., Lieberman J. D., & Olson, J. (2004). The effects of rational and experiential information processing of expert testimony in death penalty cases. *Behavioral Sciences and the Law*, *22*, 801–822.

Lieberman, J., Krauss, D., Kyger, M., & Lehoux, M. (2007). Determining dangerousness in Sexually Violent Predator evaluations: Cognitive-experiential self-theory and juror judgments of expert testimony. *Behavioral Sciences and the Law, 25*, 507–526.

Marczyk, G., Knauss, L., Kutinsky, J., DeMatteo, D., & Heilbrun, K. (2008). The legal, ethical, and applied aspects of capital mitigation evaluations: Practice guidance from a principles-based approach. In H. V. Hall (Ed.), *Forensic psychology and neuropsychology for criminal and civil cases.* (pp. 41–91). Boca Raton, FL: CRC Press.

Martinovski, B. (2006). A framework for the analysis of mitigation in courts: Toward a theory of mitigation. *Journal of Pragmatics*, *38*, 2065–2086.

Nicholson, R. A., & Norwood, S. (2000). The quality of forensic psychological assessments, reports, and testimony: Acknowledging the gap between promise and practice. *Law and Human Behavior*, *24*, 9–44.

Sabol, W.J. & Couture, H. (2008). *Prison inmates at midyear 2007.* Bureau of Justice Statistics (NCJ 221944). Retrieved June 1, 2008 from http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf.

Stafford, K. P., & Ben-Porath, Y. S. (2002). Assessing criminal responsibility. In J. N. Butcher (Ed.), *Clinical personality assessment: Practical approaches* (2nd ed., pp. 452–465). New York: Oxford University Press.

Teplin, L. A., Abram, K. M., McClelland, G. M., Washburn, J. J., & Pikus, A. K. (2005). Detecting mental disorder in juvenile detainees: Who receives services. *American Journal of Public Health*, *95*, 1773–1780.

Tetterton, V. S., & Brodsky, S. L. (2007). More is sometimes better: Increased mitigating evidence and sentencing leniency. *Journal of Forensic Psychology Practice*, *7*, 79–85.

Wormith, J. S., Olver, M. E., Stevenson, H. E., & Girard, L. (2007). The long-term prediction of offender recidivism using diagnostic, personality, and risk/need approaches to offender assessment. *Psychological Services*, *4*, 287–305.

Part III
Competence to Face Execution and the Roles of the Psychological Professions

Chapter 9
Meaningful Consideration of Competence to be Executed

Randy K. Otto

9.1 Introduction and Overview

Over 20 years ago, the Supreme Court, in Ford v. Wainright (1986), ruled that the United States Constitution prohibited the execution of incompetent inmates. The *Ford* court, however, did not identify the rationale(s) for this Constitutional prohibition, or the specific abilities and capacities required of men and women facing execution. As a result, lower courts came to different conclusions regarding what factors should be considered when the competence-related abilities of condemned inmates were raised as an issue, and mental health professionals asked to assess inmates whose competence-related abilities were questioned developed a variety of assessment strategies.

This lack of clarity was partly addressed by the Supreme Court's recent decision in Panetti v. Quarterman (2007). In the second case it has heard regarding the issue of competence to be executed, the Court offered more specific guidance regarding not only the Constitutional basis for the prohibition against executing incompetent persons, but also exactly what capacities an inmate must have before the ultimate sentence can be imposed. In this chapter, I review the legal background surrounding competence to be executed, discuss how a variety of psychological impairments may affect these abilities, and offer some strategies for specific assessment of these capacities.[1]

R.K. Otto (✉)
Department of Mental Health Law & Policy, Florida Mental Health Institute,
University of South Florida, Tampa, FL
e-mail: otto@fmhi.usf.edu

[1] In an excellent overview of issues and challenges associated with mentally ill inmates facing execution, Richard Bonnie (2005) identified three separate and potentially overlapping groups for whom mental disorder might preclude execution: (1) condemned inmates whose mental disorder impairs their understanding of the nature and purpose of their pending execution (which he refers to as "Ford incompetent"), (2) condemned inmates whose mental disorders impair their ability to assist counsel or otherwise understand and participate in post-conviction proceedings (which he labels "unable to assist counsel), and (3) condemned inmates who do not want to initiate or continue post-conviction appeals (which he describes as "volunteers). This chapter focuses on the first group of inmates, i.e., those whose mental disorder affects their understanding of the nature and purpose of their pending execution.

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_10, © Springer Science+Business Media, LLC 2009

9.1.1 The Legal Background

9.1.1.1 The Case of Alvin Ford[2]

In December 1974, Alvin Ford was convicted of the first degree murder of a police officer who attempted to prevent him from robbing a Ft. Lauderdale seafood restaurant. In January 1975, he was sentenced to death and committed to the custody of the Florida Department of Corrections. Although there was no significant evidence that Alvin Ford had a history of serious mental disorder or experienced significant psychiatric symptoms during his trial, he became increasingly paranoid while imprisoned. By early 1982 Ford became very paranoid (as evidenced by his beliefs that members of the Ku Klux Klan were masquerading as correctional officers, and family members and friends were conspiring against him and had been taken hostage), he became grandiose (reflected by his referring to himself as Pope John Paul III and his claims that he has fired a number of prison officials and appointed 9 new justices to the Florida Supreme Court), he began threatening others and engaging in self injurious behavior, and he sometimes offered that he was exempt from the state's attempts to execute him. Ford's mental state as it affected his understanding of his pending sentence was first evaluated in late 1983 by four psychiatrists, three of whom opined that he was psychotic and one of whom indicated that he was not suffering from a mental disorder (and presumably feigning symptoms of mental disorder). Of the three psychiatrists who described Ford as psychotic, only one stated that the underlying symptoms affected his understanding of the nature and purpose of his pending execution. Florida Governor Bob Graham's execution order was ultimately stayed and Ford's case worked its way to the Supreme Court, which heard arguments in 1986.

In Ford v. Wainright (1986) the Supreme Court was asked to decide whether the Constitution prohibited the execution of inmates whose understanding of their execution was impaired in some way.[3] In its decision, the *Ford* court cited a number of rationales for the Common Law prohibition of the execution of impaired inmates including that mental disorder—in and of itself—was punishment enough, and that such a course of action offended basic decency; served no punitive, retributive, or deterrent value; and impaired the condemned person's ability to prepare for the afterlife and assist counsel in challenging the sentence. Although, the *Ford* Court ruled that the Constitution prohibited the execution of "…a prisoner who is insane"[4], it failed to identify the Constitutional basis for this ban, "Whether its aim

[2] The interested reader is directed to Miller & Radelet (1993) and Mello (2007) for extended discussions of Alvin Ford, his life, and case.

[3] In addition to ruling on the constitutionality of the execution of "insane" inmates, the Supreme Court in *Ford* also ruled that Florida's procedures for determining "sanity" of a condemned prisoner violated due process requirements imposed by the Constitution.

[4] Insosfar as "insane" and "insanity" are terms which typically reference a defendant's mental state at and around the time of the alleged offense as it affects criminal responsibility, the Court's use of the term in this way is unfortunate. Throughout the chapter reference will be made to the defendant's competence or capacity to be executed.

be to protect the condemned from fear and pain without comfort and understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment" (Ford v. Wainright, p. 411). More importantly, the Court also failed to identify exactly what the condemned inmate must know, understand, or appreciate in order for the execution to move forward.[5]

9.1.1.2 Post-Ford Cases

Because the Supreme Court did not identify the capacities required of an inmate facing execution, lower courts faced with questions surrounding condemned inmates' competence were left to examine this issue in more detail and offer their own interpretations. As highlighted below, the large majority of courts adopted what is best described as a more limited, literal, and concrete interpretation of the test offered by Justice Powell in his concurrence, "…the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it" (Ford v. Wainright, 1986, p. 423). That is, most courts faced with this issue have ruled that the inquiry should be limited to the condemned inmate's knowledge of and ability to verbalize the state's stated reason for execution, regardless of whether the inmate's *understanding* or *appreciation* of the pending sanction is affected by a mental impairment of some type. In contrast, a much smaller number of courts faced with this issue have ruled that the Constitution requires something more.

An example of the more concrete interpretation of Powell's proposed standard is exemplified in Barnard v. Collins (1994), in which the 5th Circuit Court of Appeals upheld the state court's decision that Harold Barnard was competent to be executed, despite evidence that he held the delusional belief that his conviction and resulting sentence were partially attributable to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia. The court ruled that the finding of competence was justified given that Barnard also knew that he was to be put to death via lethal injection after being convicted of killing a boy during a robbery, and cited the lower court's finding of fact:

> Based on the reports and evaluations and testimony of Applicant's and the Court's mental health experts, Texas Department of Criminal Justice medical records, and the sworn statements of TDCJ personnel, the Court finds that Applicant comprehends the nature, pendency, and purpose of his execution. Applicant knows that he was found guilty of killing a young boy in a robbery in Galveston County and that his pending execution was because he had been found guilty of that crime. He knew of the date of his scheduled execution and that it would be lethal injection by use of an intravenous injection. Applicants' experts do

[5] After the Supreme Court's decision, Ford eventually returned to the Florida courts and participated in a hearing in which it was determined that he was feigning symptoms of mental disorder and, as a result, competent to be executed. Alvin Ford's lawyers were appealing this ruling when, in 1991, he died in a Florida prison with the causes of death being identified as adult respiratory distress syndrome associated with acute pancreatitis.

> not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia (Barnard v. Collins, 1994, p. 876).

As noted above, although the majority of courts faced with this issue have interpreted the Supreme Court's language in Ford in a more basic, concrete manner similar to that of the Collins court (see, e.g., Coe v. Bell, 2000; Fearance v. Scott, 1995; Lowenfield v. Butler, 1987; Whitmore v. Lockhart, 1993; Garrett v. Collins, 1992; Van Tran v. State, 1999; Rector v. Clark, 1991; Walter v. Angelone, 2003; Billiott v. State, 1995), some courts have found such analyses lacking. The Fourth Circuit Court of Appeals was first asked to address what the Constitution required of condemned inmates in the case of Percy Walton, who had been convicted of and sentenced to death for three murders (Walton v. Johnson, 2005). Although the three member panel's ruling that the lower court's interpretation of what was required by the Constitution was lacking was vacated when the case was reheard by the circuit court sitting en banc, its initial treatment of the issues is worthy of attention given its stark contrast with what the majority of the courts had concluded prior to that time.

In October 1997, Percy Walton was imprisoned and sentenced to death after he pleaded guilty to the murders of three people in two separate incidents in a rural Virginia town. In response to his execution being scheduled for May 2003, attorneys representing Walton raised questions about his competence to be executed, and he was evaluated by a number of mental health professionals. At a July 2003 competence hearing, six witnesses—four or whom were past treatment providers—testified about Percy Walton's knowledge and appreciation of his sentence. One mental health professional opined that Walton did not understand that he was to be executed or why he was to be executed, and had not "prepared" for his death as a result. Another professional, who had evaluated Walton in the months preceding the hearing, described him as "floridly psychotic" and testified that he did not know what it meant to be executed. A third examiner described Walton as lacking an understanding or appreciation of his pending execution as a result of delusional thinking. More specifically, the witness indicated that Walton's failure to appreciate the meaning and significance of his sentence was reflected by his statements that—subsequent to being executed—he intended to procure a telephone, motorcycle, and employment at Burger King, as well as visit a shopping mall. After hearing this testimony the court ruled that it was unable to come to a decision regarding Walton's competence and it directed another expert—agreed to both by the state and defense—to assess the inmate and limit his inquiry to two specific issues—Walton's understanding of his pending execution and why he was to be executed. Other issues, directed the court, were "extraneous… irrelevant or immaterial."

At a March 2004 hearing, this court appointed expert opined that, despite the fact that Walton was not likely to prepare for his death in any meaningful way, he was nonetheless competent to be executed given the "focused and… circumscribed and… limited" test he was directed to apply. The court subsequently concluded, primarily on the basis of this expert's testimony, that Walton was competent to

be executed because he "understands that he is sentenced to die by execution and that he is to be executed for murdering three people" (Walton v. Johnson, 2004, p. 601). Walton's attorney subsequently sought relief via the Fourth Circuit Court of Appeals.

Based upon the directions offered to the "neutral" expert who evaluated Walton, the appellate court inferred that the competence test crafted by the district court was limited to the condemned's understanding that he was to be executed and why, and that one's ability to prepare for death was considered by the court to be irrelevant to the inquiry. And, although the appellate court offered that the lower court's narrow construal of competence to be executed likely resulted from an understandable attempt to bring precision to an inexact standard and science, it concluded that the inquiry required by *Ford* was broader than that conducted by the district court, "…Ford requires more. A person who can only acknowledge, amidst a barrage of incoherent responses, the bare facts that his crime is the reason why does not meet the standard for competence contemplated either in the opinion of the *Ford* court or in Justice Powell's concurrence" (Walton v. Johnson, 2004, p. 294). As noted above, however, this decision was vacated when the case was reheard by the circuit court sitting en banc.

Contrasting the courts' reasoning in Barnard v. Collins (1994) and Walton v. Johnson (2005) brings into focus a key issue with respect to considering a condemned inmate's competence-related abilities. As reflected in the Barnard court's decision, some have argued that it is enough that inmates "know" or "understand" that they are about to be executed as a punishment for some prior criminal act for which they have been found responsible. Others, however, have claimed that condemned inmates must not only "know" or "understand" that they are executed as a punishment for some prior criminal act which they committed, but that this knowledge and understanding be a *rational* one that is not tainted by an underlying mental disorder or other impairment. This latter conceptualization, which may be referred to as "appreciation" (as distinguished from knowledge or understanding) is considered to require more of the condemned inmate and result in a higher legal standard or test as result. Exactly what the Constitution required of condemned inmates was recently addressed by the Supreme Court in Panetti v. Quarterman (2007).

9.1.1.3 The Case of Scott Panetti

Scott Panetti, who had a well documented history of mental disorder dating to 1981, was charged with two counts of capital murder in the 1992 slayings of his estranged wife's parents. The defendant awoke before dawn, donned camouflage fatigues, broke into the home of his in-laws and shot them, and then took his daughter and estranged wife hostage before surrendering to law enforcement officers (Panetti v. Quarterman, 2007).

Three years later, after being adjudicated competent to stand trial and waive counsel, Panetti decided to discharge his attorneys, represent himself, and employ an insanity defense. Panetti had a history of mental disorder that predated the murders (e.g., his wife testified that he once, after becoming convinced that the devil had

possessed their home, buried a number of valuables next to the house in an attempted to cleanse their surroundings) and indicators of mental disorder were apparent at trial, as well. Panetti dressed in a cowboy outfit, attempted to subpoena Jesus Christ, John F. Kennedy, and Anne Bancroft, and displayed "bizarre," "scary," and "trance-like" behavior [that] served to make the trial a "judicial farce, and a mockery of self representation" (Panetti v. Quarterman, 2007, p. 2850; Mello, 2007). The Texas jury rejected the defendant's insanity plea, convicted him of two counts of first degree murder, and sentenced him to death. After his appeals and initial habeus corpus petition were denied, attorneys acting on Panetti's behalf filed a petition alleging that he did not understand the reasons and rationales for his pending execution.

Attorneys for Panetti argued that, although he *knew* that the state was claiming that he was scheduled to be executed for the murders of his in-laws, his *appreciation* of his impending execution was limited because he held the delusional belief that he was actually being executed by the state because of its interest in preventing him from preaching. The state responded that, even if Panetti did hold delusional beliefs about the basis and reasons for his execution, his knowledge that he was to be executed as a result of having been convicted of the murders of his in-laws was intact and was enough to meet any Constitutional requirements.

Although the state's two mental health experts acknowledged that Panetti experienced symptoms of mental impairment, they opined that these symptoms were accompanied by willful, oppositional, and obstructive behavior, and that any symptoms of mental disorder that he did experience did not preclude his knowledge and understanding of his pending execution and its basis. In their evaluation of his competence-related abilities the state's two experts described Panetti as uncooperative; demonstrating "irritable scorn" and "glowering scorn;" manipulating and controlling the interview; capable of answering, but choosing not to answer their questions about his legal situation; and knowledgeable that he was to be executed with resulting death. In contrast, the four experts who testified on Panetti's behalf all perceived him as experiencing paranoid and religious delusions that resulted from an underlying psychotic process, and which affected his understanding and appreciation of his pending execution. The only defense-retained expert to write a report described Panetti as lacking insight into his severe and persistent mental illness and exhibiting impairments which included, "thought processes that are markedly disorganized, so that it is impossible to maintain a linear and logical train of thought", flight of ideas, tangentiality, circumstantiality, and "delusional beliefs incorporating both grandiosity and paranoia." With respect to the examinee's competence-related abilities more specifically, this expert opined that Panetti believed that God might render him invulnerable to execution, which he thought was actually motivated by the state's desire to prevent him from preaching the Gospel rather than a punishment for the murders of his in-laws.

Offering a line of reasoning largely consistent with the majority of courts which had considered this issue (see above of this discussion), the federal district court rejected Panetti's attorneys' argument that he was incompetent to proceed, in large part based on its conclusions that he was knowledgeable about the stated basis for his execution, even thought it acknowledged that his mental disorder affected his understanding in some way. In explaining its decision, the court offered, "There is

evidence in the record to support a finding that Panetti is capable of understanding the reason for his execution, as well as evidence to support a finding that, in fact, he does understand (at least at some level) the state's stated reason for his execution. Nonetheless, the record also would support a finding, not necessarily inconsistent with the first two, that in another possibly relevant sense, Panetti does not, in fact, know or understand the reason for his execution (Panetti v. Dretke, 2004, p. 711). On appeal, the federal circuit court cited the lower court's findings that Panetti was aware that (1) he murdered his in-laws, (2) he was to be executed, and (3) the stated reason for his execution was his commission of these crimes (Panetti v. Dretke, 2006, p. 817). In upholding the lower court's decision, the circuit court explained "because we hold that 'awareness,' as that term is used in *Ford*, is not necessarily synonymous with 'rational understanding' as argued by [the petitioner], we conclude that the district court's findings are sufficient to establish that [the petitioner] is competent to be executed" (Panetti v. Dretke, 2006, p. 821).

On appeal, the Supreme Court granted certiorari and was left to decide exactly what the Constitution required of condemned inmates. After addressing issues surrounding whether specific procedural protections which were due Panetti (see Slobogin, 2007 for a brief summary of this issue), the Supreme Court, in a 5–4 decision, ruled that the approach taken by the lower courts was inconsistent with its decision in *Ford*, reversed the Court of Appeals decision, and remanded the case for further consideration.

An important starting point for understanding the Supreme Court's decision in this case is the majority's specific explication of the rationale for and purpose of the Constitutional prohibition against execution of incompetent prisoners. As reviewed above, the *Ford* court, despite comprehensively reviewing the various rationales for the Common Law prohibition of executing "insane" inmates (i.e., mental disorder, in and of itself, is punishment enough; execution of these inmates offends basic decency; serves no punitive, retributive, or deterrent value; and impairs the condemned person's ability to prepare for the afterlife and assist counsel in challenging the sentence), failed to identify the reasons underlying its holding that such executions were prohibited by the Constitution. In contrast, in explaining its decision, the *Panetti* majority focused on the retributive purpose of the death penalty, and how this intent can be frustrated if the condemned inmate experiences a mental disorder, which limits his or understanding or appreciation of what is about to happen and why, "[The Eighth Amendment] forbids the execution of those who are unaware of the punishment they are about to suffer and why they are to suffer it."

The Court then went on to write that the lower court's apparent failure to consider the impact that Panetti's delusions had on his understanding of the pending sentence was in error. The Court noted that capital punishment is imposed because of its potential to make the offender and community recognize the gravity of the criminal behavior, and that this intent can be frustrated when inmates experience symptoms that make it so that their understanding and appreciation of their sentence "has little or no relation of those concepts shared by the community as a whole" (Panetti v. Quarternman, p. 2862). The Court concluded that, although Panetti was aware of the state's stated reason for his execution, this was not enough, "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding

of it" (Panetti v. Quarternman, p. 2863). Although the Court went on to note that defining "rational understanding" could present a challenge, it reiterated that the Constitution required such.

That the Court ruled that the Constitution requires that condemned inmates must not only demonstrate knowledge and understanding of their sentence, but a rational one that is not significantly impacted by mental disorder flows logically once given the Court's stated rationale for the Constitutional prohibition. And indeed, if the Court identified different reasons for the Constitutional prohibition against executing impaired inmates (e.g., such action serve no retributive value or deterrent effect), then the more concrete "knowledge and understanding" analysis laid out and adopted by the majority of lower courts to hear the issue may well have been accepted.[6]

9.2 Assessment of Mental Disorder and Its Potential Impact on an Inmate's Competence-Related Abilities[7]

There have been published a number of comprehensive discussions of the mechanics of evaluating an inmate whose capacity to be executed is called into question, and the interested reader is directed to those pieces for a review of evaluation issues more generally (e.g., Heilbrun & McClaren, 1988; Zapf, Boccaccini & Brodsky, 2002; Small & Otto, 1987). Provided below is a more focused discussion of how various types of psychological impairments might impair a condemned inmate's understanding and appreciation of his or impending sentence, along with recommendations for assessment and consideration of such.

9.3 Impaired Thought Content and Its Potential Impact on Competence-Related Abilities

Grandiose delusions, paranoid delusions, and religious delusions can all affect an inmate's competence-related abilities, and review of the published cases indicates that impaired thought content (i.e., delusional thinking) is the symptomatology that

[6] Of course, whether the Court first identified the rationale for the Constitutional prohibition and then reached its decision that the lower court's analysis was flawed and the test it developed lacking, or whether the court first decided that the lower court's analysis was flawed and the test it developed was lacking, and then selected a reason for the Constitutional prohibition which would support such a finding is not known.

[7] That impaired thought content, thought form, cognitive functioning, and mood are discussed separately below should not be interpreted as suggesting that such impairments cannot be experienced concurrently, or that some mood disorders do not involve impairment in thought form or content, that some thoughts disorders are not accompanied by impairments in mood etc. Rather, this discussion is parceled this way to facilitate and organize the discussion of how specific impairments might impact a condemned inmates competence related abilities.

most typically affects a condemned inmate's understanding and appreciation of the ultimate sentence. For example, during his time on death row, Alvin Ford developed a constellation of paranoid and grandiose thoughts that affected his understanding and appreciation of his death sentence. Ford, according to the report of one examiner, held the grandiose beliefs that he could preclude his executions because he owned Florida prison system and could control the Governor through mind waves. Percy Walton's limited appreciation of the significance of his scheduled execution was revealed by his delusional beliefs that he would dine, work, and shop afterwards, and Panetti's paranoid and religious delusions limited his understanding and appreciation of his scheduled execution insofar as he believed that it was partly brought about by a variety of groups conspiring against him and the government's desire to silence him because of his religious beliefs and activities—despite the state's claims to the contrary.

Given the above, mental health professionals assessing a condemned inmate's competence-related abilities must pay particular attention to the examinee's thought content, how such content affects the inmate's understanding and appreciation of his or her impending execution, and the cause of or basis for any unusual beliefs. And given reports that between 20% and 60% of death row inmates may display psychotic spectrum symptoms while incarcerated or at some time in their past (see Cunningham & Vigen, 2002 for a summary of the psychological characteristics of inmates facing the death penalty), such issues may come into play fairly regularly.

Crucial to informing the court about the inmate's competence-related abilities is an understanding of the specific thought content and how that affects his or her appreciation of the sentence. Of course, impaired thought content, in and of itself, does not render an inmate incompetent to be executed—at least in those cases in which the delusional beliefs have little or no impact on the defendant's understanding and appreciation of the execution. One can imagine an inmate who understands and appreciates that he is to be put to death by the state after being found responsible for the death of another, yet who still holds paranoid delusions about fellow inmates, somatic delusions about his current health status, and grandiose beliefs about his intellectual abilities. At the same time, as the cases of Alvin Ford, Percy Walton, and Scott Panetti indicate, an condemned inmate's appreciation of his sentence can be significantly limited by paranoid delusions about the basis for her conviction and execution, or somatic and grandiose delusions that she could render herself invulnerable to the method of execution.

As suggested above, in addition to identifying and describing any beliefs that impact the inmate's understanding and appreciation of the execution, the examiner must also identify the cause of or basis for these beliefs. The limitations that Ford, Walton, and Panetti experienced with respect to their ability to understand and appreciate their pending executions resulted from symptomatology associated with underlying mental disorders. And the Court, in its treatment of both the *Ford* and *Panetti* cases, considered the issue of competence for execution only *as it was affected by mental disorder.* More specifically, the *Ford* Court ruled that the Constitution precluded execution of the "insane" (i.e., inmates whose competence-related abilities were impaired by mental illness, also see discussion in footnote viii below), and the *Panetti* court distinguished

inmates whose understanding of their pending sentences was affected by mental disorders and those whose understanding was limited by other factors.

> And we must not ignore the concern that some prisoners, whose cases are not implicated by this decision, will fail to understand why they are to be punished on account of reasons other than those stemming from severe mental illness. The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered to be out of touch with reality. Those states of mind, even if extreme compared to criminal populations at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder… Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose (Panetti v. Quarterman, 2007, p. 2863).

The Court's language makes clear that not only should the examiner investigate and describe in detail the beliefs which are impacting his or her understanding and appreciation of the execution, but their bases or causes as well. Although the Court has not yet been faced with the case of an individual whose competence to be executed is considered to be impaired for reasons other than an underlying mental disorder, inmates who hold beliefs which do not flow from a severe and persistent mental disorder but nonetheless limit their understanding or appreciation of their sentences presumably are not protected from execution given the language in the *Ford* and *Panetti* decisions.[8]

[8] Imagine the case of a survivalist defendant who knows that he is to be executed after being convicted of the murder of a federal agent, but holds the non-delusional belief that he was framed for the murder by federal officials, and he was unfairly tried by a federal judge, all of whom wish to silence his criticism of the Internal Revenue Service. Although this defendant knows and understands that he is to be executed for murdering a federal agent, his appreciation is quite limited insofar as he actually holds the non-delusional, yet unusual and idiosyncratic, belief that he was actually arrested, tried, and convicted by a corrupt federal system trying to silence his criticism of its primary source of revenue generation. Difficulties determining what does and does not constitute a mental disorder always present themselves, particularly in the case of persons who, other than holding uncommon or unusual religious or political beliefs, show no problems with their adjustment and functioning—much like the inmate in this hypothetical. One could well argue that the survivalist described above, despite his beliefs about the nature of and basis for his execution, is eligible for execution given the basis for these beliefs (i.e., an unusual political and social perspective). Alternatively, one could argue that these beliefs are the product of an underlying mental disorder and impact the inmate's appreciation of his arrest, conviction and pending execution in such a way as to render him incompetent to be executed. Mental health professionals can be of most assistance to the court if they describe the examinee's beliefs as completely as possible, describe how they affect the examinee's understanding and appreciation of his capital sentence, and identify-to the degree possible whether these beliefs are the product of a mental disorder of some type.

9.4 Impaired Thought Form and Its Potential Impact on Competence-Related Abilities

Impaired thought process or form (e.g., irrational and illogical thinking, tangentiality, circumstantiality) can also affect the condemned inmate's understanding and appreciation of his or her pending execution and its mechanics. Like impaired thought content, a disordered thought process can impact an inmate's ability to appreciate the pending execution, although likely in a different way. Inmates who are experiencing a formal thought disorder may be so impaired that they do not understand much of what is occurring around them, including the conditions of their current circumstances and the associated preparations for their pending execution. And given reports that between 20% and 60% of death row inmates may display psychotic spectrum symptoms while incarcerated or at some time in their past (see Cunningham & Vigen, 2002 for a summary of the psychological characteristics of inmates facing the death penalty), such issues may come into play fairly regularly.

Of course, impaired thought form, in and of itself, does not render an inmate incompetent to be executed—at least in those cases in which, despite some problems in thinking, the inmate still understands and appreciates his or her current condition, including the pending execution and its significance. As a result, an inquiry into whether and, if so, how an impaired thought process affects the condemned inmate's understanding and appreciation of the pending sentence is necessary. Altogether, issues of response style aside (see below), assessment of inmates whose predominant impairment involves formal thought disorder may actually be less challenging than assessment of inmates whose thought content is impaired (but also see footnote vi above regarding overlapping impairments).

9.5 Cognitive Impairment and Its Potential Impact on Competence-Related Abilities

The competence-related abilities of inmates experiencing various types of cognitive impairments (e.g., deficits in memory, attention/concentration, orientation, executive functioning, intellectual functioning) may also be limited in ways similar to those of inmates who experience formal thought disorders. These inmates may demonstrate little awareness of their basic circumstances, including their pending execution and associated preparations. Given research which indicates that between 25% and 60% of death row inmates may display some significant impairment in cognitive functioning, broadly conceived (see Cunningham & Vigen, 2002 for a summary of the psychological characteristics of inmates facing the death penalty) such issues may come into play fairly regularly.[9]

[9] Of course, the Constitutional prohibition against execution of inmates with mental retardation (one type of cognitive impairment) was established in Atkins v. Virginia (2002).

Of course, the presence of some cognitive impairment, in and of itself, does not render an inmate incompetent to be executed—at least in those cases in which, despite limited intelligence, attention, or decision making, the inmate still understands and appreciates his or her current predicament, including the pending execution and its significance. As a result, the mental health professional conducting a competence inquiry must consider whether and, if so, how cognitive impairments impact the condemned inmate's understanding and appreciation of the pending sentence.

9.6 Mood Impairment and Its Potential Impact on Competence-Related Abilities

Not surprisingly, large numbers of death row inmates experience symptoms indicative of or associated with mood disorders (Cunningham & Vigen, 2002). Although impairments associated with mood disorders could affect an inmate's knowledge and appreciation of a pending execution, such impairments would probably need to be severe. It is likely that a large number of condemned inmates who, despite experiencing numerous symptoms of depression (e.g., dysphoria; lethargy; feelings of guilt, hopelessness, and helplessness; sleep difficulties; impaired appetite, low self esteem), can still appreciate the circumstances surrounding their pending execution. However, the ability of inmates experiencing more severe symptoms (e.g., catatonia) to understand and appreciate the nature and consequences of execution may be significantly compromised, as these inmates may show little awareness or appreciation of their circumstances and events occurring around them more generally.

9.7 Consideration and Assessment of Response Style

As is the case in all forensic evaluation contexts, it is important that the clinician pay particular attention to issues of response style (i.e., the way in which the examinee approaches the assessment) when examining a condemned inmate's understanding and appreciation of his or her pending execution. Although all persons whose mental state is at issue in legal proceedings in which they are involved have much at stake, it is hard to imagine any litigants facing more serious consequences that those who are at risk for execution. And questions of the examinees' response style (and the possibility of malingering) are often raised in these cases. Although the observation was not made in its discussion of Percy Walton's competence to be executed, the Fourth Circuit Court of Appeals, sitting en banc, made reference to the inmate's past intentions to "play crazy" (Walton v. Johnson, 2005), two of the experts who evaluated Scott Panetti opined that he was uncooperative, manipulative, and controlling, and chose not to answer questions about his legal situation, and Alvin Ford was described by at least one examining expert as feigning symptoms of mental disorder in an attempt to avoid execution.

To assume that inmates whose competence to be executed is at issue will be wholly candid and forthcoming in their presentations is naïve at best. Integral to assessing the inmate's competence-related abilities as they are affected by his or her behavioral, cognitive, and emotional functioning is consideration of his or her response style and approach to the evaluation process more generally (Rogers & Bender, 2003; Melton et al., 2007). Although a comprehensive review of response style and its assessment is well beyond the score of this chapter, a few issues are important to consider.

Most important for examiners to remain cognizant of is that there are at least six response styles which persons undergoing forensic psychological and psychiatric examinations may adopt including (1) symptom feigning, (2) guardedness/disavowal, (3) false presentation of positive traits, (3) irrelevant responding, (4) random responding, (5) honest/candid responding, and (6) hybrid responding (Otto, 2008). Although one might assume that inmates who are sentenced to death may be motivated to exaggerate and/or fabricate symptoms in an attempt to avoid execution, other response styles may be adopted as well.

When conducting these evaluations, mental health professionals should pay special attention to assessment of response style and, whenever possible, rely on more than clinical impressions or clinical judgment given the limited utility of such techniques (Rogers, 2008). Use of psychological measures specifically designed to aid in assessment of various response styles (e.g., SIRS, WMT, TOMM, PDS) along with accessing important collateral data (e.g., prison records, other mental health and medical records, observations of the inmate offered by informed third parties such as correctional officers and defense attorney) is indicated.

9.8 Summary

In Ford v. Wainright (1986) the Supreme Court made clear that the Constitution doe not allow the execution of "insane" inmates. A little over two decades later, in Panetti v. Quarterman (2007), the Supreme Court identified the basis for this Constitutional prohibition, and laid out what is required of inmates facing the death penalty. That is, inmates who are about to be executed must not only demonstrate an awareness of their pending execution and its reason, but an appreciation that is rational and not significantly impaired by mental disorder. The test enunciated by the Supreme Court in *Panetti* is significantly more demanding than tests adopted and employed by the large majority of lower courts that were asked to address this issue in the first 20 years after the Ford decision. Given this, in combination with the significant number of inmates on death row who experience significant behavioral, cognitive, and emotional impairments, the courts and mental professionals seeking to be of assistance to them can anticipate facing questions of condemned inmates' competency with increasing frequency in the years to come.

References

Atkins v. Virginia, 536 US 304 (2002).
Barnard v. Collins, 13 F.3d 871 (5th Cir. 1994).
Billiott v. State, 655 So.2d 1 (Miss. 1995).
Bonnie, R. (2005). Mentally ill prisoners on death row: Unsolved puzzles for courts and legislatures. *Catholic University Law Review, 54*, 1169–1187.
Coe v. Bell, 209 F.3d 815 (6th Cir. 2000).
Cunningham, M. D., & Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences and the Law, 20,* 191–210.
Fearance v. Scott, 56 F.3d 633 (5th Cir. 1995).
Ford v. Wainright, 477 US 399 (1986).
Garrett v. Collins, 951 F.2d 57 (5th Cir. 1992).
Heilbrun, K., & McClaren, H. (1988). The assessment of competency for execution: An overview. *Behavioral Sciences and the Law, 5*, 383–396.
Lowenfield v. Butler, 843 F.2d 183 (5th Cir. 1987).
Mello, M. (2007). Executing the mentally ill: When is someone sane enough to die? *Criminal Justice, 22(3)*, 1–12.
Melton, G. B., Petrila, J., Poythress, N., Slobogin, C., Lyons, P., & Otto, R. K. (2007). *Psychological evaluations for the courts: A handbook for mental health professional and lawyers* (3rd ed.). New York: Guilford.
Miller, K. S., & Radelet, M. S. (1993). *Executing the mentally ill: The criminal justice system and the case of Alvin Ford.* Thousand Oaks, CA: Sage.
Otto, R. K. (2008). Challenges and advances in assessment of response style. In R. Rogers. *Clinical assessment of malingering and deception* (3rd ed.). New York: Guilford.
Small, M. A., & Otto, R. K. (1987). Evaluations of competency to be executed: Legal contours and implications for assessment. *Criminal Justice and Behavior, 18*, 146–158.
Panetti v. Quarterman, 551 US; 127 S.Ct. 2842 (2007).
Panetti v. Dretke, 448 F.3d 815 (2006).
Rector v. Clark, 923 F.2d 570 (8th Cir. 1991).
Rogers, R. (2008). *Clinical assessment of malingering and deception* (3rd ed.). New York: Guilford.
Rogers, R., & Bender, S. D. (2003). Evaluation of malingering and deception. In A. M. Goldstein (Ed.), *Forensic psychology* (pp. 109–132). New York: John Wiley and Sons.
Slobogin, C. (2007). The Supreme Court's recent criminal mental health cases: Rulings of questionable competence. *Criminal Justice, 22*(3), 1–8.
Van Tran v. State, 6 S.W.3d 257 (Supreme Court of Tennessee, 1999).
Walter v. Angelone, 321 F.3d 422 (4th Cir. 2003).
Walton v. Johnson, 306 F.Supp. 2d. 597 (W.D. Virginia, 2004).
Walton v. Johnson, 407 F.3d 285 (Fourth Cir. 2005)
Whitmore v. Lockhart, 8. F.3d 614 (8th Cir. 1993).
Zapf, P. A., Boccaccini, M. T., & Brodsky, S. L. (2002). Assessment of competency for execution: Professional guidelines and an evaluation checklist. *Behavioral Sciences and the Law, 21,* 103–120.

Chapter 10
Psychological Expertise and Amicus Briefs in the Context of Competence to Face Execution

Robert F. Schopp

10.1 Introduction

In Panetti v. Quarterman, the Supreme Court reversed a lower court finding that a delusional offender was competent to face execution (CFE). The Court remanded the case to the district court, but it provided no clear standard for the lower court to apply.[1] Three professional organizations filed a joint amicus brief in support of the petitioner. The American Psychological Association, the American Psychiatric Association, and the National Alliance on Mental Illness identified themselves as scientific and professional organizations with a "strong interest in the establishment of legal competency standards consistent with the best scientific knowledge."[2] This brief explicitly advocates that the Court should preclude execution of delusional offenders and commute capital sentences for these offenders to lesser sentences.[3]

Recent discussion in the psychological literature contends that psychological expertise is not sufficient to allow psychologists acting as expert witnesses to offer expert opinions that an offender is dangerous for the purpose of capital sentencing.[4] The juxtaposition of this contention that psychological expertise does not provide the basis for expert opinions regarding dangerousness for capital sentencing and the amicus brief that explicitly contends that psychological expertise provides the basis from which to advocate specific legal standards and dispositions regarding CFE should lead us to reflect upon the roles, limits, and responsibilities of members of the psychological profession in offering professional opinions in the forms of expert testimony and amicus briefs.

I do not claim that these two positions are necessarily inconsistent or that the responsibilities and limits should be identical in the roles of expert witness and of amicus. Rather, comparing and contrasting the functions and limits of these two roles might provide a process through which we can articulate more clearly the appropriate form and limits of the application of psychological expertise to

R.F. Schopp (✉)
College of Law, University of Nebraska, Lincoln, Nebraska, USA
e-mail: rschoppl@unl.edu

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_11, © Springer Science+Business Media, LLC 2009

the judicial process in the form of amicus briefs. In this chapter, I consider the form and content of the Associations Brief as a vehicle for reflecting upon the appropriate form, range, and limits on amicus briefs by scientific and professional organizations. Section 10.2 summarizes the Associations Brief. Section 10.3 discusses recent literature regarding expert testimony by psychologists in the context of capital sentencing. Section 10.4 examines the traditional and contemporary forms and functions of amicus briefs by professional organizations. Section 10.5 discusses three alternate forms of amicus briefs. Section 10.6 discusses some considerations relevant to the selection of one of these forms for a particular case, and Section 10.7 concludes the chapter.

10.2 The Associations Brief in *Panetti*

10.2.1 The Case

Panetti was convicted of murdering two victims, and he was sentenced to death. There was substantial evidence that he manifested significant psychological impairment prior to the offenses, during the trial for those offenses, and during the period approaching execution.[5] As the execution date approached, he was reportedly aware that he had committed the murders, that he had been sentenced to death for those murders, and that the state's stated reason for executing him was as punishment for those murders. He reportedly believed, however, that the state's real motivation for executing him was to prevent him from preaching the gospel.[6] The Supreme Court quoted Panetti's brief in framing the substantive question as "whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of the mental capacity to understand that [he] is being executed as a punishment for a crime."[7]

10.2.2 The Associations Brief

The Associations Brief was explicitly identified by the amici as a brief in support of Panetti. It advanced the following argument in support of Panetti's claim that his disorder rendered him incompetent to face execution (ICFE). Panetti is clearly delusional, with diagnoses of schizophrenia and schizoaffective disorder.[8] The brief describes delusions as false beliefs that are the product of distortion of logical thinking and incorrect inferences. These false beliefs cannot be corrected by logic because the distortion of the process of reasoning renders the delusional person unable to engage in critical reflections on those beliefs and on the relevant reasons to accept or reject them.[9] Panetti's delusional disorder that preceded his crime and continues through the trial and appellate process prevents genuine understanding of the reason for his execution.[10] The distortion of cognitive process renders him unable to

understand and critically evaluate the relationships among his conduct, the conviction and sentence for that conduct, and his pending execution. Thus, his delusional disorder prevents him from drawing the logical connections between his conviction for the murders and his impending execution. The presence of the delusional disorder explains how he can know that he committed the murders, that he was convicted for the murders, that he was sentenced to death as punishment for those murders, and that the state asserts that he will be executed as punishment for the murders, yet he can firmly believe that the execution is intended to prevent him from preaching the gospel.[11] Although the brief describes him as lacking "genuine understanding of the reason for his execution," it does not provide any clear explanation of the applicable conception of "genuine understanding" or of the relationship between genuine understanding and awareness or understanding simplicitor.[12]

The brief contends that execution of offenders with delusional disorders such as that manifested by Panetti cannot serve the retributive purpose of capital punishment, and it criticizes the standard applied by the Fifth Circuit as allowing execution of some offenders who manifest delusions regarding their pending executions but not others.[13] The brief does not provide, however, reasoning that explains why execution of offenders who are ICFE by the standard it endorses cannot serve the retributive purpose or why all delusional offenders should qualify for the same status regarding execution.

The brief concludes that the sentences of offenders who are ICFE should be reduced to lesser sentences because merely suspending execution would force the individual to choose between foregoing treatment or increasing the risk of execution.[14] The brief does not provide any reasoning to explain why it would be illegitimate to impose that choice on a convicted murderer or to impose treatment without the convicted offender's consent for the purpose of restoring CFE. In short, the brief provides some description and explanation regarding the nature and effects of delusional disorder, and it addresses the significance of this disorder for CFE. It does not provide clear analysis, however, that explains the distinction between Panetti's beliefs and "genuine understanding." Neither does it provide clear reasoning to support the contention that the lack of genuine understanding undermines the retributive function of capital punishment and violates Eighth Amendment doctrine regarding the CFE requirement.

10.3 Expert Testimony Regarding Dangerousness for Capital Sentencing

Recent literature contains several articles contending that psychologists should not offer expert testimony contending that a convicted offender is dangerous for the purpose of capital sentencing. These authors emphasize the relatively low rate of further recorded violence by prisoners generally and by those in maximum security facilities specifically. They contend that due to the relatively low base rates and high security environments, predictions of violence or putative professional opinions that

an offender is dangerous will generate a high rate of false positives.[15] This emphasis on the low base rates and the resulting high rate of false positives reflects the premise that current rates of expertise do not enable psychological experts to predict violence in these circumstances with a sufficient level of accuracy. Taken on its face, this reasoning rejects such predictions or opinions due to insufficient accuracy with current methods and evidence. Thus, this reasoning suggests that such predictions or opinions would be appropriate when the available methods and evidence improve the accuracy rates to some unspecified level. That is, since the problem is presented as one of insufficient accuracy, some unspecified degree of improvement in accuracy would render such testimony appropriate.

I have argued that psychological experts should not offer predictions of dangerousness for any legal purpose due to a more fundamental concern. A determination of dangerousness for any specified legal purpose is not a prediction. Furthermore, psychologists should not offer putatively professional opinions that individuals are, or are not, dangerous for any legal purpose because such opinions necessarily extend beyond the limits of psychological expertise. These contentions do not rest on current levels of accuracy. Rather they rest upon the most defensible legal conception of dangerousness and upon the legitimate distribution of responsibility among witnesses, judges, and juries.[16]

A determination that a particular individual is, or is not, dangerous for any specified legal intervention or liability requires the integration of empirical information and justificatory judgments. The empirical component involves assessment of risk in the circumstances. This assessment involves estimates of the probability and severity of harmful conduct in various circumstances, including the likely effects of various types of risk management. The justificatory judgments include determinations of quantitative and qualitative sufficiency for the legal purpose at issue. The determination of quantitative sufficiency requires the judgment that the probability and severity of risk in the relevant circumstances is sufficient to justify the legal intervention at issue. The determination of qualitative sufficiency requires the judgment that the individual generates that risk in a manner that justifies imposing the legal intervention or liability at issue.[17]

When relevant information is available, psychological expertise may provide the basis for descriptive and explanatory testimony regarding the assessment of risk in the circumstances, including the likely effects of various forms of risk management. The determinations of quantitative and qualitative sufficiency require justificatory judgments that necessarily fall beyond psychological expertise.[18]

Although these two approaches differ regarding the range of testimony they would allow and the specific reasoning that supports these conclusions, they agree that purportedly expert opinions that particular offenders are dangerousness for the purpose of capital sentencing exceed the boundaries of psychological expertise. A similar analysis applies to psychological testimony regarding legal determinations phrased as "mental illness," "mental disease or defect," "mental abnormality" or similar terms. When relevant information is available, psychological experts can provide descriptive and explanatory testimony regarding an individual's psychological impairment and the effects of that impairment on capacities, psychological

processes, or conduct. The conclusion that a particular category of impairment or the specific impairment manifested by a particular individual constitutes "mental illness" (or some similar term) for a particular legal purpose, however, requires integration of that descriptive and explanatory testimony with legal analysis. This integration must determine whether the impairment is of a type and degree that justifies the decision to grant it significance for the specific legal purpose at issue. For most legal standards, this latter step in the analysis will require legal analysis of the standards in light of their purpose and justification. Such analysis extends beyond psychological expertise.[19]

These analyses regarding dangerousness and mental illness reflect a common framework. When relevant information is available, psychological expertise can provide the basis for descriptive and explanatory testimony regarding risk assessment and impairment, but the legal determinations of dangerousness or of mental illness require justificatory judgments and legal interpretations that extend beyond the limits of psychological expertise. These analyses raise the following question regarding amicus briefs that purport to support particular legal conclusions regarding questions such as the significance of delusions for CFE. If putative expert opinions that particular individuals are, or are not, dangerous or mentally ill for particular legal purposes exceed psychological expertise, why would amicus briefs by psychological organizations that purport to endorse particular judgments or standards for CFE be legitimate? More generally, what are the functions and limits of psychological expertise and of the legal roles of expert witness or amicus that would render professional opinions addressing integrated empirical and legal questions inappropriate for the purpose of expert testimony but appropriate for the purpose of amicus briefs? Insofar as we can advance plausible answers to these questions, what do these answers tell us about the appropriate form and content of such briefs?

The limitations on expert testimony reflect the specific functions of expert testimony and the legal rules that set the parameters of such testimony. Contemporary rules of evidence allow expert testimony that is based on sufficient facts or data and produced by reliable principles and methods that have been applied to the facts of the case in a reliable manner.[20] Such testimony is appropriate when untrained lay jurors, or judges in a bench trial, are not fully qualified to determine the question at issue without the assistance of experts.[21] Although relevant, expert testimony may be excluded if its probative value is outweighed by the risk "of unfair prejudice, confusion of the issues, or misleading the jury."[22]

Putatively expert opinions that individuals are, or are not, dangerous violate these standards at each step. First, although descriptive and explanatory testimony regarding risk can reflect reliable methods and data, the justificatory determinations of quantitative and qualitative sufficiency require that the experts apply personal judgments or legal interpretations. Thus, they necessarily extend beyond scientific or technical expertise. Second, insofar as witnesses depend on personal justificatory judgments, their opinions are not based on expertise that is not available to ordinary jurors. Rather, they reflect the moral and social judgments that fall within the responsibility of the jurors. Third, the potential prejudicial effect of such testimony is substantial because it can mislead jurors by misrepresenting the justificatory

components of the dangerousness determinations as empirical, thus suggesting that jurors can rely on the expert testimony for an authoritative determination of dangerousness, rather than discharging their responsibility to make the necessary justificatory judgments.

10.4 Amicus Briefs by Professional Organizations

10.4.1 Parameters of Law

The constraints of law on the content and bases of amicus briefs are substantially less strict than the analogous parameters for expert testimony. Professional organizations can present amicus briefs to the courts if they receive the permission of the parties or of the court.[23] Although amicus briefs by scientific or professional organizations can present information that falls within the scope of their scientific or professional expertise, they are not precluded from providing legal analysis that interprets the legal significance of that information. As legal briefs presented to the court, amicus briefs can include legal analysis and advocacy regarding the most defensible application of professional expertise to the legal matters at issue. Because the briefs are presented to the courts, rather than to jurors, the courts can reasonably be expected to evaluate the legal persuasiveness of the legal arguments presented.

Insofar as expert testimony includes opinions based on explicit or implicit interpretations of law, jurors cannot reasonably be expected to distinguish the testimony based on expertise from that based on legal interpretation. When such testimony is presented to a judge in a bench trial, this concern remains. When organizations present mixed professional and legal analysis in a brief, they can explicitly articulate the legal arguments presented. When legal or justificatory judgments are presented by expert witnesses, in contrast, these judgments are more likely to be implicitly blended into testimony based on expertise. In these circumstances, the boundaries between the witness' expertise and the witness' implicit legal judgments are more likely to be blurred. Thus, the concern that the legal opinions presented will be misinterpreted as scientific or professional expertise is exacerbated in the context of expert testimony. This concern is ameliorated in the context of a brief, although it is not eliminated insofar as the boundary between the presentation of scientific or professional expertise and legal analysis might be blurred in presentation within the brief.

10.4.2 Original and Contemporary Amici

The original meaning of "amicus" as friend of the court suggests that the amicus is a disinterested party offering relevant information to the court. Early amicus curiae reportedly brought relevant factual information or legal precedent to the attention

of the court that was hearing a case. Amici, in this traditional sense, were literally acting as "friends of the court" in that they assisted the court by bringing relevant factual information or legal precedent to the attention of the court. Although one might imagine that some of these traditional amici might have had some implicit interest in the outcome of the case or in achieving recognition by the court, they did not overtly pursue a particular interest or outcome.[24] Contemporary amicus briefs, in contrast, are often explicitly identified as advocacy briefs pursuing the interests of the amicus or supporting the position of one of the parties to the case. Commentators may differ regarding the rate of change, but they agree that the emphasis has shifted from the role of neutral friend of the court to that of advocate for one party to the case or for some more general interest endorsed by the amicus.[25] Thus, the courts evaluate the expertise, interests, and arguments of the organizations offering amicus briefs with explicit notice that these organizations are engaging in advocacy of a preferred outcome or rule of law.

The Associations Brief in *Panetti*, for example, was explicitly identified as a brief in support of the petitioner, and it explicitly stated the interest of the members of the associations in establishing competency standards. It advocated a position that rejected the Fifth Circuit's standard for CFE as inadequate. The brief included a substantial discussion of the nature of delusional disorder of thought and of the diagnostic categories of schizophrenia and schizoaffective disorder. That discussion presented delusional thought as a disorder of cognitive process, and it explained that this disorder of cognitive process disrupts the individual's ability to comprehend and reason regarding events or outcomes that are subject to the delusional thought.[26] The organizations that presented this brief might have limited the brief to this descriptive and explanatory account of delusional thought disorder. If they had done so, they would have acted as amici in the original sense of the term in that they would have provided the Court with information grounded in their expertise that might have enhanced the Court's understanding of Panetti's impairment and thus, informed the Court's interpretation of the legal significance of that impairment for the more comprehensive constitutional analysis of the CFE requirement and of the appropriate standard for that requirement.

The Associations Brief did not, however, limit the presentation to this informative function. Rather, the brief presented arguments that the Fifth Circuit's legal standard for CFE was inadequate, and it endorsed the conclusions: (1) that the petitioner lacked CFE because he lacked genuine understanding of the state's reason for his execution; (2) that due to this lack of genuine understanding, his execution would not serve the retributive purpose of CP; (3) that the fifth circuit standard was inadequate because it treated some delusional offenders differently than others; and (4) that findings of ICFE should result in commutation of capital sentences to lesser sentences.[27]

In taking these positions, the Associations adopted the more contemporary advocacy function, rather than the original amicus function. For the purpose of exposition, I distinguish two categories of amicus briefs. I use the term "informative amicus brief" or "informative brief" to refer to amicus briefs in the traditional sense that communicated relevant information regarding facts or law to the court hearing

a case. Informative briefs do not advocate for a particular outcome, a particular rule of law, or a particular interpretation of law; rather, they limit their function to providing relevant information to the court. In contrast, I use the term "advocacy brief" to refer to briefs that advocate specific outcomes, rulings of law, or interpretations of applicable law. Advocacy briefs by scientific or professional organizations might also address the informative function in that they can provide relevant information grounded in their expertise. Advocacy briefs differ from informative briefs in that they extend beyond the informative function by arguing for a particular interpretation of the legal significance of that information. In this terminology, the Associations Brief clearly represents an advocacy brief, rather than an informative brief, but it does not provide sufficient legal reasoning to support the conclusions listed above. Consider the following candidates for ICFE.

10.4.3 Alternative Candidates for ICFE

Recall that Panetti reportedly knew that he had committed the murders, that he was sentenced to capital punishment as punishment for those murders, and that punishment for those crimes provided the state's purported reason for executing him. If delusional thought that deprived him of genuine understanding of the state's "real" motive for his punishment was sufficient to render him ICFE, consider the following hypothetical offenders. Suppose that Timothy McVeigh had been aware that he had committed the Oklahoma City bombing, that he had been sentenced to death as punishment for that bombing, and that the government's stated reason for his execution was to punish him for that bombing. He believed, however, that the government's real motive for his execution was to silence criticism of the government by members of the militia movement or others with similar political views. Alternately, suppose that Anderson was convicted of a car-jacking during which he killed the driver and a passenger in the car. He knows that he committed the car-jacking and the murders, that he was sentenced to death for those crimes, and that those crimes provide the government's stated motive for executing him. He believes, however, that the governor and the attorney general refused to commute his sentence because they want to appear tough on crime as the next election approaches.

In these circumstances, would McVeigh or Anderson be CFE or ICFE? If awareness of the government's actual motivation for executing them is the appropriate standard, they both seem to qualify as ICFE. It might seem reasonable to respond that neither is delusional; rather, each is simply mistaken. If awareness of the government's motive for carrying out the execution is the appropriate standard for CFE, however, why would the explanation for the lack of awareness in delusional disorder be important? Insofar as accurate or erroneous belief content about the government's actual motive for carrying out the execution is the appropriate standard for separating those who are CFE from those who are ICFE, why should one specific explanation for that erroneous belief render one ICFE while a different explanation for the same erroneous belief does not?

The brief endorses the claim that delusional belief about the government's motive for the execution prevents the execution from serving the retributive purpose of CP, but it provides no explanation of that retributive function and no reasoning to support the proposition that this delusional belief would prevent the execution from fulfilling that function. Neither does it provide any reasoning that would explain why the lack of awareness of the government's motive due to non-delusional personal or political reasons such as those manifested by the hypothetical offenders McVeigh or Anderson would be more consistent with the retributive purpose.[28] Thus, it provides no reason that would justify treating Panetti differently than McVeigh or Anderson for the purpose of CFE.

These two examples raise at least three distinct questions that the Associations Brief does not address. First, what constitutes the government's motive as distinct from the conviction and capital sentence at trial as the basis for execution? If the government's motive refers to the considerations that motivate various individual government actors, McVeigh and Anderson might be correct about the motivations of specific government actors. Understood in this manner, however, the government will have an indefinite number of different motives, depending upon the number of government actors involved, their personalities, their circumstances, and the particular case. Second, why would the motives of various individual government actors be relevant to an offender's CFE if he is aware that he was convicted for the capital offense and sentenced to capital punishment? Third, insofar as the purported relevance involves the retributive function of capital punishment, what exactly is this function, and how do the beliefs about the motives of various government actors undermine that function?

The Associations might reasonably respond that an analysis addressing these questions extends beyond their areas of expertise. This response would provide a reasonable explanation for filing an informative brief that provides relevant information and explanation within that expertise but refrains from engaging in legal analysis regarding the significance of that information and explanation. When the Associations chose to extend beyond that informative function to present an advocacy brief, however, they chose to endorse an interpretation of the legal significance of the professional expertise they present. By presenting an advocacy brief, rather than limiting themselves to an informative brief, the Associations assert a particular interpretation of the legal significance of the professional expertise they present. The brief lacks legal analysis to support that assertion.

According to traditional interpretations of retributive punishment and some Supreme Court opinions, retributive punishment requires punishment severity in proportion to the offender's desert as indicated by the severity of the harm done and by his culpability or responsibility for inflicting that harm.[29] If one accepts this interpretation of the retributive purpose, however, it is not clear why CFE is relevant to the justification for carrying out the execution. That is, the punishment should be proportionate to the offender's culpability or responsibility for the offense. Thus, the relevant mental state would be his mental state at the time of the offense, rather than his mental state at the time of his execution.

One might respond that the retributive function requires that the punishment inflict suffering or distress upon the offender comparable to that which he inflicted upon the victims. Thus, he must be aware that he is being executed for his crime in order to render him aware that he is subjected to intentional killing, just as his victims were. The murder victims were subjected to unjustified killing, however, so delusional belief that the execution is in some way unjustified and motivated by selfish, illegitimate motives would arguably improve the degree to which the punishment would "fit the crime" if one accepts this interpretation of the retributive requirement. Ironically, if one accepts this interpretation of the retributive function, it seems that punishment the offender recognizes as justified can rarely if ever qualify as justified punishment. That is, if the requirement that the punishment fit the crime requires that the offender experience the punishment in the same manner that the victim experienced the crime, then a guilty offender who recognizes that he deserves the punishment can never experience that punishment in the manner that the innocent victim experienced the unjust murder or any alternative unjustified crime.

Consider the following convicted capital offenders all of whom have been sentenced to death for murders. Baker has repented and been converted to Christianity while on death row. He has come to anticipate his coming execution as an opportunity to leave the misery of prison and go to heaven because he believes that his sins were forgiven when he was baptized. Cook hates prison and his continued life of chronic depression. He would prefer to die than to spend additional decades in the misery of his depressed prison existence. He foregoes all appeals and "volunteers" for execution as preferable to continuing his miserable life in prison. Davis has deteriorated into a delusional state during his time on death row. He is now convinced that he is innocent of the murders that he actually committed. He believes that the government has conspired to convict him of murders he did not commit and surgically inserted inaccurate memories of the crimes that he did not actually commit. Thus, he is outraged that the government plans to murder him by carrying out this criminal conspiracy to convict and execute him for crimes the government knows he did not commit.

If the retributive function of execution is understood to require that an offender experience the execution in a manner comparable to the experience that he inflicted on his victims, it seems that Baker and Cook, who do not suffer psychological disorder that distorts their perception of reality, are ICFE because, in contrast to their victims, they will experience their executions as relief from their current situations. Davis, who does suffer severe distortion of reality testing directly related to his crimes and execution, in contrast, would qualify as CFE because he will experience his execution as unjustified killing, similar to the experience of wrongful killings that he inflicted on his victims. Arguably, Panetti most clearly resembles Davis in that both manifest delusional disorders that distort their understanding of the reasons for their executions and that lead them to believe that they are to be subject to unjustified killing. Thus, if the retributive function of capital punishment requires that the offenders experience their executions in a manner that resembles their victims' experience of their murders, Davis and Panetti are the offenders whose executions would most clearly fulfill the retributive function.

I do not contend that these hypothetical examples reflect an accurate account of retribution as a theory of the justification of punishment or as a component of Eighth Amendment doctrine. Rather, they illustrate that a plausible argument for the proposition that a specific form of psychopathology prevents execution from fulfilling the retributive purpose of capital punishment, or any alternative justification for capital punishment, must present a reasoned analysis of that justification and a reasoned explanation regarding the manner in which specified types of psychological impairment would undermine that justification. Such analysis might be provided by the courts or by the individuals or organizations advancing the arguments. Consider three variations of advocacy briefs.

10.5 Alternate Forms of Advocacy Briefs

10.5.1 Settled Advocacy Briefs

One variation of advocacy briefs would present relevant expertise and argue that this expertise supports a particular outcome or position as consistent with clearly established law. The Associations Brief initially appears to take this form in that it provides the discussion of delusional impairment referred to above, and it contends that such impairment prevents capital punishment from serving its retributive purpose.[30] The brief also rejects the Fifth Circuit's interpretation because that approach allows the execution of some delusional offenders but not others. The brief provides no reasoning, however, to support the apparent premises that capital punishment must serve a retributive purpose in order to conform to the Eighth Amendment and that constitutional standards require that all delusional offenders are treated alike for the purpose of CFE. If settled Eighth Amendment doctrine established these two requirements, then there would be no need for the brief to provide reasoning to support them. Rather the brief could provide the explanation regarding the nature and effect of delusional disorder and regarding the manner in which that disorder precludes execution according to these two requirements under settled law.

Persuasive reasoning of this form would provide: (1) clear precedent establishing the retributive function as necessary to constitutional capital punishment; (2) clear precedent articulating the nature and requirements of this constitutional retributive function; and (3) clear explanation of the manner in which delusional disorder precludes execution from serving that retributive function regardless of the specific content, range, or degree of severity of that disorder.

The Associations Brief does not adequately address any of these three steps. It identifies no controlling precedent that establishes the retributive function as necessary to constitutional capital punishment. It cites to Justice Powell's concurring opinion in Ford, but the brief explicitly recognizes that neither this concurring opinion nor the majority articulate a clear standard.[31] Justice Powell's opinion in Ford is a concurring opinion by a single justice in which Justice Powell asserts that execution of an ICFE offender cannot serve the retributive function, but he provides

no reasoning to support this assertion.[32] Neither the Associations Brief nor Justice Powell cite to controlling precedent or provide any reasoning to support the contention that the retributive function is a necessary condition for constitutional capital punishment, as opposed to one legitimate function that would render it not merely the gratuitous infliction of suffering. Thus, even if the brief provided persuasive reasoning to support the contention that execution of a delusional offender cannot serve the retributive function of capital punishment, that would not be sufficient to establish that it precludes constitutional capital punishment.

Similarly, if settled Eighth Amendment doctrine established that the retributive function is necessary for constitutional capital punishment, a persuasive argument that delusional disorder prevents execution from serving that function would identify the precedent that articulates the nature and requirements of that retributive function. It would then provide an analysis demonstrating that the impairment involved in delusional disorder necessarily prevents execution from fulfilling those requirements. The Associations Brief addresses neither of these elements in a persuasive analysis. The brief recognizes that the requirement that the offender is aware of why he is to be executed is susceptible to the interpretation that the offender is aware that the state claims that the execution is punishment for the offense. It rejects that interpretation as allowing execution of some delusional offenders but not others. It provides no analysis of the required retributive function, however, that would justify the apparent premise that the CFE requirement must apply to all delusional offenders in the same manner, regardless of the content or severity of the delusional disorder.[33]

In short, the brief provides no precedent that establishes the retributive function as a necessary condition for constitutional capital punishment or that clarifies the necessary conditions for the purportedly required retributive function. Thus, it provides no criteria for eligibility that can serve as a standard that the delusional disorder must prevent the offender from fulfilling.

As previously discussed, the brief provides substantial description of the nature and effects of delusional thought disorder. Because the brief identifies no criteria of eligibility for the retributive function, however, it cannot explain why the type and degree of impairment involved in delusional thought categorically precludes eligibility for execution due to inability to meet those eligibility criteria. In summary, the brief does not adequately address any of the three steps that would be involved in a persuasive argument from settled law. Arguably, the Court's fragmented capital punishment doctrine effectively precludes an argument of this type. That doctrine provides neither a specific standard for CFE, a clear ruling that the retributive function is a necessary condition for constitutional capital punishment, nor a clear articulation of the retributive function that provides a legitimate purpose of punishment, thus rendering that punishment more than merely the gratuitous infliction of suffering.

This concern regarding the lack of a clear legal standard that can serve as a basis for an amicus brief arguing to settled law may be more pervasive than it initially appears. In Atkins v. Virginia, for example, the Court provided a categorical rule precluding capital punishment of offenders who suffer mental retardation.[34] The majority

opinion based this ruling upon its analysis of the evolving standards of decency as represented primarily by statutory developments and supplemented by additional sources.[35] The opinion also confirmed these developments by concluding that capital punishment of mentally retarded offenders would serve neither the retributive nor deterrence purposes of capital punishment.[36] The Court did not provide a constitutional standard, however, that defines mental retardation for this purpose. Rather, it left the task of defining standards of mental retardation for this purpose to the states.[37]

It might initially appear that the *Atkins* ruling provides a settled rule of constitutional law that would enable organizations with relevant expertise to apply their expertise in the form of a settled advocacy brief advocating a particular standard of mental retardation for this purpose. Review of the opinion reveals, however, that some of the central concerns regarding the lack of clearly articulated legal standards apply in this context. The Court's ruling, for example, reflected in part the reasoning that capital punishment of mentally retarded persons would serve neither the deterrent nor retributive purposes of capital punishment. Thus, an amicus brief might endorse a particular standard of mental retardation by providing evidence that a particular type and degree of impairment prevents offenders from engaging in the kind of psychological processes that are necessary to fulfill at least one of the retributive or deterrence functions. Unfortunately, the court has not clearly articulated those functions in a manner that enables one to clearly identify the type and level of psychological processes that are necessary to fulfill those purposes.

In some passages, for example, the Court discusses the deterrent function in terms that suggest that the deterrence function applies only to those who engage in a cold calculus of cost and benefits.[38] These passages provide no reasoning, however, to explain why execution of severely retarded offenders could not serve the general deterrence function by demonstrating to other potential offenders that capital offenders will be executed. Similarly, the Court's descriptions of the offenses committed by Atkins and Penry suggest that these mentally retarded offenders did engage in cost–benefit analysis insofar as they committed crimes other than homicides and then committed murder in order to reduce the risk of being arrested and punished for those crimes.[39] Both offenders were apprehended, convicted, and sentenced to death. Thus, they apparently did not engage in accurate cost–benefit analysis as applied to their particular decision to kill. The deterrence function cannot apply only to those who engage in accurate cost–benefit analysis in this individualized sense because if it did, it would apparently apply only to those offenders who were not apprehended for their offenses.

One might reasonably argue that the relevant abilities to engage in cost–benefit analysis for the purpose of deterrence should be interpreted as some more general capacities to engage in mental processes such as comprehension and reasoning. Neither the Court's opinion nor the Associations Brief presents any such interpretation. Thus, neither source provides any account of the capacities required for deterrence, nor do they provide support for the contention that mentally retarded persons necessarily lack these capacities. Furthermore, even if there were reason to believe that these classes of offenders were not susceptible to deterrence, the

Court provides no reasoning to explain why executing them could not enhance the deterrent effect for other potential offenders. In short, the Court provides no clear reasoning regarding the precise nature and parameters of the deterrent function or regarding the capacities that are necessary for punishment to serve this function. Thus, it provides professional organizations with no guidance regarding the type or degree of impairment that should be understood as qualifying as mental retardation for this purpose.

The *Atkins* opinion asserted that the lesser culpability of mentally retarded offenders renders them inappropriate for capital punishment under the retributive function. The opinion identified the "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" as impairment manifested by mentally retarded individuals.[40] The opinion did not explain, however, what type and degree of impairment in the ability to perform these various functions renders a person who remains criminally responsible necessarily insufficiently culpable to merit capital punishment for a capital crime, regardless of the severity of the crime and the circumstances in which it occurred.[41]

Thus, the opinion provides no basis to conclude that the degree and type of impairment that should qualify as mental retardation for this constitutional purpose should, or should not, converge with the degree and type of impairment that is categorized as mental retardation by conventional standards for clinical or educational purposes. One widely applied diagnostic manual, for example, applies the diagnosis of mental retardation to individuals who demonstrate intellectual functioning at an I.Q. level of approximately 70 or below with concurrent deficits or impairment in adaptive functioning. This manual lists eleven areas of adaptive functioning and requires deficits or impairment in at least two of those areas for a diagnosis of mental retardation.[42] The lack of clarity or specificity in the reasoning that justifies the Court's categorical rule renders it difficult to conclude that deficits in any two of those eleven areas should qualify a person as mentally retarded for the purpose of the Eighth Amendment, regardless of the circumstances of the crime and the relationship between those circumstances and specific deficits manifested by the offender. It is not obvious, for example, why deficits relative to an offender's age group in the areas of academic skills and leisure should render that offender less than fully accountable for murder committed during a car jacking or home invasion. Similarly, the Court's opinion provides no reasoning to support the premise that the level of intellectual functioning that prevents capital punishment from serving either the retributive or deterrent functions converges with the I.Q. score of approximately 70 that the manual identifies as the threshold for mental retardation for clinical and educational purposes.

The point here is not that the *Atkins* decision was wrongly decided. I make no attempt to assess that question here. The central point for the purpose of this chapter is that even a relatively clearly settled legal standard, such as the categorical preclusion of capital punishment for mentally retarded offenders, requires additional analysis of the relevant constitutional doctrine and legal reasoning interpreting that

doctrine in order to support an argument for specific interpretation and application. Thus, an amicus brief that purports to apply professional and scientific expertise to a settled legal standard will ordinarily be required to engage in legal interpretation of that standard in the context of its purpose and justification. This difficulty is compounded in the context of CFE because the doctrine provides neither a clear standard nor a clear articulation of the purpose and justification for the CFE requirement. In the absence of both a clear statement of the justification for the CFE requirement and a settled legal standard for CFE that articulates the required psychological capacities in a manner that allows amici to apply available expertise regarding the nature and significance of specified types of impairment, the organizations might pursue a more comprehensive analysis. Such an approach would integrate that expertise with legal reasoning that supports a particular standard and an interpretation of the significance of specified impairment for that standard as consistent with the applicable constitutional doctrine.

10.5.2 Comprehensive Advocacy

As discussed in Section 10.3, the legal functions and limits on amicus briefs differ from those that apply to expert testimony in a manner that allows professional organizations to pursue comprehensive advocacy by presenting reasoning that endorses a particular interpretation of relevant law and applies the expertise of the profession to that interpretation. Thus, the amicus might apply its expertise in arguing that the Court should adopt a particular doctrine or interpretation of doctrine and that this doctrine is consistent with a particular standard or a particular outcome in specified circumstances.

In the context of CFE, for example, the first step in a comprehensive amicus brief might argue that the Court should adopt a particular interpretation of the retributive purpose of criminal punishment as most consistent with the more comprehensive body of Eighth Amendment doctrine, the underlying purpose of the Amendment, the justification of criminal punishment, or some alternative justificatory argument. The second step in the analysis would advance reasoning demonstrating that this retributive purpose limits the justified application of capital punishment to those who are CFE at the time of execution. The third step would endorse a particular standard for CFE as one that accurately identifies those offenders who retain the capacities that are necessary for execution to serve the retributive function as articulated in the first step. The fourth step in the argument would integrate the first, second, and third steps with available descriptive and explanatory information regarding various types and degrees of psychological impairment. This integration might address general categories of impairment or the specific type and severity of impairment manifested by a particular individual.

The Associations Brief, for example, opposed the Fifth Circuit's approach partially because that approach would categorize some delusional offenders as CFE and others as ICFE. The brief asserts that execution of delusional offenders would

not serve the retributive purpose of capital punishment, but it provides no reasoning that supports this assertion.[43] A comprehensive brief would integrate the explanation of delusional disorder with a standard for CFE that reflected the most justifiable interpretation of the CFE requirement as part of the more comprehensive Eighth Amendment doctrine in order to demonstrate why execution of any delusional offender would be inconsistent with that standard and with the more comprehensive Eighth Amendment doctrine. Alternately, a comprehensive advocacy brief could focus attention on the particular offender's delusional disorder and explain why execution of an individual with this particular form and degree of impairment would be inconsistent with the CFE standard that would most accurately reflect the more comprehensive Eighth Amendment doctrine.

In principle, an advocacy brief for a scientific or professional organization might offer analysis that applies its expertise at each step. Consider the first step in which the comprehensive brief advances an interpretation of the retributive purpose. Some Court opinions have discussed the retributive function of capital punishment as expressing the outrage of the citizenry at certain crimes and thus, as preventing vigilante justice.[44] Other opinions have rejected this interpretation of retribution and asserted that capital punishment is not necessary to prevent vigilante justice.[45] The first step in the comprehensive argument would provide doctrinal or justificatory reasoning to support an interpretation of the retributive function as most consistent with the relevant Eighth Amendment doctrine or with the most persuasive moral justification. Insofar as the expertise of the amicus provided evidence or argument relevant to this analysis, a comprehensive brief could integrate this evidence into this doctrinal or justificatory analysis.

An amicus brief by organizations such as those that submitted the Associations Brief, for example, might present empirical information about the types of punishment that are generally perceived as appropriate in form or severity for certain categories of offenses or offenders. That evidence might support or undermine the premise that execution of seriously impaired offenders would accurately express the outrage widely felt toward those offenders or would be generally perceived as unjust. Thus, it might advance the second step in the analysis by supporting or undermining the CFE requirement as consistent with the expressive function of punishment, insofar as that expressive function is intended to express condemnation in a manner and to a degree viewed as appropriate by the general citizenry.[46]

Evidence that execution of offenders who were unable to fulfill specified requirements were generally perceived as unjust might inform the third step in the analysis by providing reason to adopt a particular standard as consistent with preserving the expressive function. If execution of those who were unaware that they were to be executed as punishment for their crimes was generally perceived as unjust, for example, that evidence might support Justice Powell's standard as consistent with maintaining the expressive function. If relevant evidence was available, it might provide a basis to identify the quality of awareness that would be most consistent with this expressive function. Ordinary citizens might find Panetti's awareness of the state's purported reason for his execution as sufficient to justify his execution, or they might find this awareness insufficient for this purpose. Insofar as relevant

evidence regarding this question was available, it could inform the comprehensive analysis. Insofar as such evidence was not available, the analysis would rely on a hypothesis regarding this question that might be informed by further research.

The fourth step would integrate the analysis from the first three steps with diagnostic information about a particular offender or category of offenders in order to advance an argument that execution of this offender or of a general category of individuals with particular types and degrees of impairment would promote or undermine the retributive purpose as interpreted in the first step. If there were empirical evidence that all delusional offenders lacked awareness of their pending executions in a manner that undermined the general perception that justice was attained in these cases, for example, this evidence might provide a component in a more complete argument for a requirement of CFE, for a standard of CFE that precluded execution of offenders who lacked such awareness, and for appropriate application of that standard to all offenders who manifested delusional disorders.

I do not contend here that integration of the relevant doctrinal and justificatory analysis with available empirical evidence would, or would not, generate this conclusion. Rather, I provide this brief discussion to illustrate the complexity of a comprehensive analysis for this purpose. The core of the comprehensive advocacy brief by scientific or professional organizations involves the integration of the specific expertise of those organizations with the doctrinal and justificatory reasoning that supports a particular interpretation or application of the relevant law as most consistent with the more complete body of doctrinal or justificatory reasoning. Although this might seem an ideal approach, it will be impractical in many circumstances for three reasons. First, the basis in available law might not provide a sufficient foundation to identify the justification that is most consistent with the full body of relevant law. The Court's opinion in *Ford*, for example, identified a variety of asserted justifications for the CFE requirement, but it provided no clear reasoning to accept any of those purported justifications as controlling. Rather, the opinion relied heavily on the historical and contemporary acceptance of a CFE requirement.[47] Second, persuasive empirical evidence that directly addresses the relevant questions presented by the doctrine will often be unavailable. There may be some relevant research, however, that can inform the more comprehensive analysis. Third, amicus briefs are limited in length by the courts.[48] Thus, a brief can provide substantive analysis and argument addressing only a limited range of questions.

10.5.3 Conditional Advocacy

Amici might fulfill the advocacy role within the limited scope allowed by the constraints on amicus briefs by advancing conditional arguments. Assume that there is no settled doctrine available, either because the relevant court opinions are divided among two or more interpretations of the applicable doctrine or because the opinions are sufficiently vague or ambiguous as to preclude identification of any settled doctrine. In these circumstances, an advocacy brief might identify a particular interpretation of

applicable law and an arguably appropriate standard without attempting to provide persuasive analysis to support this interpretation and this standard as the most defensible candidates. It would then argue that if the courts adopt this interpretation of law and this standard for its application, then the scientific or professional expertise of the amicus would have the following significance. Such a brief would not purport to provide a persuasive argument that the courts should adopt the specified interpretation of doctrine, the specified standard, or a specific outcome. Rather, it would posit a plausible interpretation of the doctrine and standard, and it would advocate a particular interpretation of the significance of the identified scientific or professional expertise as applied to that interpretation of the doctrine and standard.

By stipulating a particular interpretation and standard, without attempting to provide persuasive reasoning to support that interpretation and standard, the amici would recognize the roles of the parties and of the courts in providing the legal and justificatory analysis. Amici would focus their attention on informing the courts regarding the matters that fall within the expertise of the amici and that carry relevance for the interpretation and application of the legal doctrine as stipulated. This approach would facilitate the ability of the amici to fulfill their role by allowing the amici to focus their attention, resources, and virtually all of the allocated length of the brief on the matters that fall within their range of expertise. An amicus brief formulated in this manner might assist the courts in applying the stipulated interpretation of the doctrine and standard, and this application might provide relevant reasoning to adopt or to reject that interpretation of the doctrine and standard. If the court rejected the stipulated interpretation, however, it might then disregard the brief as irrelevant to the alternative interpretation and standard adopted by the court. This decision to disregard the amicus brief as irrelevant would not be a concern to traditional amici who were providing assistance to the courts, but it would be a concern for amici that were pursuing professional or political agendas.

10.5.4 The Associations Brief

The Associations Brief arguably spans the boundaries among these four categories of amicus briefs in a manner that renders it difficult to satisfy any one of them fully. The Associations Brief provides descriptive and explanatory information regarding delusional disorder that fulfills a valuable informative function. Had the brief been limited to that function, it would have provided a useful and coherent informative brief. Furthermore, limiting the brief to this informative function might have allowed the amici to develop more fully the informative function within the limited page length allowed. One passage, for example, refers to a text book to support the claim that people with schizophrenic thought disorder "think and reason… according to their own intricate private rules of logic."[49] Logic addresses "the forms of sound or valid thought patterns."[50] Thus, if delusions involve private rules of logic, they are apparently private rules of valid thought, rather than thought disorder. Presumably, those who wrote the Associations Brief intended to refer to idiosyncratic distortions

of logical reasoning. Had the brief been limited to the informative function, the page constraints might have been sufficient to allow the writers to explain more clearly this and other passages that present relevant information within their range of expertise.

The brief apparently extends beyond the informative function to engage in what initially appears to be settled advocacy, however, in that it asserts that this descriptive and explanatory information had specific significance for the retributive function. The brief provides no analysis, however, to support this interpretation of its significance. That is, it neither articulated the nature, purpose, or justification of the retributive function as part of the Court's settled Eighth Amendment doctrine, nor did it explain how delusions undermine this retributive function. It is not clear how it could have done so, because the Court opinions that refer to the retributive function neither provide a clear and consistent account of that function nor clearly adopt it as necessary or sufficient for constitutional capital punishment. Thus, the brief appears to engage in settled advocacy regarding matters that lack clearly settled doctrine or standards. This lack of settled legal foundation suggests that settled advocacy is not a viable format, and thus, that an amicus brief that purports to extend beyond the informative function must engage in comprehensive or conditional advocacy.

The brief fulfills none of the identified steps that would constitute comprehensive advocacy. It provides no reasoning to support any particular interpretation of the retributive function or of any alternative constitutional basis for the CFE requirement. It refers to Justice Powell's awareness standard, but it provides no analysis that justifies any interpretation of that standard as most consistent with the purpose and justification of the CFE requirement. Because it provides no doctrinal analysis, it cannot integrate the discussion of delusional disorder with the applicable doctrinal analysis in order to justify the assertion that delusional disorder prevents an offender from fulfilling the constitutional CFE requirement. Given the restrictions on length ordinarily placed on an amicus brief, it is not clear that comprehensive advocacy is a viable alternative in many cases.

Finally, the brief does not provide conditional advocacy because the assertions of significance are not conditioned upon the Court's adoption of any specified interpretation of the CFE requirement or of the asserted retributive function. Rather, it asserts that delusions render offenders ICFE because they undermine the retributive function, but it provides no reasoning that supports the purported significance of these delusions for that retributive function. Neither does it provide any reasoning to support the contention that the CFE standard should treat all delusional offenders alike, regardless of the severity and content of their delusional thought and regardless of the relationship between that delusional thought and the offenders' offenses and executions.

10.6 Selecting a Form

Sections 10.4 and 10.5 identify four plausible approaches to framing amicus briefs. As discussed, each has advantages and limitations. Thus, a professional or scientific organization might consider each in deciding how to frame an amicus brief for a

particular purpose in a particular case. Arguably, a comprehensive advocacy brief would frequently provide the preferred approach in that it allows the organization to file the brief explicitly in support of one party and to engage in explicit advocacy regarding the presentation and interpretation of the applicable law, its relevant expertise, and the significance of the latter for the former. Thus, the organization can present and explain the information that falls within its domain of expertise and argue for a preferred interpretation of the relevant law and of the relationship between that law and the expertise it presents. In this manner, the organization has the opportunity to reduce the risk of misrepresenting its political views or its concern for self-interest as disinterested or "objective" information. The explicit advocacy format provides notice that it pursues interests and that these might bias its presentation and interpretation of its expertise, the relevant law, and the relationship between the two. It is then the responsibility of the courts to examine critically the persuasiveness of the amicus brief in light of those interests and in the context of the full body of evidence and argument from the parties and the various amici.

As discussed previously regarding the Associations Brief, length limits preclude the complete and integrated analysis required for a comprehensive advocacy brief in many circumstances. Thus, amici that attempt to file comprehensive advocacy briefs will be forced to omit some important components of a comprehensive analysis or to address some components superficially.

Alternately, two or more organizations might file separate but coordinated briefs, each of which addresses a limited component of the comprehensive analysis. The organizations that filed the Associations Brief, for example, might have divided the task and filed separate briefs. One might have presented professional expertise in the form of descriptive and explanatory information about delusional disorder. The second might focus on the legal analysis of the retributive function of the CFE requirement. The third might integrate the analyses presented by the first and second briefs in order to support their joint contention that delusional disorder renders execution inconsistent with the retributive function. Such an approach would facilitate a more comprehensive analysis, but it would retain and perhaps exacerbate the concern regarding the risk that each might fail to clearly identify the effect of the joint advocacy interest on the empirical and legal analyses presented in each individual brief. One might reasonably worry, for example, that the organization that presented the empirical account of delusional disorder might present that account as objective and fail to recognize or communicate that this putatively objective account was influenced by the joint agenda of the three associations.

In circumstances in which there is a reasonably well-established body of settled legal doctrine, a settled advocacy brief might provide an appropriate format. Professional and scientific organizations can provide their expertise as applied to settled law in a brief that they explicitly identify as an advocacy brief for one party. Thus, they can avoid misrepresentation or the appearance of misrepresentation of their role as neutral or objective. The appeal to settled law allows the organization to expend relatively limited page length on legal analysis and to focus their brief on the presentation of their expertise and the application of that expertise to the settled law. Unfortunately, as discussed previously in Section 10.5.1, law that is

settled to the degree that interpreting the significance of the professional expertise will not require substantial legal analysis will probably be relatively rare in cases that advance to the United States Supreme Court or to the supreme courts of various states. Cases that remain controversial at the appellate level are likely to do so at least partially because the most defensible interpretation and application of the relevant doctrine remains controversial. A persuasive argument addressing the significance of the various forms of adaptive functioning discussed in Section 10.5.1 for an Eighth Amendment standard of mental retardation, for example, would involve an integration of descriptive and explanatory information regarding these forms of impairment with a doctrinal and justificatory analysis of the relevant Eighth Amendment doctrine.

Thus, in many of the controversial cases in which scientific and professional expertise might be most relevant, the law might not be sufficiently settled to allow for settled advocacy. In such circumstances, an attempt to provide settled advocacy might force the amicus to confront a dilemma. The amicus might have to choose between misrepresenting the relevant law as much more clearly settled than it is or blurring the boundary between settled and comprehensive advocacy in a manner that encounters the problem of limitations on length.

In some circumstances, a conditional brief might provide the most viable alternative because it allows the amicus to briefly state a defensible interpretation of law without expending substantial length on legal analysis. The amicus can then carefully present and explain the relevant expertise provided by the amicus and the significance it has for the relevant legal doctrine the amicus conditionally asserted. If the courts accept that interpretation of the relevant law, this approach allows the amicus to focus its attention on explaining its expertise and the application of that expertise to the settled legal doctrine. If the courts reject that interpretation of law, however, they might well disregard the expertise of the amicus as irrelevant to the alternative interpretation they adopt. Alternately, they might still consider the expertise presented by the amicus, but they might not accurately interpret it in the context of legal doctrine that differs from that which the amicus was addressing. Furthermore, this approach does not provide the amicus with the opportunity to pursue its professional or political interests by arguing for its preferred interpretation of the relevant law. Insofar as the amicus adopts the traditional friend of the court role, this lack of opportunity does no harm. Insofar as the amicus intends to advocate for a preferred interpretation of law, however, this approach undermines the purpose of the brief.

This concern draws attention to the importance of careful reflection by such organizations on their purpose in filing amicus briefs. If they truly seek to fulfill the traditional friend of the court role, the risk that they will have no influence if they stipulate an interpretation of law that differs from that accepted by the courts does not present an adverse outcome. If they pursue a preferred interpretation or outcome, however, the conditional approach might prove self-defeating.

Insofar as organizations actually pursue the traditional friend of the court role, the informative brief might provide a more appropriate instrument than any of the three forms of advocacy briefs. By limiting the brief to the informative function,

the organization maximizes the page length that it has available for that purpose, thus enhancing its ability to address that informative function as clearly as possible. Furthermore, this approach allows the organization to direct its attention to matters within its domain of expertise, reducing the risk that it will distort the explanation due to misunderstanding of the related legal analysis. The informative approach raises a concern, however, regarding the potential for distortion through the influence of unrecognized or unstated interests. Developing and filing an amicus brief requires an investment of time and resources. The organization's willingness to make that investment suggests that the organization perceives itself as having some vested interest in the matter. This interest might be a tangible one, a political commitment, or a desire to have its expertise recognized and accepted by the courts.

This concern regarding the potential contaminating effect of unstated interests draws attention to the question regarding the circumstances under which organizations can or should submit purportedly disinterested informative briefs. First, are they able to do so with a reasonable degree of objectivity? Do they have unstated interests, political commitments, or desires for recognition by the courts that undermine their ability to present an authentically disinterested analysis? Such interests and commitments arguably influence advocacy briefs also, but insofar as advocacy briefs overtly state their advocacy positions, the amici reduce the risk of misleading the courts by giving explicit notice that they are pursuing an advocacy role.

Consider, however, organizations such as those that filed the Associations Brief, that present themselves as scientific organizations.[51] This representation of expertise as scientific suggests that their position rests upon the objective observations through reliable methods that are "valid according to the objective principles of scientific method."[52] Insofar as the brief purports to present science to the courts, it contends that it presents "[t]heoretical perception of a truth, as contrasted with moral conviction (conscience)."[53] At first glance, the presentation of an advocacy brief by a purportedly scientific organization seems to represent the propositions that it constitutes objective observation, in contrast to moral conviction, and that it actively pursues an outcome or an interpretation of law as that which is most justified. Although these two propositions appear to be at tension with each other, they are reconcilable insofar as one interprets them as contending that the brief presents an objective account of the relevant science and advocates for a preferred interpretation or application of relevant law based on that science. One might reasonably suspect that the advocacy goals influence the purportedly objective presentation of the relevant science, but understood in this manner, the two propositions are not inherently contradictory. Furthermore, the overt advocacy role provides notice of the organization's interests and goals that may influence its putatively objective account of the science.

Briefs that purport to take the form of informative briefs, in contrast, do not explicitly pursue an agenda, perhaps rendering any influence of such an agenda more difficult to recognize and correct. This difficulty might arise for the courts and for the organizations. Insofar as the brief purports to present only an objective account of the relevant science, it presents an account of substantive information and method that ordinarily extends beyond the competence of the courts. Thus,

most judges are not well prepared to evaluate the presentation of science in the briefs or to recognize the manner and degree in which the organizations' implicit agendas, biases, or preferences influence the presentation of science in the brief. Furthermore, the absence of explicit advocacy renders it more difficult for the courts to identify the form or direction that any implicit bias might take.

Similarly, an organization that presents an explicit advocacy brief might be more likely to recognize the risk that its pursuit of a particular agenda might distort its ability to present an unbiased account of the relevant science. Although advocacy briefs explicitly identify amici as advocates for a specified party or position, advocacy briefs by organizations that purport to be scientific organizations advocating on the basis of science implicitly contend that their presentation of the relevant science represents the unbiased application and interpretation of scientific method. Thus, advocacy briefs presented as based on science purport to present an unbiased account of the current state of the relevant science, but they acknowledge their advocacy role in pursuing particular interpretations of the legal significance of that science. Explicitly recognizing the potential for the advocacy role to contaminate the interpretation and presentation of the purportedly objective account of the science might enhance the ability of the organizations to establish internal methods of critical review designed to ameliorate such distortions. I do not suggest that these procedures are likely to eliminate such distortions. I suggest only that purportedly objective informative briefs might present an increased risk of such distortions because those who develop the briefs are less likely to be cogently aware of that risk.

Although the first question asks whether associations are able to provide disinterested informative briefs, the second question asks whether organizations should attempt to provide strictly informative briefs if its members generally hold the view that its expertise and responsibilities support a particular legal conclusion. Such an attempt might exacerbate the risk of unintended distortion of the scientific content due to biases, agendas, or an investment in maintaining an illusion of objectivity that prevents the organizations from recognizing the effects of their interests and preferences. Alternately, it might undermine the integrity of the organization by producing an informative brief that effectively misrepresents the views or commitments of the members through omission. In short, the attempt to file an informative brief might undermine the integrity of the organization and of the legal process by intentionally or unintentionally misrepresenting the views and agendas of the organizations or its members, or by generating an advocacy brief that purports to be an informative brief.

This review suggests that each of the four identified forms of amicus briefs might serve important purposes in some circumstances, but each raises concerns regarding potential distortion of the content or of the role of the organization filing the brief. This risk of distortion does not preclude a legitimate and valuable role for amicus briefs. Rather, it suggests that organizations contemplating submission of an amicus brief should reflect carefully upon the decision to do so and upon the form that such a brief should take. This reflection should include careful consideration of the organization's relevant expertise, responsibilities, interests, motives, and roles.

Such reflection might enhance an organization's ability to file a brief that takes a form that accurately represents its expertise, the interests it is pursuing, and the role it is adopting. Ideally, carefully engaging in this reflective process will promote: (1) the accuracy with which the organization recognizes its role and presents that role to the court; (2) the organization's ability to present a brief that accurately applies its expertise and responsibly fulfills its chosen role; (3) the court's ability to assess the information and analysis presented; and (4) the integrity of the organization and of the legal process.

10.7 Conclusion

The common practice of submitting amicus briefs by professional organizations renders the purpose and methods of such briefs worth examining. The Associations Brief in *Panetti* serves a useful and appropriate function in that it provides the Court with descriptive and explanatory information regarding delusional disorder. That information clearly falls within the expertise of the Associations, and it is relevant to the question the Court encountered regarding the defensible formulation, interpretation, and application of the CFE standard. A brief that confined itself to the informative function might have fulfilled that function more clearly and completely.

Amici who choose to extend beyond the informative function to file an advocacy brief might do so in the form of settled advocacy, comprehensive advocacy, or conditional advocacy. Arguably, the lack of clearly articulated and justified Eighth Amendment doctrine regarding the CFE requirement precluded the associations from offering a settled advocacy brief, although some of the language seems to suggest that the associations understood it as serving that purpose. Similarly, the limited length allowed for such briefs precludes amici from providing persuasive comprehensive advocacy briefs in many, and perhaps most, cases. Furthermore, the vague and fragmented nature of the Court's opinions regarding the Eighth Amendment generally, and the CFE requirement specifically, arguably preclude a well-grounded comprehensive brief addressing these areas of constitutional doctrine. This lack of foundation in clear and settled doctrine in combination with page limits arguably support the conclusion that the associations might have provided a more persuasive conditional advocacy brief if they had consistently pursued that approach.

I do not claim that this categorization of approaches carries some official status nor do I deny that others might be able to identify some useful alternative formulations. I claim only that recognizing these variations in approaches facilitates the ability of the organizations to reflect upon the assets and vulnerabilities of each. Such reflection might enhance the ability of amici to identify their specific roles and thus, to pursue carefully analyses that contribute to the judicial decision-making process in a manner that reflects the expertise of the amici and the appropriate roles of the amici and of the courts. This approach may promote the ability of the amici and of the courts to discharge their responsibilities effectively and to promote the integrity of the amici and of the legal process.

Notes

1. Panetti v. Quarterman, (2007) WL 1836653 (U.S.).
2. Brief for Amici Curiae American Psychological Association, American Psychiatric Association, and National Alliance on Mental Illness in Support of Petitioner, 2007 WL 579235 at *1 (hereinafter Associations Brief).
3. *Id.* at *17.
4. *See infra* § 10.3
5. Associations Brief, *supra* note 2, at *5–7, 17
6. *Id.* at *17–18.
7. Panetti v. Quarterman, (2007) WL 1836653 at *17.
8. Associations Brief, *supra* note 2, at *7–8
9. *Id.* at *7–12.
10. *Id.* at *12–13.
11. *Id.* at *11–13.
12. *Id.* at *13.
13. *Id.* at *14–17.
14. *Id.* at *16–17.
15. Daniel A. Krauss, John McCabe, & Sarah McFadden, *Limited Expertise and Experts: Problems with the Continued Use of Future Dangerousness in Capital Sentencing*, Chapter 6 in this volume; Robert F. Schopp, Two-Edged Swords, Dangerousness, and Expert Testimony in Capital Sentencing, 30 L. & Psychology Rev. 57, 67–68 (sources cited in notes 47–52) (2006).
16. Schopp, *id.* at 72–80.
17. *Id.* at 78–80.
18. *Id.* at 91–94.
19. Robert F. Schopp, Competence, Condemnation, and Commitment 41–49 (2001).
20. Fed. R. Evi. 702.
21. 56 Federal Rules Decisions 183, 282 (Advisory note).
22. Fed R. Evi. 403.
23. Robert L. Stern et. al., Supreme Court Practice 464–68 (8th ed. 2002).
24. Stuart Banner, *The Myth of the Neutral Amicus: American Courts and Their Friends*, 20 Const. Comment. 111, 119–120 (2003); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 Yale L.J. 694, 694–695 (1963).
25. Banner, *id.* at 119–22; Krislov, *id.* at 703–704.
26. *See supra* § 10.2
27. Associations Brief, *supra* note 2, at *13–16.
28. *Id.* at *14–15.
29. Roper v. Simmons, 125 S.Ct. 1183, 1196 (2005); Atkins v. Virginia, 536 U.S. 304, 319 (2002); Robert Nozick, Philosophical Explanations 363–365 (1981).
30. *See supra* § 10.2
31. Associations Brief *supra* note 2, at *5–6.
32. Ford v. Wainwright, 477 U.S. 399, 421–22 (1986) (Powell, J., concurring).
33. Associations Brief, *supra* note 2, at *14–15.
34. Atkins v. Virginia,536 U.S. 304, 321 (2002).
35. *Id.* at 313–316 and n21.
36. *Id.* at 317–320.
37. *Id.* at 317.
38. Roper v. Simmons, 125 S.Ct.1183, 1196 (2005); Atkins, 536 U.S. at 319–320.
39. Atkins, 536 U.S. at 307; Penry v. Lynaugh, 429 U.S. 302, 322–324 (1989).
40. Atkins, 536 U.S. at 318.
41. *Id.* at 319 (majority opinion), 349–51 (Scalia, J., dissenting).

42. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 49 (4th ed. Text Revision 2000).
43. Associations Brief, *supra* note 2, at *14–15.
44. Gregg v. Georgia, 428 U.S. 153, 183–184 (1976) (plurality opinion).
45. Gregg v. Georgia, 428 U.S. 227, 237–239 (1976) (Marshall, J., dissenting).
46. Joel Feinberg, Doing and Deserving 95–118 (1970) (discussing the expressive function of punishment).
47. Ford v. Wainwright, 477 U.S. 399, 405–410 (1986).
48. Robert L. Stern, et al, *supra* note 23, at 380–381.
49. Associations Brief, *supra* note 2, at *11.
50. Peter Angeles, Dictionary of Philosophy 155 (1981).
51. Associations Brief, *supra* note 2, at *1.
52. II The New Shorter Oxford English Dictionary 2717 (1993).
53. *Id.*

Chapter 11
Constitutional Health Care and Incompetency to Face Execution

Michael R. Quattrocchi

The uncertainties associated with competency to face execution (CFE) underlie difficult questions regarding the role, limits, and responsibilities of clinical expertise in this area of mental health law. The Supreme Court in Ford v. Wainwright (1986) ensured the necessity for forensic clinical input by ruling that the Eighth Amendment prohibits the state from executing an inmate who is insane. The uncertainties impacting forensic clinical input appear to be driven most visibly by the absence of a definitive standard of CFE. While the Supreme Court in Panetti v. Quarterman (2007) seemed to support a standard of rational understanding for CFE, this opinion did not identify the psychological abilities required for a death row inmate to qualify as competent.

The chapters in this volume by Otto and Schopp reflect the critical importance, and unstable footing, of clinical input by individual practitioners and professional organizations regarding competency and execution. As seems characteristic of the literature in general, their discussions of CFE and clinical input occur within a perspective of the Eighth Amendment's limitations on the criminal sentence of death. The scope of the Eighth Amendment, however, reaches beyond punishment imposed by a criminal sentence. The Supreme Court has applied the cruel and unusual punishments clause to other aspects of an inmate's life, including deprivations in prison never intended as punishment (Wilson v. Seiter, 1991), and notably deprivations relative to health care (Estelle v.Gamble, 1976).

Estelle established that deliberate indifference to an inmate's serious medical needs constitutes cruel and unusual punishment. This ruling characteristically is interpreted as an Eighth Amendment obligation on the part of state authorities to provide health care to inmates for their serious medical needs (Cohen, 1998; Mushlin, 2002; Posner, 1992). As will be detailed below, any condition that impedes an inmate's psychological functioning to the point of incompetency to face

M.R. Quattrocchi (✉)
Independent Practice, Fishers, Indiana, USA
e-mail: quattrocchimr@sbcglobal.net

I am grateful to Bob Schopp for his insightful suggestions and guidance in the preparation of this chapter.

R.F. Schopp et al. (eds.), *Mental Disorder and Criminal Law*,
DOI 10.1007/978-0-387-84845-7_12, © Springer Science+Business Media, LLC 2009

execution (ICFE) almost certainly represents a serious medical need and, thereby, must be adequately addressed by the state in order to avoid a constitutional violation. As such, the Eighth Amendment health care mandate apparently requires health care treatment intended to ameliorate the disorder that renders the inmate incompetent to face execution. This requirement forces clinicians and the courts to confront the roles, responsibilities, boundaries, and relationships of forensic clinicians addressing CFE and correctional health care clinicians addressing medical conditions impacting CFE.

Otto develops issues central to CFE assessments and Schopp, in analyzing variations in purpose and structure among amicus briefs by professional organizations, raises a question relative to forced treatment designed to restore CFE. This comment will highlight some complexities associated with conducting competency assessments and with implementing forced restorative treatment in the context of the Eight Amendment mandate for states to provide health care for psychological conditions rendering inmates incompetent. This perspective is vital because the implications of state correctional health care obligations are interwoven with questions regarding CFE, and seem to reshape many of the issues relative to clinical input and competency. Gannon (2005) highlights the tension implicit in an integration of health care with corrections, noting that the principles guiding these institutions are at substantive odds with each other. Correctional facilities deliver criminal punishment, an essentially adversarial institution, while health care is designed around nurturance that promotes well-being through healing and the prevention of ills. CFE seems to trigger the most troubling of these integrations, and one that cannot be avoided by questioning whether psychological dysfunction renders a death row inmate incompetent to be executed.

Section 11.1 of this comment briefly summarizes the Eighth Amendment's mandate regarding health care and its entanglement with CFE. Section 11.2 demonstrates problematic issues associated with forensic clinicians conducting CFE assessments in the context of correctional health care clinicians providing treatment for the SMHN (serious mental health need) generating questions about an inmate's competency. Section 11.3 highlights relationships among forced restorative treatment, correctional mental health care, and the constitutional health care mandate, and it explores apparent impediments to forced restorative treatment implied by these relationships. Section 11.4 speaks to the importance, from multiple perspectives, of resolving the tensions implied by the interface of forensic activities addressing CFE and correctional mental health care designed to satisfy the Eighth Amendment mandate.

11.1 The Eighth Amendment and Health Care

Lower courts and legal commentary consistently conclude that serious mental health needs are encompassed by the Supreme Court's ruling in *Estelle* (Balla v. Idaho State Board of Corrections, 1984; Bowring v. Godwin, 1977; Cohen, 1998; Grubbs

v. Bradley, 1982), and "(t)here can now be no doubt that the requirement that inmates receive needed medical care includes the requirement that they receive needed mental health care" (Mushlin, 2002, p.433). As such, a death row inmate with an SMHN has an Eighth Amendment right to mental health care, and state correctional authorities have an Eighth Amendment obligation to provide mental health care to the inmate.

Defining deliberate indifference and SMHNs has been a struggle. Not until 1994, in Farmer v. Brennan, did the Supreme Court establish the test for deliberate indifference as "(s)ubjective recklessness, as used in criminal law" (p. 826), essentially a conscious disregard of a substantial risk of harm. SMHNs continue to resist a clearly established definition (Cohen, 1998; Cohen & Gerbasi, 2005; Human Rights Watch, 2003; Metzner, Cohen, Grossman, & Wettstein, 1998; Mushlin, 2002). However, there appears to be no controversy that psychosis, schizophrenia, bipolar disorder, major depression, or any mental health condition underlying active suicide risk represent SMHNs and, thus, constitutionally require health care (Cohen & Gerbasi; Human Rights Watch).

While *Panetti* seems to support a standard for CFE that requires rational understanding, the standard remains uncertain; and there is no clearly established definition of an SMHN. Nevertheless, the reasoning and precedent provided by the Supreme Court in *Ford* and *Estelle*, and developed by lower courts, virtually ensure that a mental health condition resulting in ICFE also constitutes an SMHN. Indeed, conceiving of any mental health condition that would render an inmate incompetent to face execution without simultaneously qualifying as an SMHN, no matter what the standard of competency, may not be possible. As such, the Eighth Amendment's prohibition against cruel and unusual punishments prevents the state from executing a death row inmate rendered ICFE by virtue of a mental health condition, while simultaneously requiring the state to provide health care to that inmate by virtue of this mental health condition.

11.2 Correctional Health Care and Forensic Assessments of Competency

When considering CFE primarily from the perspective of the Eighth Amendment's limitations on criminal punishment, clinical issues revolve around an inmate's psychological functioning relative to eligibility for execution. When interfaced with the Eighth Amendment's limitation on the deprivation of health care, the application of clinical skills and the establishment of standards of care become more complex. Notably, two sets of clinical skills and standards of practice are needed to address a death row inmate suspected of ICFE by virtue of psychological dysfunction, one providing correctional health care and the other forensic services relative to competency. Correctional health care targets the assessment and treatment of an inmate's SMHN with the goal of improving his or her ability to function adaptively in the criminal justice circumstances to which he or she is exposed. Forensic activities relative to competency target the assessment of an inmate's abilities in order to

inform legal questions regarding eligibility for execution and, possibly, the identification of interventions that may restore CFE. The correctional health care function intends no punishment, the forensic no nurturance.

11.2.1 The Correctional Health Care Plan

Effectively integrating these two functions creates an extended series of complex and troubling concerns. The correctional mental health care plan of a death row inmate in itself may be quite strained. At the foundation of correctional health care is the management of a patient's condition to the end of promoting and maintaining ability to function adaptively in his or her correctional environment. The American Psychiatric Association (2000), in the section of its task force report regarding principles governing the delivery of psychiatric services in jails and prisons, identifies the goal of correctional mental health treatment as the alleviation of symptoms "that significantly interfere with an inmate's ability to function in the particular criminal justice environment in which the inmate is located" (pp. 15–16). The National Commission on Correctional Health Care (NCCHC) Standards for Health Care Services in Prisons (2003) explains that its Mental Health Services standard, P-G-04, "intends that inmates with mental health problems are able to maintain their best level of functioning" (p. 99). Consistent with these principles and standards, the functional adjustment of inmates to their correctional environments is a focus in assessing SMHNs. A number of court opinions and decrees, among other sources, have emphasized functional impairment in judging the seriousness of mental health needs (Maue, 2006; McGuckin v. Smith, 1992; Cohen, 1998; Human Rights Watch, 2003).

This emphasis on functioning is consistent with the Global Assessment of Functioning Scale (GAF), Axis V, of multiaxial diagnosis established by the Diagnostic and Statistical Manual of the American Psychiatric Association (4th ed.) Text Revision (DSM-IV-TR, 2000).The aim of the GAF Scale is not only comprehensive diagnosis that includes functional impairment, but also the provision of a tool for health care clinicians to gage treatment effects by assessing changes in patient functioning associated with treatment (DSM-IV-TR). Adaptive functioning is largely situation-dependent, and some state correctional systems use a variation of the GAF designed for prison environments. The New Mexico Department of Corrections has developed a GAF "For the Prison Environment" (New Mexico Corrections Department Policy, Revised 01/30/08).

How might a correctional mental health care treatment plan approach the functional adjustment of a death row inmate's SMHN? Death row presents as an extreme stress which may substantially impact the mental health of inmates (Cunningham & Vigen, 2002). Should adjustment to the stress of impending death ever be an objective of correctional health care treatment for an SMHN? Consider the incompetent inmate who adjusts to the pendency of execution by maintaining a delusion that he or she cannot die, and by virtue of this delusion exercises

emotional control, adheres to correctional regulations, and reasonably manages activities of daily living in the correctional setting. From a correctional health care perspective it seems conceivable that a practitioner may design a treatment plan to maintain the functional adjustment to the inmate's circumstances, in part by avoiding intrusion on this delusion. What about a condemned inmate diagnosed with a major depression of psychotic proportions whose maladjustment is driven by hopelessness about the future, a symptom common to major depression? How might the inmate's correctional health care plan address this symptom?

11.2.2 The Correctional Health Care Plan and Forensic Assessment of CFE

In light of the unsettled CFE standard and the continuing development of approaches to evaluating competence to face execution, Zapf, Boccaccini, and Brodsky (2003) view CFE assessments as "an area of evolving practice" (p. 116). The Specialty Guidelines for Forensic Psychologists (SGFP, 1991), and the February 2008 Proposed Third Draft of the Specialty Guidelines for Forensic Psychology (2/27/08), provide general structure applicable to such evaluations. And the literature includes development of procedures, practice issues, and guidelines specific to CFE assessments (Ackerson, Brodsky, & Zapf, 2005; Heilbrun, K. S., 1987; Heilbrun, K. S. & McClaren, H. A., 1988; Small, M. A. & Otto, R. K., 1991; Zapf et al., 2003). However, this composite of guidelines, practice issues, and procedures does not include substantial development of how CFE assessments integrate with the correctional health care to which the inmate is entitled. Heilbrun and McClaren, in distinguishing issues related to pre-adjudicative assessments of competency (conducted following concerns about an inmate's competency but prior to a judicial determination) from those associated with post-adjudicative assessments (conducted following a judicial determination of incompetency), do note particular problems with the latter due to the simultaneous provision of treatment for the condition underlying an inmate's incompetency. Of course, a condemned inmate may be receiving correctional health care treatment for an SMHN prior to any CFE assessment or judicial ruling on competency.

Interfacing forensic assessments of CFE with correctional health care services targeting an inmate's SMHN that may be compromising CFE augment practice difficulties for all clinicians. The mission of the correctional health care clinicians, likely employed by or under contract with the state or a state-selected health care vendor, revolves around providing correctional health care treatment to inmates. The mission of the forensic clinicians focuses upon assessing inmate functioning specific to informing courts making legal decisions about CFE.

Such assessments may conflict with correctional health care plans characterized by interventions designed to manage a condemned inmate's impaired psychological functioning and promote adjustment to the inmate's circumstances.

In discussing problems with informed consent in capital sentencing evaluations, Cunningham (2006) emphasizes the necessity for well thought-out caution triggered

not only by the magnitude of the death penalty, but also by the complexity of issues associated with such evaluations. He likens the "description of the pending procedures and potential applications" that should be presented to a defendant "more akin to a warning than to a fully illuminated disclosure" (p. 452). He stresses the significance of this issue with clinicians retained by the prosecution, given the possible consequences of refusing the evaluation including "barring the defense from calling mental health experts" (p. 452).

While court-ordered assessments do not necessitate an inmate's consent, the 1991 SGFP, the February 2008 Proposed Third Draft of the Specialty Guidelines for Forensic Psychology, and applicable ethical issues (Knapp & Vandecreek, 2001) require that examining psychologists inform examinees about the purpose and possible outcomes of forensic evaluations. And proposed guidelines specific to CFE assessments (Zapf et al., 2003) state that at the beginning of the forensic interview clinicians should inform the inmate regarding the purpose and possible outcomes of the assessment, "and the consequences of not participating" (p. 110). How might this information be delivered to a death row inmate by a forensic psychologist conducting a pre-adjudicative CFE assessment, for instance, in the context of a health care plan designed by correctional health care clinicians directing staff to avoid discussing the pendency of death until the correctional health care clinicians determine that the inmate is likely to participate in such a process without deteriorating? How can such a CFE assessment accommodate this kind of correctional health plan restriction? How can it not? How might such accommodation be accomplished while fulfilling the functions of properly informing the inmate of the nature, purpose, and uses of the results of the evaluation, and the possible consequences of not participating? What is an alternative to such accommodation that would avoid interfering in the correctional health care plan? How might providing information about the assessment impact the inmate, his or her constitutionally mandated mental health treatment and its functional objectives, and the correctional health care clinicians maintaining this treatment?

Suppose a question regarding an inmate's competency to be executed arises simultaneously with the diagnosis of an SMHN. Could the provision of correctional health care treatment to the inmate ever be delayed in order to accommodate the initiation and completion of CFE assessments, likely to require multiple contacts with the inmate (Heilbrun & McClaren, 1988; Zapf et al., 2003), perhaps by multiple forensic consultants? Would such an accommodation fit with the Eighth Amendment health care mandate? Is it conceivable that such an accommodation may meet the test for deliberate indifference to SMHNs? Of note, the 2003 NCCHC prison health care standards state that "once a health care professional orders treatment for a serious condition, the courts will protect, as a matter of constitutional law, the patient's right to receive that treatment without undue delay" (p. 140).

The February 2008 Proposed Third Draft of the Specialty Guidelines for Forensic Psychology addresses conflicts that forensic psychologists may encounter with legal and organizational restrictions, and with other professionals, but these guidelines are not specific to the conflicts described above. The proposed guidelines for CFE assessments (Heilbrun & McClaren, 1988; Zapf et al., 2003) do not address such

conflicts. Neither the forensic psychology specialty guidelines nor the proposed guidelines specific to CFE develops the interface between CFE assessments and correctional health care. What are the standards of law and of the practice of the varied clinicians involved that provide the foundation for the integration of forensic assessment of competency to face execution with correctional health care?

Clinical practice relative to CFE raises this complex intersection of legal, ethical, and practical concerns because the death penalty fits poorly with correctional mental health care for SMHNs that may underlie ICFE. This poor fit clouds the boundaries between the correctional health care and forensic functions. Nowhere do these boundaries seem more critical than with treatment imposed to restore a death row inmate's competency to be executed, as developed below in addressing questions raised by Schopp's chapter.

11.3 Forensic Restorative Treatment, Correctional Mental Health Care, and Constitutionally Adequate Health Care

In reviewing the 2007 Brief for Amici Curiae American Psychological Association, American Psychiatric Association, and National Alliance on Mental Illness in support of Petitioner Panetti (Associations Brief), Schopp argues that recognizing distinctions among informative and varied types of advocacy amicus briefs can enhance the contribution of professional organizations to judicial decision-making. While Schopp's thrust revolves around expert contribution to briefs in general, he takes issue with the Associations Brief's conclusion that the death sentence of an incompetent inmate should be reduced to a lesser sentence rather than suspended. He asks why it would be illegitimate to impose treatment without the inmate's consent for the purpose of restoring CFE. While this comment will not speak to legitimacy directly, the relationships among forced restorative treatment, correctional mental health care, and constitutionally mandated health care seem relevant to Schopp's concern.

11.3.1 Correctional Health Care and Forced Restorative Treatment

Central to the Eighth Amendment health care mandate is the judgment of the health care professional (*Bowring*; Cohen & Gerbassi, 2005; Estelle; Langley v. Coughlin, 1989; Metzner et al., 1998; NCCHC, 2003; Posner, 1992). Notably, the accountability for diagnosing and treating inmate health care needs rests with the clinical judgment of professionals providing correctional health care.

Correctional health care, as addressed by court opinions and standards, emphasizes the inmate's functional adjustment to his or her correctional setting. Even if a death row inmate's correctional health care treatment for an SMHN occurs in a setting outside of his or her usual criminal justice environment, for instance, in a prison mental health treatment unit, or a correctional or forensic hospital, the health care treatment plan objectives likely would target functional adjustment to the

inmate's present and anticipated criminal justice settings. This focus on functioning carries implications regarding treatment. Critical to scope of care is the emphasis that correctional mental health treatment entails more than psychotropic medication (American Psychiatric Association, 2000; *Langley*; NCCHC, 2003). NCCHC explains the following:

> In the correctional setting, as in most other environments, the immediate objective is to alleviate symptoms of serious mental disorders and prevent relapses to sustain patients' ability to function safely in their environment. Mental health treatment is more than prescribing psychotropic medications. Treatment goals include the development of self-understanding, self-improvement, and development of skills to cope with and overcome disabilities associated with various mental disorders (2003, p. 99).

NCCHC standards reflect the premise that objectives of inmates' correctional mental health care plans may address such issues as the activities of daily living, the frequency and appropriateness of communication with health care and custody staff, compliance with prison rules and directions, and use of recreational time.

Forced restorative treatment differs from correctional health care in terms of accountability and scope. The decision for such treatment does not fall within the accountability of a correctional health care provider, but within the judiciary. While both correctional health care and forced restorative treatment targeting an inmate's psychosis are likely to involve psychotropic medication, it does not seem coherent for the scope of the latter to include the functional adjustment of the inmate to his or her criminal justice setting. For instance, the inmate's compliance with prison rules and with custody officers, with expectations for hygiene and self-care, and with parameters of appropriate social exchanges, in itself, has no bearing on CFE. The objectives of forced restorative treatment revolve around the functional abilities required to meet the operative CFE legal standard. Correctional health care objectives targeting functional adjustment to prison have no substantive relevance to CFE. By virtue of these variations in inclusions and lack of inclusions, the forensic restorative and correctional health care functions differ in scope of treatment.

These differences in accountability and scope reveal that forced restorative treatment is not equivalent to correctional health care. Forced restorative treatment does not appear to fulfill the requirements of correctional health care treatment for the SMHN of a death row inmate. The differences in underlying purposes and justifications, reflected in issues of accountability and scope of these two treatment functions, seem likely to lead to circumstances in which the forensic treatment plan designed to restore CFE would diverge from the correctional health care plan addressing the inmate's SMHN.

It seems a safe conclusion that correctional mental health care delivered according to NCCHC prison standards would likely satisfy the constitutional health care mandate, as these standards are designed to do so. Forced restorative treatment seems unlikely to meet the constitutional health care mandate. The accountability for providing correctional health care that meets the constitutional mandate rests with clinicians charged with providing health care (*Bowring;* Cohen & Gerbasi, 2005; *Estelle; Langley;* Posner, 1992). This accountability reflects, in part, that the correctional health care provider is responsible for deciding whether or not to treat an inmate's particular health care need. Since forced restorative treatment is judicially

driven, the decision to treat an SMHN to the end of restoring CFE does not rest with a clinician, but with the court. With respect to scope, minimally adequate constitutional mental health care involves more than psychotropic medication (Cohen & Gerbasi) and, based upon the emphasis on functional adjustment in applicable standards, court opinions, and commentary, the "more" likely includes interventions to promote an inmate's functional adjustment to his or her prison circumstances. Since forced restorative treatment does not seem to include investment in an inmate's functioning beyond those abilities required to satisfy the operative CFE standard, such treatment cannot be expected to satisfy the requirements of constitutionally adequate mental health care.

The above analyses support the conclusion that forced restorative treatment likely will not satisfy the minimal requirements for constitutional health care. It would seem that implementing forced restorative treatment as health care intended to satisfy the constitutional health care mandate might raise a fundamental question: whether the state's forensically generated treatment intended only to restore eligibility for execution could result in the deliberately indifferent deprivation of health care to an inmate with an SMHN and, as such, constitute an Eighth Amendment violation. In this regard it should be noted that the Louisiana Supreme Court in State v. Perry (1992) concluded that forced restorative treatment "actually prevents the prisoner from receiving adequate medical treatment for his mental illness" (p. 752).

11.3.2 Correctional Mental Health Care and Simultaneous Forced Treatment to Restore Competency

A reader might acknowledge the differences between forced treatment to restore CFE and correctional mental health care to ameliorate an underlying SMHN, but suggest that both may be provided simultaneously. Simultaneous provision, however, seems likely to promote overwhelming problems. In addition to the issues of accountability and scope as discussed above, the correctional health care provider could not orchestrate both functions without apparently conflicting with NCCHC standard, P-1–03, prohibiting correctional health services staff from "participating in the collection of *forensic information*" defined as including "psychological data collected from an inmate that may be used against him or her in…legal proceedings" (p. 128). Managing forced restorative treatment and targeting its functional objectives to qualify an inmate for execution, implicitly includes collecting forensic psychological data. Further, "forced" treatment would seem to be at odds with NCCHC's standard relative to informed consent (P-I-05, p. 131) and correctional health care, and to an inmate's right to refuse medical treatment (P-I-06, p. 133). As such, how would the correctional health care clinician reconcile forcing restorative treatment while providing correctional health care treatment involving informed consent? Not only would the correctional health care psychiatrist prescribing psychotropic medication to restore competency be in conflict with NCCHC standards, but the correctional health care service supporting this treatment plan would be unable to

avoid such conflict. Notably, a team of mental health professionals and ancillary personnel monitor, observe and assess an inmate's functioning to provide feedback to the psychiatrist directing this treatment. Regarding scope, it is difficult to envision a conjoint forced restorative treatment/correctional health care plan designed to meet the NCCHC mental health services standard for the inmate to maintain his or her "best level of functioning" (p. 99) while simultaneously emphasizing the functional CFE objectives of restoring the abilities required for execution. How would such a combined treatment plan impact the therapeutic alliances between the correctional health care providers and the patient? Simultaneous provision by two different treatment directors, one forensic, and the other correctional health care, orchestrating forced restorative treatment and correctional health care respectively, would likely result in even greater problematic complexities legally, ethically, and procedurally.

The Eighth Amendment health care obligation seems to present formidable obstacles to forced restorative treatment. Implementing only forced restorative treatment does not seem to meet the requirements of the constitutional health care mandate. Implementing a combined plan involving correctional health care designed to achieve compliance with constitutional requirements, and forensic treatment designed to restore CFE, seems likely to run into overwhelming impediments and create great strain on all providers involved, and on the relationships among those providers and the inmate. The difficulties associated with forced restorative treatment and correctional health care may not speak directly to Schopp's question regarding legitimacy, but may support an argument opposing such treatment for an inmate found ICFE by virtue of an SMHN requiring correctional health care. Highlighting these kinds of difficulties may have enhanced the Associations Brief's conclusion that the death sentences of inmates found ICFE be reduced rather than suspended.

11.4 Resolution?

Conflicts surrounding CFE, with respect to assessment and to treatment designed to restore, or that may restore, competency, often emphasize ethical or moral issues (Bonnie, 1990; Heilbrun, Radelet, & Dvoskin, 1992; Latzer, 2003). Some dilemmas associated with such issues have been viewed as "seemingly intractable" (Ward, 1986, p. 100) or "probably unresolvable" (Heilbrun & McClaren, 1988, p. 213). This comment has argued that, beyond moral and ethical problems, CFE assessments and forced treatment to restore competence interfaced with the Eighth Amendment health care mandate results in considerable difficulties involving clinical practice and, perhaps, constitutional issues.

The intersection of ICFE and the constitutional health care mandate presents as an underdeveloped area involving questions critical to the boundaries, responsibilities, and limits of the forensic clinical function addressing CFE and those of the correctional health care clinical function addressing a death row inmate's SMHN. The issues

involved complicate the uncertainties generated by either clinical function alone. The questions raised by conducting CFE assessments or implementing forced restorative treatment within a context of correctional health care exemplify these complications. At minimum, conflicts with clinical practice are implicated. Moreover, the issues involved may speak to fundamental legal questions. The Supreme Court's rulings in *Estelle* and in *Ford* reflect the Court's opinion that the standards shaping our society have evolved to where it is humane, and constitutionally mandated, to provide health care to inmates suffering from serious mental health conditions, and to where it is humane, and constitutionally mandated, to abstain from executing those condemned inmates whose serious mental health conditions limit awareness that they are being executed and the reasons for it. In what manner might evolving standards of decency address the tensions raised by the state's interest in clinical procedures to support implementing the death penalty concomitantly with its obligation to provide health care for the condition presently disqualifying an inmate to receive that punishment?

Courts and commentary have focused upon varied forensic issues associated with CFE, but have not seemed to develop the interface of these issues with correctional health care and the constitutional health care mandate. Interestingly, however, the Supreme Court in Louisiana in *Perry,* and the United States Eighth Circuit Court in Singleton v. Norris (2003), both voiced concerns relative to the interface of forced restorative treatment and correctional health care. As noted earlier, *Perry* considered such forensic treatment as preventing the inmate from receiving adequate medical care for his SMHN. And *Singleton*, in responding to the claim that forced restorative treatment differs from health care by virtue of intention, declined "to undertake a difficult and unnecessary inquiry into the State's motives in circumstance where it has a duty to provide medical care," contending that the state's "obligation to administer antipsychotic medication" relegated "any additional motive or effect" as "irrelevant" (p. 1027).

From the perspective of clinical practice, legal doctrine, or both, the relationship between correctional health care, designed to meet the Eighth Amendment health care mandate, and forensically driven clinical activities relative to CFE, does not seem to have undergone sufficient scrutiny. Clarification of this relationship seems relevant to multiple issues, including the roles and boundaries of individual practitioners providing correctional health care and forensic services, and professional organizations advising courts, in this sensitive area of mental health law.

References

Ackerson, K. S., Brodsky, S. L., & Zapf, P. A. (2005). Judges' and psychologists' assessments of legal and clinical factors in competence for execution. *Psychology, Public Policy, and Law, 11,* 164–193.

American Psychiatric Association (2000). *Diagnostic and statistical manual of mental disorders* (4th ed.), text revision. Washington, DC: Author.

American Psychiatric Association (2000). *Psychiatric services in jails and prisons: A task force report of the American Psychiatric Association* (2nd ed.). Washington, DC: Author.

American Psychological Association, American Psychiatric Association, and National Alliance on Mental Illness (2007). Brief for Amici Curiae in Support of Petitioner. *Panetti v. Quarterman* (No. 06–6407). Washington, DC: Author.

Balla v. Idaho State Board of Corrections, 595 F. Supp. 1558 (1984)

Bonnie, R. J. (1990). Dilemmas in administering the death penalty: Conscientious abstention, professional ethics, and the needs of the legal system. *Law and Human Behavior, 14,* 67–90.

Bowring v. Godwin, 551 F. 2d 44 (1977).

Cohen, F. (1998). *The mentally disordered inmate and the law.* Kingston, N.J: Civic Research Institute.

Cohen, F., & Gerbasi, J. B. (2005). Legal issues regarding the provision of mental health care in correctional settings. In C. L. Scott & J. B. Gerbasi (Eds.), *Handbook of correctional mental health* (pp. 259–283). Washington, DC: American Psychiatric Publishing.

Committee on Ethical Guidelines for Forensic Psychologists (1991). Specialty guidelines for forensic psychologists [Electronic version]. *Law and Human Behavior, 15,* 655–665.

Committee on the Revision of the Specialty Guidelines for Forensic Psychology (2008). Specialty Guidelines for Forensic Psychology, Proposed Third Draft 2/27/08, retrieved May 4, 2008 from www.ap-ls.org/links/22802sgfp.pdf.

Cunningham, M. D. (2006). Informed consent in capital sentencing Evaluations: Targets and content. *Professional Psychology: Research and Practice, 37,* 452–459.

Cunningham, M. D. &Vigen, M. P. (2002). Death row inmate characteristics, adjustment, and confinement: A critical review of the literature. *Behavioral Sciences and the Law, 20,* 191–210.

Estelle v. Gamble, 429 U. S. 97 (1976).

Farmer v. Brennan, 511 U. S. 825 (1994).

Ford v. Wainwright, 477 U. S. 399 (1986).

Gannon, J. (February 2005). Mental health in corrections: The continuing Dilemma [Electronic version]. *Corrections Today,* 2 pages.

Grubbs v. Bradley, 552 F. Supp. 1052 (1982).

Heilbrun, K. S. (1987). The assessment of competency for execution: An overview. *Behavioral Sciences and the Law, 5,* 383–396.

Heilbrun, K. S., & McClaren, H. A. (1988). Assessment of competency for Execution? A guide for mental health professionals. *Bulletin of the American Academy of Psychiatry and Law, 16,* 205–216.

Heilbrun, K., Radelet, M. L., & Dvoskin, J. (1992). The debate on treating individuals incompetent for execution. *American Journal of Psychiatry, 149,* 596–605.

Human Rights Watch. (2003). *Ill-equipped: U.S. prisons and offenders with mental illness.* New York: Author.

Knapp, S., & VandeCreek, L. (2001). Ethical issues in personality assessment in forensic psychology [Electronic version]. *Journal of Personality Assessment, 77,* 242–254.

Langley v. Coughlin, 715 F.Supp. 522 (S.D.N.Y. 1989)

Latzer, B. (2003). Between madness and death: The medicate-to-execute controversy. *Criminal Justice Ethics, Summer/Fall,* 3–14.

Maue, F. R. (July 2006). Management of the mentally ill in administrative segregation: Legal and management challenges. *Corrections Today,* 46–50.

McGuckin v. Smith, 974 F. 2d 1050 (1992).

Metzner, J. L., Cohen, F., Grossman, L. S., & Wettstein, R. M. (1998). Treatment in jails and prisons. In R. H. Wettstein (Ed.), *Treatment of offenders with mental disorders* (pp. 211–264). New York: Guilford.

Mushlin, M. B. (2002). *Rights of prisoners: Third edition.* (Vol. 1). Thomson West.

National Commission on Correctional Health Care (NCCHC, 2003). *Standards for health services in prisons.* Chicago: Author

New Mexico Corrections Department Policy, (Revised 01/30/08). *Outpatient Mental Health Treatment,* Retrieved May 17, 2008 from http://corrections.state.nm.us/policies/CD-180100.pdf.

Panetti v. Quarterman, 127 S.Ct. 2842 (2007). Posner, M. J. (1992). The *Estelle* medical professional judgment standard: The right of those in state custody to receive high-cost medical treatments. *American Journal of Law and Medicine, XVIII,* 347–368.

Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) [Electronic version].
Small, M. A., & Otto, R. K. (1991). Evaluations of competency to be executed: Legal contours and implications for assessment. *Criminal Justice and Behavior, 18,* 146–158.
State v. Perry (1992), 610 So.2d 746.
Ward, B. A. (1986). Competency for execution: Problems in law and Psychiatry. *Florida State University Law Review, 14,* 35–100.
Wilson v. Seiter, 111 S. Ct. 2321 (1991).
Zapf, P. A., Boccaccini, M. T., & Brodsky, S. L. (2003). Assessment of competency for execution: Professional guidelines and an evaluation checklist. *Behavioral Sciences and the Law, 21,* 103–120.

Index