FOREWORD

PSYCHIATRY AND THE DEATH PENALTY: EMERGING PROBLEMS IN VIRGINIA

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VIRGINIA'S revised capital sentencing procedures took effect on July 1, 1977. Today, eight men sit on death row in Mecklenburg.[1] Whatever one's views on the ethics or the efficacy of the death penalty, the reinstitution of capital punishment presents issues of great moral and social significance. Of special importance to the judiciary and the bar is the need to assure fairness and consistency in the process of imposing the ultimate sanction.

I assume, for present purposes, that aggravated forms of homicide such as those classified as capital offenses in Virginia may permissibly be made punishable by death.[2] But this assumption concerns offenses in the abstract; we are not thereby advised which capital offenders should pay for their deadly deeds with their own

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[1] The eight individuals are Michael Marnell Smith, *see* Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1978); Alton Waye, *see* Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202, *cert. denied*, 442 U.S. 924 (1979); Morris Odell Mason, *see* Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116 (1979), *cert. denied*, 100 S. Ct. 239 (1980); James T. Clark, *see* Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 100 S. Ct. 741 (1980); Frank Coppola, *see* Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 100 S. Ct. 1069 (1980); Charles Sylvester Stamper, *see* Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 100 S. Ct. 1666 (1980); Joe Giarratano, *see* Giarratano v. Commonwealth, *appeal docketed*, No. 79-1619 (Va. Feb. 25, 1980); and William Earl Justus, *see* Justus v. Commonwealth, *appeal docketed*, No. 79-1326 (Va. Feb. 25, 1980). This information reflects death sentences issued through Dec. 31, 1979.

The last person executed in Virginia was Carroll L. Garland, a 27-year-old black man convicted of murder, who was electrocuted on March 2, 1962.

[2] By all measures of public opinion, it appears that a painless form of execution is not categorically unacceptable in contemporary American society; thus, there are some types of

lives. The process of *selection* has independent moral and legal significance. In each case, those who administer criminal justice—prosecutors, jurors, courts, and governors—have it within their power to spare a human life and to show mercy. They must therefore ask not only "what did this person *do?*" but also *"who* is he and *why* did he do it?"

This translation from the abstract acceptability of the death penalty to its imposition in individual cases calls attention to the fundamental importance of establishing and administering a process that selects in a fair and reliable way those to whom the death penalty will be applied. We must demand consistency—whether a person is sentenced to death should not depend on where he is tried, on which judge is sitting, or on which jury has been impaneled. We must also seek accuracy in the fundamental moral sense; in each case we must be convinced that the defendant's conduct and culpability clearly distinguish him from other murderers who are not thought to deserve the ultimate penalty. At this level of inquiry, crucial questions arise: What are the proper grounds of distinction? On the basis of what criteria should we decide who shall live and who shall die?[3]

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homicide for which the death penalty is not regarded as an excessive or disproportionate punishment.

I am also prepared to assume that the threatened imposition of the death penalty does exert a deterrent for the most rational and calculated homicidal offenses. I refer particularly to terrorism and murder for hire. In contrast, the deterrent effect of the threatened imposition of capital punishment would appear to be questionable in situations when the homicidal act occurs without significant prior reflection about the consequences, as is the case in many rape-murders. Killings in the course of armed robbery account for most capital murders in Virginia; for these, categorical assumptions one way or the other seem intuitively implausible.

[3] Although my present purpose is not to tangle with the philosophical questions concerning the justifications for punishment in general, or capital punishment in particular, let me make two general observations in passing.

First, general prevention, not retribution, provides the "general justifying aim" of all punishment, including the death penalty. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 1-27 (1968).

Second, retribution is the *only* acceptable principle of selection or "distribution" of punishment in capital cases. General deterrence, incapacitation, and redemption are not legitimate criteria for selecting those who will be executed and for distinguishing those who will be permitted to live out all or most of their lives in the penitentiary. I do not take this position with respect to all criminal punishment; in fact, I believe that many of the recent "just desert" sentencing proposals have been inspired by an overdose of retributivism. Where incarcerative sentences are concerned, I believe that general deterrent, intimidative, and incapacitative effects of alternative sentences may legitimately be taken into account so

Over the past two years, I have been making a careful study of the administration of Virginia's revised capital sentencing procedures. Although any sweeping conclusions would be premature at this early date, I am troubled by a cluster of problems relating to the quality and scope of psychiatric testimony in capital cases. First, serious problems have already emerged concerning proof of aggravating circumstances, especially the appropriate use of clinical testimony concerning the dangerousness of the defendant. Because such testimony is not as accurate or reliable as we might wish, it should be carefully limited. Second, because the statutory mitigating circumstances emphasize psychological abnormality, expert testimony tends to occupy a central role in any capital defendant's efforts to persuade the judge and jury to spare him. The use of experts raises a serious question concerning both access to and the quality of forensic evaluation in capital cases.

In this Foreword to the Twenty-Fourth Annual Survey of Developments in Virginia Law, I would like to address these important issues. After an examination of the constitutional background of capital sentencing and of Virginia's capital punishment procedures, I will analyze the uses and limits of psychiatric testimony in capital cases. In so doing, I will suggest some specific steps which Virginia judges, legislators, and forensic specialists might take to preserve the essential value of fairness in the solemn process of administering the death penalty.

I. Background: Constitutional Standards for Capital Punishment

For a decade, opponents of the death penalty focused their efforts to abolish capital punishment in this country on the United States Supreme Court, arguing that capital punishment was inherently unconstitutional because it contravened the "evolving standards of decency which mark the progress of a maturing society,"[4] and therefore amounted to the cruel and unusual punishment proscribed by the eighth amendment to the Constitution of the United States. When the Supreme Court finally agreed to address this

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long as appropriate attention is paid to the accuracy and reliability of the decision-making process. On the other hand, the finality of the death penalty and the special need for consistency in its application preclude the use of probability estimates concerning defendants' future behavior as a basis for choosing between death and life imprisonment.

[4] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion by Warren, C.J.).

question in 1972 in *Furman v. Georgia,*[5] only Justices Marshall and Brennan agreed with the abolitionist position.[6]

The other seven Justices focused their attention on another of the challengers' arguments—that the process by which the death penalty was administered was unfair and discriminatory. In most states the decision whether to impose the death penalty rested entirely within the discretion of the jury or sentencing judge. The challengers argued that since no criteria governed this selection, those sentenced to death constituted a "capriciously selected random handful"[7] of persons convicted of capital crimes. Even worse, the challengers claimed, the death penalty was imposed disproportionately on defendants who were black and poor.

The Georgia statute before the Court in *Furman* classified first degree murder, rape, and armed robbery as capital crimes and left the decision whether to impose the death penalty in lieu of life imprisonment entirely in the hands of the jury. Three members of the Supreme Court were convinced that such statutes did, indeed, create a "substantial likelihood" that the death penalty would be imposed arbitrarily[8] and joined with Justices Marshall and Brennan, forming a majority of five, to strike down the Georgia statute, and, as a result, virtually all of the state statutes then in effect, including Virginia's.

Between 1972 and 1976, thirty-five states enacted new death penalty statutes in response to the *Furman* decision. The states responded to *Furman* in two entirely different ways. Some states, including Virginia, tried to minimize the risk of arbitrariness by requiring the imposition of the death penalty for certain crimes. These so-called mandatory statutes generally applied to certain specified types of homicides, such as those committed in the course of a rape or armed robbery, those committed by a person serving a life term, or those involving the killing of a police officer. Other states attempted to preserve some degree of discretion but to reduce the risk of arbitrariness through normative procedural constraints. These statutes usually provided for a separate sentencing hearing at which the judge or jury would consider evidence offered

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[5] 408 U.S. 238 (1972).

[6] *See id.* at 257 (Brennan, J., concurring), 315 (Marshall, J., concurring).

[7] *See id.* at 309-10 (Stewart, J., concurring).

[8] *See id.* at 240 (Douglas, J., concurring), 306 (Stewart, J., concurring), 310 (White, J., concurring).

in aggravation and mitigation and would decide whether to impose the death penalty according to specified statutory criteria, a process policed by appellate review.

In a series of cases decided in 1976, the Supreme Court reviewed representative statutes of each type. It upheld the statutes which had allowed, in varying degrees, consideration of mitigating circumstances and had permitted the structured exercise of discretion.[9] On the other hand, the Court invalidated the statutes, like Virginia's, that had banned sentencing discretion altogether and had prescribed death as a mandatory penalty for certain types of homicides.[10]

Although no majority on the Court accepted any single point of view, several basic propositions did clearly emerge. First, "the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . [and] . . . [b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[11] The Court's corollary proposition was that the death penalty may "not be imposed under sentencing procedures that [create] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner."[12] Whether a state's capital sentencing procedures satisfy this constitutional requirement is determined, the Court declared, by a careful review of the decisionmaking processes and the criteria as they appear on the face of the statute and as they are administered in practice.

Applying these principles, the majority of the Court upheld the capital sentencing procedures of Georgia, Florida, and Texas.[13] In each case, the Court concluded that the statutory scheme adequately structured the exercise of discretion by requiring a separate proceeding for choosing, after conviction of a capital offense, between death and life—a proceeding which approximated the carefully structured process by which guilt is determined rather than

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[9] Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

[10] Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

[11] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion by Stewart, Powell, and Stevens, JJ.).

[12] Gregg v. Georgia, 428 U.S. 153, 188 (1976) (opinion by Stewart, Powell, and Stevens, JJ.).

[13] Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

the traditionally unstructured process of sentencing.

At the same time, the Court struck down the mandatory statutes of North Carolina and Louisiana because, in Justice Stewart's words, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[14] Justice Stewart continued:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.[15]

The Court reinforced the emphasis on potential mitigating factors in a 1978 decision, *Lockett v. Ohio*,[16] striking down an Ohio statute that restricted the type of evidence the defendant could introduce in mitigation. This decision is particularly germane to the topic of psychiatric evidence because the Ohio statute required the imposition of the death penalty unless the defense could prove one of three mitigating factors, one of which was that "the offense was primarily the product of the offender's psychosis or mental deficiency . . . ."[17] The Court said in *Lockett* that the jury must be permitted to consider "as a mitigating factor, any aspect of the 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."[18] And further, the Court stated that an individualized determination of the appropriateness of the death sentence was required because "[t]he need for treating each defendant in a capital case with a degree of respect due the uniqueness of the individual is far more important than in noncapital cases."[19]

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[14] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion by Stewart, Powell, and Stevens, JJ.).

[15] *Id.*

[16] 438 U.S. 586 (1978).

[17] *Id.* at 607 (quoting OHIO REV. CODE ANN. § 2929.04(B) (1975)).

[18] *Id.* at 604 (emphasis omitted).

[19] *Id.* at 605.

II. Virginia's Response: Sentencing Procedures in Capital Cases

The capital sentencing procedures adopted by the Virginia General Assembly in the wake of the United States Supreme Court's 1976 decisions were modeled after the Georgia and Texas statutes upheld by the Court.[20] The General Assembly classified six subcategories of first degree murder as capital murder—premeditated murder in the course of armed robbery, kidnapping, or rape; murder for hire; premeditated murder of a police officer; and premeditated murder by a person serving a prison sentence.[21] Once a person has been convicted of a capital offense, a separate proceeding is held to determine whether death or a sentence of life imprisonment should be imposed.[22]

The death penalty may not be imposed unless the court or the jury finds either of two aggravating circumstances beyond a reasonable doubt. One such circumstance refers to the future dangerousness of the offender—"that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society;" and the other refers to the "vileness" of the offense—"that [the defendant's] conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."[23]

If the court or jury finds, upon proof beyond a reasonable doubt, either or both of these aggravating circumstances, it is then required to consider all of the circumstances of the case, including evidence in mitigation, in order to decide whether or not "to recommend that the penalty of death be imposed."[24] If the jury does "recommend" that the penalty of death be imposed, the circuit court is required to conduct its own independent review to determine "whether the sentence of death is appropriate and just."[25] If

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[20] The Supreme Court of Virginia rejected a constitutional challenge to the Virginia statute, on the strength of *Gregg* and *Jurek*, in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, *cert. denied*, 441 U.S. 967 (1978). *See Criminal Procedure, 1978-1979 Virginia Survey*, 66 Va. L. Rev. 261, 264 (1980).

[21] *See* Va. Code Ann. § 18.2-31 (Cum. Supp. 1979). *See generally Criminal Procedure, 1976-1977 Virginia Survey*, 63 Va. L. Rev. 1408, 1415 (1977).

[22] *See* Va. Code Ann. § 19.2-264.2 to .5 (Cum. Supp. 1979).

[23] *Id.* at § 19.2-264.2.

[24] *See id.* at § 19.2-264.4(C).

[25] *Id.* at § 19.2-264.5.

the circuit court decides to impose the sentence of death, the defendant is then entitled to automatic review by the Supreme Court of Virginia. In conducting its review, the Supreme Court is in turn directed to "consider and determine" in every case "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[28]

III. Defining the Proper Boundaries of Psychiatric Testimony in Capital Cases

By requiring the states to individualize the capital sentencing process, the Supreme Court has virtually assured routine participation by mental health professionals, especially psychiatrists, in the sentencing phase of capital murder trials. This has clearly been the case in Virginia during the last two years. In order to assist both the bar and the mental health professions in discerning the proper boundaries of clinical testimony, I will address two key questions presented by Virginia's capital sentencing scheme: First, what role can mental health professionals legitimately play in predicting accurately the "dangerousness" of a particular defendant—one of the key elements of aggravation required by the statute? Second, what are the parameters of clinical judgments concerning the mitigating factor of mental abnormality under the Virginia statute? Discussion of these questions will underscore both the utility and the limits of psychiatric testimony in capital cases. Some additional observations will be made about appropriate pretrial evaluation procedures.

A. Proof of Aggravating Circumstances: Dangerousness

One of the two specific aggravating circumstances that must be considered by the judge or jury under the Virginia capital sentencing procedure is the likelihood that the defendant will commit additional criminal acts of violence in the future and would constitute a continuing serious threat to society. This inquiry, concerning the so-called "dangerousness" of the defendant, is somewhat unique to

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[28] *See id.* at § 17-110.1(C).

Virginia—only three other states have similar provisions[27] —and is fraught with ethical problems.[28]

We might well ask, at the outset, whether the selection of capital defendants to be considered for execution should depend on whether a judge or jury believes that there is "a probability" that a

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[27] Under the Texas statute, which classifies five types of murder as capital murder, *see* TEX. PENAL CODE ANN. § 1903 (Vernon 1974), the death penalty may not be imposed upon a person convicted of capital murder unless three additional circumstances are found beyond a reasonable doubt, one of which is the "probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon Cum. Supp. 1979).

Under the Idaho statute, which classifies first degree murder as a capital offense, the death penalty may not be imposed unless the court finds at least one of 10 aggravating circumstances, one of which is that the "defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." IDAHO CODE § 19-2515(f)(8) (1979). Having found one aggravating circumstance beyond a reasonable doubt the court must impose the death penalty unless mitigating circumstances outweigh the gravity of the aggravating circumstances. *See id.* at § 19-2515(b).

Under the Washington statute, which classifies first degree murder as capital murder, *see* WASH. REV. CODE ANN. § 9A.32.040 (Cum. Supp. 1978), the death penalty may not be imposed unless the court or the jury finds beyond a reasonable doubt (1) that the prosecution has proved at least one of eight aggravating circumstances listed in § 9A.32.045; (2) that "there are not sufficient mitigating circumstances to merit leniency;" (3) that the evidence at trial established the guilt of the accused with clear certainty; and (4) "that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society." *Id.* at § 10.94.020.

These statutes should be distinguished from the "prior history" provisions included in most capital sentencing statutes. Although the rationale for such provisions may be incapacitative, no predictive finding is required. Thus most states with capital sentencing provisions include as one of the specified aggravation circumstances—but *not* as a required finding—proof that the defendant has a "previous felony conviction involving the use or threat of violence" or "a substantial history of serious assaultive convictions" or similar language. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-46a(g)(2) (West Cum. Supp. 1978); LA. CODE CRIM. PROC. ANN. art. 905.4(c) (West Cum. Supp. 1979); NEV. REV. STAT. § 200.033(2) (1977); WYO. STAT. § 6-4-102(h)(ii) (1977). Another group of states have more limited versions of such "prior history" circumstances—proof that the defendant had a prior conviction for murder. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 9-1(b)(3) (Smith-Hurd 1979); MONT. REV. CODES ANN. § 46-18-303(2) (1979); S. C. CODE § 16-3-20(C)(a)(2) (Cum. Supp. 1979).

It should also be noted that most statutes include as a mitigating circumstance the fact that the defendant has no significant history of prior criminal activity or of previous felony convictions, or similar language. One state includes the absence of dangerousness as a mitigating circumstance: "It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." MD. ANN. CODE art. 27, § 413(g)(7) (Cum. Supp. 1979).

[28] *See generally* Brief Amicus Curiae For the American Psychiatric Association at 12-15, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) (copy on file with the Virginia Law Review Association); Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. OF CRIM. L. 151 (1977).

person will constitute a continuing serious threat to society. Even the most sophisticated criminological studies have been unable to develop good predictors of serious violence, even among prisoners previously convicted of violent crimes.[29] The Supreme Court of Virginia was concerned enough about the speculative quality of this inquiry that it stated that the "principal predicate for a prediction of future 'dangerousness' " must be the defendant's prior criminal conduct, more specifically, his previous convictions of "serious crimes against the person committed by intentional acts of unprovoked violence."[30]

Given the speculative nature of such predictions, it is very important for circuit courts to recognize that a "probability" of dangerousness cannot, by law, be established beyond a reasonable doubt unless this principal predicate of prior convictions has been established. The question then arises whether the prosecution may also introduce psychiatric or psychological testimony as additional evidence of future dangerousness. This evidence has already been admitted in several cases.[31]

An increasing number of commentators and experts in forensic psychiatry/psychology have taken the view that clinical predictions of future violence are so unreliable and speculative that it is unethical to offer any expert opinion on this issue in the courtroom, especially in capital cases.[32] From a legal standpoint, a strong case can be made for the more limited proposition that the prosecution should not be permitted to offer clinical testimony on the defendant's dangerousness unless the defendant himself has already done so.[33]

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[29] *See generally* Monahan, *The Prediction of Violent Criminal Behavior: A Methodological Critique and Prospectus,* in DETERRENCE AND INCAPACITATION: ESTIMATING EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 244 (1978). For specific studies, *see, e.g.*, Kozol, Bouchor & Garolfalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 731 (1972); Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972).

[30] *See* Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149, *cert. denied*, 441 U.S. 967 (1979). For a discussion of *Smith*, see *Criminal Procedure, 1978-1979 Virginia Survey*, 66 VA. L. REV. 261, 264-65 (1980).

[31] *See, e.g.*, Giarratano v. Commonwealth, *appeal docketed*, No. 79-1619 (Va. Feb. 25, 1980).

[32] *See* note 28 *supra.*

[33] *See* Brief Amicus Curiae on Appeal of the Post-Conviction Assistance Project of the University of Virginia School of Law at 51-61, Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979) (copy on file with Virginia Law Review

Even if such testimony is not categorically excluded, however, the risks of misleading the judge and jury are so great that some guidelines must be developed by the courts and by the mental health professions themselves to restrict and structure the use of such testimony. Although the articulation of such guidelines would range far beyond the scope of this Foreword, I would offer three suggestions:

(1) An expert witness should decline to offer any opinion on the dangerousness issue unless he has conducted a comprehensive personal examination of the defendant, with extensive attention to developmental and behavioral history, directed specifically at the probability of future violence.[34] Under no circumstances should an examination focused on competency to stand trial, or even on the defendant's mental state at the time of the offense, be used as a basis for formulation of an opinion on dangerousness.[35]

(2) An expert witness should not express an opinion on a defendant's dangerousness unless he has special training and experience in conducting such evaluations, unless he is fully familiar with the developing clinical literature on this subject, and unless he qualifies his opinions with the observation that clinical predictions of future violence currently lack empirical validation.[36]

(3) An expert witness asked to express an opinion on a defendant's dangerousness should do so only if the opinion derives from a generally accepted diagnostic or psychodynamic framework. If the prediction lacks such a theoretical foundation, it is nothing more than a lay reaction to the defendant's behavior and does not merit any weight as an "expert" opinion. Since courts will not ordinarily possess the clinical sophistication to determine whether an opinion rests on an accepted theoretical foundation, we must depend on clinicians themselves, as a matter of professional ethics, to be sensitive to the limits of their own expertise and to qualify their

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[34] *See* Dix, *supra* note 28, at 177-94.

[35] In Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), a psychiatrist conducted an examination of the defendant to determine his competency to stand trial. This psychiatrist later presented evidence of the dangerousness of the defendant at the sentencing hearing based on the competency examination. The defendant was not warned prior to the examination of its use for anything other than a determination of competency nor was the psychiatrist ever listed by the stato as a witness for the sentencing phase of the trial. The Fifth Circuit found both procedures unconstitutional and set aside the death penalty.

[36] *See* Dix, *supra* note 28, at 175-77, 200-12.

opinions accordingly.

I would like to offer two final arguments concerning dangerousness, one addressed to the General Assembly and one to the courts. First, I would propose that where the only concern is that the defendant be incapacitated, the General Assembly should provide not for the death penalty, but for mandatory life imprisonment. Among the population of defendants convicted of capital murder, the legislature has said the death penalty should be reserved, first, for those whose crimes are especially vile or atrocious—appealing to the community's sense of retribution—and, second, for those whose prior conduct indicates that they are "probable" recidivists. I have no trouble, in principle, with the "vileness" criterion; perhaps the most outrageous crimes do indeed deserve the ultimate punishment.[37] But I do have difficulty, in principle, with the dangerousness criterion. Why is execution a necessary means of incapacitating those who arouse the most fear?

For the handful of killers whose own behavior has proven that the risk of repetition is too great ever to be taken again, why is life imprisonment without *any* chance of parole not a preferable alternative to the death penalty, at least for those prisoners who prefer to live? If our main objective is to assure that the defendant will have no opportunity to prey upon society again, mandatory life imprisonment will provide an equally effective means of incapacitation. To the extent that the execution is offered as the only way of assuring that the prisoner will not escape or kill within the prison walls, I would respond that effective prison security seems a morally superior alternative to the electric chair.

Let me be clear about what I am proposing. I am *not* saying that all persons convicted of capital murder and sentenced to life imprisonment should be ineligible for parole. Nor am I saying that capital punishment should necessarily be abolished in favor of mandatory life imprisonment. The General Assembly has already determined that a combination of general deterrence and retribution justify the death penalty for specific premeditated killings that involve torture or aggravated battery. What I am saying is that execution should *not* be used for purposes of incapacitation alone and, accordingly, that "dangerousness" should not be an

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[37] *See* notes 2-3 *supra*.

independent criterion-of-aggravation in a capital sentencing proceeding. If the General Assembly wants to assure incapacitation of those capital murderers whom the jury finds dangerous but whose killings lack the characteristics of "vileness," it should amend the capital sentencing statute to require mandatory life imprisonment in those cases.[38]

In the meantime, circuit court judges sitting in capital sentencing proceedings under the present statute should instruct jurors so as to avoid unwarranted speculation about the incapacitative effects of a life sentence. They are required by the statute to instruct the jury to decide whether the defendant's release would present a continued threat to society, and if so, whether they would recommend the death penalty in lieu of life imprisonment. In reaching a decision on this second question, a careful juror would want to know exactly what life imprisonment means. Undoubtedly, jurors are aware that many prisoners, having served less than their full sentence, are released on parole. They naturally may want additional information about the parole system. In at least two cases that I am aware of,[39] the jury returned to the courtroom and asked the judge about the possibility of parole. In both cases, the judge answered them in the Delphic way that the Supreme Court of Virginia had directed them to do in ordinary (noncapital) cases when the jury recommends the length of a prison term: "If you find the

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[38] At a minimum, the General Assembly ought to include mandatory life imprisonment as a third sentencing option, aside from death and life imprisonment with parole eligibility.

My suggestions are offered on the assumption that incapacitation is the General Assembly's object in these cases. It should be emphasized, however, that the class of persons convicted of capital murder is both overinclusive and underinclusive with regard to the class of offenders whose history of violent criminal behavior provides an appropriate basis, both empirically and normatively, for preventive confinement through mandatory life imprisonment. The larger issue of extended terms for dangerous offenders should be confronted on its own terms, not simply as an incidental by-product of amending the capital sentencing statute. The relevant literature is voluminous. For legislative proposals, see ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 2.5 (Approved Draft 1968); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT § 3-105 (1979); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Standard 5.3 (1973). For commentary, see generally Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 439 (1975); Perlman & Stebbins, *Implementing an Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175 (1979); Von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717 (1972).

[39] Stamper v. Commonwealth, 220 Va. 260, 278, 257 S.E.2d 808, 821 (1979), *cert. denied*, 100 S. Ct. 1666 (1980); Clark v. Commonwealth, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979), *cert. denied*, 100 S. Ct. 741 (1980).

defendant guilty, you should impose such punishment [within the prescribed statutory range] as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards."[40] In other words, the jury is told nothing.

This is not an adequate response in a capital case. The jury is first told to speculate about the defendant's future behavior if he were released and is then told to speculate, in ignorance, about the parole board's behavior. At a minimum the jury should be told, in a capital case, that the parole board is not supposed to release someone who is dangerous. I strongly urge the judges of the circuit courts to advise juries in capital cases as follows:

> You should not assume that a defendant sentenced to life imprisonment will automatically be set free after a set number of years. The Virginia parole statutes state that "No person shall be released on parole . . . until the Parole Board has determined that his release on parole will be compatible with the interests of the prisoner and of society."[41]

In short, if the dangerousness category is going to be a criterion in capital cases, juries should be given all of the information needed to apply the criteria fairly in view of all the relevant circumstances.

B. Psychiatric Testimony or Evidence Relating to Mitigating Circumstances

Much more could be said about the proof of aggravating circumstances under the Commonwealth's capital sentencing statute, especially the sufficiency of evidence to prove "vileness"; I have singled out the dangerousness criterion only because of the special problems raised by expert testimony on this issue. Many difficult

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[40] *See* I MODEL JURY INSTRUCTIONS IN VIRGINIA—CRIMINAL 25 (1979) (General Instruction No. 4—Duty of Jury in Fixing Punishment).

[41] *See* VA. CODE ANN. § 53-253 (Repl. Vol. 1978). In Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), the Supreme Court of Virginia stated, in response to the argument that the trial court should have charged the jury as to the date of parole eligibility, that "[p]arole and pardon are not proper matters for consideration by a jury." *Id.* at 214, 257 S.E.2d at 792. *See also* Stamper v. Commonwealth, 220 Va. 260, 278, 257 S.E.2d 808, 821 (1979). However, the Court based its ruling entirely on precedent involving noncapital convictions, *see* Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978); unlike other sentencing determinations, the capital sentencing statute specifically requires the jury to determine the likelihood that the defendant will constitute a continuing threat to society.

questions also remain unresolved in connection with proof of mitigating circumstances, including the nature of the defendant's burden of proof in establishing the statutorily specified circumstances and the relationship of aggravating and mitigating circumstances with the substantive rule by which the jury is to decide whether to recommend the death penalty. For present purposes, however, I will focus only on one aspect of a defendant's case-in-mitigation—the contours and impact of expert testimony concerning psychological abnormality.

Clinical evaluation and testimony will be sought by the defense, as a matter of course, in capital cases. This is because the defense must try to persuade the judge and jury, at a minimum, that the offender's homicidal behavior is only understandable in terms of some underlying psychopathology or mental abnormality—and that it would therefore be unjust to execute him. Undoubtedly, the defense would also like to persuade the jury that the defendant is not beyond rehabilitation or redemption. In any event, it is clear that the defendant's case-in-mitigation—if there is to be one at all—must be built on a foundation of psychiatric testimony.

The indispensability of psychiatric testimony in capital cases is further assured by the restricted coverage of most capital sentencing statutes. The United States Supreme Court has implied that only homicide can be punished by the death penalty;[42] moreover, in Virginia, as in most states, a person cannot be convicted of capital murder (or sentenced to death) unless the killing was premeditated.[43] For this reason, these cases will lack the type of extenuating evidence concerning provocation or excuse that customarily leads to convictions of less serious forms of homicide, such as second degree murder or manslaughter. In short, most capital cases will involve homicidal behavior that defies jury understanding and sympathy.

Two themes of the U.S. Supreme Court's death penalty decisions run in opposing directions. On the one hand, the Court has said

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[42] In Coker v. Georgia, 433 U.S. 584 (1977), the Court held that imposition of the death penalty for the crime of rape was cruel and unusual punishment. It intimated, however, that the death penalty might be excessive for any crime not involving the taking of human life. *Id.* at 598.

[43] In Virginia, capital prosecutions, by definition, will involve homicide defendants with a history of violent crime or whose capital crimes are characterized by abnormal brutality. A large percentage—maybe even a majority—of the cases in which the death penalty is sought by the prosecution involve rape-murder.

that discretion must be limited by normative constraints—the judge and jury must be given a substantive basis for choosing between life and death. On the other hand, the Court has insisted that the decision must be individualized and the defendant must be given an opportunity to offer not only *some* but *any* evidence which he thinks will have mitigating impact in order to persuade the judge or jury to spare him. In other words, mitigating circumstances may *not* be limited in the effort to squeeze discretion out of the system.

Nowhere is this tension more apparent than in connection with mitigating mental abnormality. In Virginia, as in other states, the defendant may summon a clinical expert to offer any opinion that may be relevant to the sentencing decision.[44] The door is wide open to testimony ranging from the defendant's painful childhood, which may arouse the jurors' sympathy, to testimony relating to his potential for rehabilitation, which may dampen their fears. In this sense, the expert's participation in a capital sentencing proceeding is not substantially different from his role in an ordinary sentencing hearing governed by the ethos of individualization.

Capital sentencing proceedings, however, *are* different from ordinary sentencing proceedings by virtue of the effort to specify mitigating circumstances and thereby guide the jury's decision. In Virginia, as in most other states, the legislature defined a threshold of significance for mitigating mental abnormality:

> Facts in mitigation may include, but shall not be limited to, the following:
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> . . . .
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> (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance or
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> . . . .
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> (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired . . . .[45]

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[44] In Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 100 S. Ct. 1069 (1980), the Supreme Court of Virginia held that VA. CODE ANN. § 19.2-264.4(B) (Cum. Supp. 1979) vests discretion in the trial judge to determine, subject to rules governing the admissibility of evidence, specifically rules of relevance, the evidence which may be adduced in mitigation of the offense. 220 Va. at 253, 257 S.E.2d at 804.

[45] *See* VA. CODE ANN. § 19.2-264.4(B) (Cum. Supp. 1979). Only three other "facts in mitigation" are specifically mentioned: The defendant's "age"—presumably his youthfulness;

These provisions are drawn directly from the American Law Institute's Model Penal Code,[46] which uses parallel language in other Code sections concerning the law of homicide and the insanity defense.

Thus, the first provision ("extreme mental or emotional disturbance") resembles the culpability formulation used by the drafters of the Code to distinguish murder from manslaughter;[47] it is similar to the common-law concept of "heat of passion," reflecting the moral proposition that people who kill when they have been provoked and have become angry, fearful, or stressed are not as culpable as those who kill without provocation and stress. The key point is that in distinguishing between murder and manslaughter, the moral relevance of this acute psychological distress depends upon adequate or reasonable external provocation; the defendant is not guilty of murder if the judge and jury can begin to understand how a reasonably normal person could have been provoked under the circumstances.

Under the capital sentencing statute, however, the universe of defendants is, by virtue of their convictions for capital murder, limited to those who were *not* provoked and who were not so acutely disturbed that they lacked the capacity to "premeditate," as the law defines it. Thus, if we think about this language ("extreme mental or emotional disturbance") in the legal context of a capital sentencing proceeding, we find ourselves in a moral twilight zone where the defendant is, by common consensus, culpable enough to deserve life imprisonment and yet where some hypothesized idiosyncratic and abnormal psychological response may mitigate his culpability enough so that it is unjust to put him to death. The nature of the moral question is thus considerably different from that asked in any other type of criminal proceeding—and so is the threshold of clinical significance.[48]

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the absence of a "significant history of prior criminal activities;" and participation or consent by the victim—which seems wholly unlikely in any of the situations which constitute capital murder. Since the youthfulness and behavioral history of the defendant do not have any meaning independent of some hypothesis about the psychological determinants of, or influences on, his behavior, it seems clear that the expert witness will in most cases be the primary source of evidence concerning the mitigating circumstances specified in the statute.

[46] *See* MODEL PENAL CODE § 210.6, Alternative Formulation of Subsection 2 (Proposed Official Draft, 1962).

[47] *Id.* at § 210.3(1)(b).

[48] It is worth noting, in passing, that these abnormal psychological responses are not so

The second of the statutory formulations concerning mitigating mental abnormality has similar implications. The statutory language is similar to the American Law Institute's "test" for criminal responsibility: the jury is asked to determine whether the defendant's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired." This language differs from the Model Penal Code's insanity test in two respects: First, it substitutes the term "significantly" for the term "substantially"; second—and more important—it omits the requirement that this incapacity be attributable to an underlying "mental disease or defect."[49]

Thus, for purposes of capital sentencing, the concept of mitigating mental abnormality has been detached from the medical model. This is hardly a minor editorial omission. Indeed, only its mooring to the medical model keeps the insanity defense from being loosed in a sea of determinism.

The longstanding debate over the scope and phraseology of the defense of insanity bottoms on the need to accommodate the law's postulate of free will with its acknowledgment that a wide spectrum of forces, including the law itself, shape human behavior. Aberrational intrapsychic functioning sometimes appears to be such a potent force that it seems fundamentally unjust to hold some individuals criminally accountable for their "resulting" conduct. For the most part, those who formulate the law have tried to limit the boundless inquiry regarding the factors which determine human behavior by relying on the medical model of severe mental illness to provide a conceptual stopping point. Thus, the "mental disease or defect" threshold—which must be crossed before the law will entertain claims that a person's ability to appreciate the criminality of his behavior or to control his conduct were impaired—is characteristic of all insanity formulations.

The substantive inquiry in a capital sentencing proceeding, by contrast, is not restricted to behavioral impairments arising out of mental disease or defects. The door in this sense is open to the full

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abnormal that a layperson will automatically recognize "craziness" or "sickness"; and the defendant—or the testifying clinician—faces an uphill battle even in depicting the acute psychological dysfunction in a way that will make any sense to laymen. This has been especially apparent in the rape-murder cases which have thus far been tried under the revised Virginia statute.

[49] *See* MODEL PENAL CODE § 4.01(1) (Proposed Official Draft, 1962).

spectrum of explanations that may be offered, including pure psychodynamic formulations rooted in the developmental sequence of the defendant's life. Because of this key substantive difference between the concepts of exculpatory mental abnormality and mitigating mental abnormality, the revised capital sentencing procedures place the clinician on entirely new terrain. Professional organizations should focus on the implications of this new legal environment for forensic psychology and forensic psychiatry.

On the one hand, it is inappropriate and unacceptable for the expert to regard the inquiry at the capital sentencing phase as the mirror image of the inquiry concerning criminal responsibility. When the forensic expert is asked to conduct an evaluation in a capital case, it is entirely insufficient for him to conduct the essential threshold inquiry characteristic of the insanity defense and conclude that because he found the defendant not mentally ill at the time of the offense, he cannot offer helpful psychological evidence. On the other hand, it is equally inappropriate for the expert to assume that the law has now abandoned its postulate of free will and is opening the door to an unbounded scientific determinism. The law still seeks to draw its fundamental moral line between a person who has *chosen* evil, regardless of the forces which shape the development of his character, and the person whose homicidal behavior arose from a significant impairment of his normal psychological controls. We are here seeking to ascertain and understand the interaction of the person, with all of his characterological predispositions and weaknesses, and the external environment, with special attention to its psychological impact on him at the time of the homicidal behavior. Yet the expert must also recognize that the moral gradient is still there; the capacity of all capital defendants to control their behavior is not *significantly* impaired, and not all capital defendants, regardless of the nature of their crimes, were under extreme emotional distress. These are the "ultimate" issues of value and moral judgment which the jury and judge will have to resolve. The clinician's task is to provide the information, however speculative and uncertain, to assist them to do so.

C. Pretrial Evaluation Procedures

The indispensability and special complexity of psychiatric testimony in capital cases has several implications for pretrial evaluation procedures. In order to reduce the risks of unfairness and inconsistency in the administration of the capital sentencing statutes, I offer the following recommendations:

(1) An indigent defendant charged with a capital crime should be provided a comprehensive forensic evaluation, at state expense, to assist his attorney in exploring and presenting his "defenses," including evidence in exculpation or mitigation. Because this evaluation should be viewed as essential to the effective assistance of counsel,[50] the evaluation should be conducted for the defense by a qualified forensic specialist on terms similar to those arranged by defendants with means to pay for their own defense.[51] On the other hand, if the defense gives notice of its intent to present forensic testimony in exculpation or mitigation, the state should be entitled to compel the defendant to undergo another examination, which could be performed by the forensic specialists in the state mental health system or by any other forensic expert.[52]

A defendant who refused to cooperate with the state examiner would forfeit his right to introduce expert testimony as part of his case-in-mitigation. However, the fifth amendment interests of the defendant, as well as the integrity of the evaluation process, must be protected by an unequivocal rule precluding the prosecution

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[50] *Cf.* Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978) (holding that a defendant was denied effective assistance of counsel when the attorney failed to conduct an adequate investigation of potential defenses based on mitigating mental abnormality). *See generally* Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970).

[51] It may be argued that the indigent defendant should be entitled to an evaluation by an expert of his own choosing, rather than by state forensic examiners, on the ground that examinations in forensic units are of inferior quality when compared with examinations by private clinicians. Whether or not this proposition is accepted for noncapital cases, I believe that special evaluation procedures are required in capital cases. The indigent capital defendant should have access to an expert evaluation by a clinician of his own selection, within appropriate limitations of cost and administrative convenience; and, if the prosecution or court so requests, the defendant should also be examined by a clinician in the state system. This will assure the defendant that he is being treated fairly and will also enhance the reliability of the fact-finding process since more than one opinion will be available.

[52] *Cf.* United States v. Albright, 388 F.2d 719 (4th Cir. 1968) (holding that the district court had inherent authority to order psychiatric examination of a defendant who pleaded insanity and presented psychiatric evidence supporting his plea).

from introducing, as part of its case on guilt or in aggravation of sentence, any statements concerning the present offense or any prior criminal activity which are made by the defendant during the course of any pretrial psychiatric examination.[53]

(2) Clinicians who conduct pretrial forensic evaluations of defendants charged with capital crimes must become familiar with the unique range of issues which are raised in a capital sentencing proceeding. Whenever testimony is contemplated at the sentencing phase, it is clearly insufficient for the examiner to limit his formulation to opinions concerning competency to stand trial and criminal responsibility. The clinical information and opinions likely to be sought in a capital sentencing trial are both more complex and more subtle than in most other legal settings. Here, as in other areas discussed in this Foreword, the law must depend on the mental health professions themselves to develop ethical guidelines for participation in capital sentencing proceedings; ultimately, the fairness of the process may depend on a shared sense of profound professional responsibility within the bar and within the mental health disciplines.

IV. Conclusion

By requiring the states to individualize the capital sentencing process, the Supreme Court has virtually assured routine participation by psychiatrists and other mental health experts.[54] One might ask who is better qualified than the trained clinician to present evidence on the "character and record of the individual offender" and the "mitigating factors stemming from the diverse frailties of humankind."[55]

Yet, the role of clinician is being expanded in capital cases at precisely the same time that the validity and reliability of expert testimony by mental health professionals is being challenged on virtually every other front. Recent reforms of the civil commitment statutes are based, in significant measure, on doubts about the accuracy of clinical determinations, and some commentators have

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[53] *See* Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979); Gibson v. Zahradnick, 581 F.2d 75 (4th Cir.), *cert. denied*, 439 U.S. 996 (1978).

[54] *See* Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing*, 1 Int'l J. L. & Psych. 283, 285, 304 (1978).

[55] *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

claimed that psychiatric assessments of imminent dangerousness are no more trustworthy than "flipping coins in the courtroom."[56] Similarly, the increasingly popular proposals to abolish the insanity defense are partly responsive to beliefs that expert testimony regarding a defendant's state of mind at some time in the past lacks an objective scientific foundation.[57] Finally, retributive ("just desert") sentencing reforms that link severity of punishment more closely to the seriousness of the offense are motivated in large part by a belief that it is not possible to predict an offender's future behavior and to tailor the disposition accordingly.[58] At bottom this is an attack on the ethos of individualization and its alliance with the clinical method, and those reforms will, wherever adopted, undoubtedly decrease the role played by clinicians in most sentencing proceedings.[59]

By pointing out these contradictory developments, I do not mean to imply that the Supreme Court's 1976 death penalty decisions were wrong. I think the Court was reflecting a widely shared moral perception that it is unjust to condemn someone to the electric chair without asking who he is and how he came to do what he did. We may be confused and uncertain about the "causes" of his behavior but we should not remain indifferent to them. For this reason, we should insist, as the Court has done, that the decision whether or not to impose the death penalty be made only after a concerted effort to uncover the psychological roots of his homicidal behavior.

But these trends should call to our attention the risks—of error and abuse—that inhere in the process of applying the revised capital sentencing statutes. We must be sensitive to the limits of our knowledge. Even the best clinical testimony merely casts some light into a room that remains very dark. What is worse, clinicians may err and be influenced by their own biases, and some may be

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[56] *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711-17 (1974).

[57] *See, e.g.*, Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 640-45 (1978).

[58] *See* N. MORRIS, THE FUTURE OF IMPRISONMENT 58-77 (1974); A. VON HIRSCH, DOING JUSTICE (1976); Perlman & Stebbins, *supra* note 38.

[59] *See generally* Dershowitz, *The Role of Psychiatry in the Sentencing Process*, 1 INT'L J. L. & PSYCH. 63, 71-77 (1978).

more convinced than they ought to be about the validity and reliability of their clinical impressions. The imperfections of forensic evaluation and the fortuities of courtroom testimony—which have provoked endless debate in the context of the insanity defense—are only exacerbated in the context of a capital sentencing proceeding, where the stakes are disturbingly high.

If this system is to be just, we must be sensitive to the problems in its administration. My own concern is that these problems are now being ignored. Before we send a fellow human being to the electric chair, we should give him every reasonable opportunity to persuade us why we should not condemn him. This places a heavy responsibility on those of us who administer the law to do so fairly. And, as I have tried to demonstrate, it also places a heavy burden on those who claim to be experts on the aberrations of the human mind to be sensitive both to the significance of their role and the limits of their knowledge.