



# **THE MIND ON TRIAL:**

**MENTAL ILLNESS AND CAPITAL PUNISHMENT IN AMERICA'S**

**HIGHEST EXECUTION STATE**

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Number of words: 99,935

## **ABSTRACT**

Mentally ill and intellectually disabled capital defendants are regularly sentenced to death in Texas, America's highest execution state. Psycho-legal scholars argue that the reason for this phenomenon is that Texas courts rely on out-dated clinical criteria and stereotypes without scientific foundation in their mental incapacity evaluations. While existing literature offers significant insights regarding the treatment of mentally incapacitated capital defendants in this and other US jurisdictions, it provides a decontextualized view of the problem which takes for granted the underlying assumptions upon which notions of mental illness and criminal responsibility are based. Starting from the idea that such interpretations are historically contingent and socially constructed, the thesis seeks to identify the ways in which scientific developments, mental health caselaw, and shifting values and standards of behaviour have influenced expert and lay discourse on the intersection of mental illness and crime in the psycho-legal literature and in Texas courtroom interactions. To accomplish this goal, the thesis utilises a socio-historical methodology based on in-depth archival research. Specifically, the thesis analyses forensic psychiatric publications, trial records of male capital defendants who claimed insanity or asked for a mitigation of the sentence due to mental illness, and social and cultural histories of forensic psychiatry and psychology spanning the 20<sup>th</sup> century. Drawing from critical theory and cultural studies, the thesis argues that despite their claims to scientific objectivity and legal neutrality, American psycho-legal theorists and Texas expert witnesses, defence attorneys, prosecutors, and appellate courts provide morally charged descriptions of mentally ill offenders which reveal a far from dispassionate approach. Moreover, the thesis proposes that, through their arguments and opinions, psychiatrists and legal actors in Texas courts have contributed to the labelling of marginalised male offenders in a way that increases the stigma attached to particular social categories, while encouraging punitive responses amongst Texas jurors.

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## **ACKNOWLEDGMENTS**

I would like to express my gratitude to a number of people and institutions for their help, support, and advice during this research journey. To my funders, the Economic and Social Research Council, Exeter College, and the Amelia Jackson Senior Scholarship, for providing the financial support that made this project possible. To my supervisor, Professor Carolyn Hoyle, for guiding me with her insightful feedback in the writing of this thesis, for supporting me psychologically over the years - especially as I navigated the challenges associated with being a new parent - and for bringing a positive outlook and a warm sense of humour to all our meetings, even when I thought I had lost it!

To my examiners from the Centre for Criminology, Professors Lucia Zedner and Mary Bosworth, for their constructive criticism, which improved this project's viability along with its theoretical and methodological rigour. To Professors Lawrence Rosen from Columbia Law School (NY, USA) and Michelle Dempsey from Villanova University School of Law (PA, USA) for providing thought-provoking feedback on my research project and helpful professional advice during my time as a visiting scholar in the United States. To Kate Black from the Texas Defender Service and Elizabeth Vartkessian from 'Advancing Real Change' for helping me locate the archival resources used for this dissertation and anticipate some of the practical challenges encountered during my fieldwork. To the archivists of the Texas State Library and Archives Commission and to the clerks of the Texas Court of Criminal Appeals for patiently

guiding me through the archival resources and helping me identify the court documents of interest.

To my colleagues and friends at the University of Oxford and beyond for sharing with me the pains and joys of this intellectual endeavour. To my sister Bianca, my mother Jessica, my father Nanni, and my grandmothers Anita and Floriana for encouraging me to pursue my dreams, take risks, and believe in myself, and for always being there for me when I fall. Finally, to my wonderful young children, Julian and Angelica, for teaching me that some of the best ideas can come while joyfully running with them in the park, looking at the squirrels, and singing lullabies, and to my incredible husband Scott, who has supported me in every way I could have possibly dreamed of, encouraging me to push myself even under the most adverse circumstances - such as a global pandemic combined with a lack of childcare - and firmly believing in me, even when I was having doubts. I could not have completed this work without his loving support, and for this I will be eternally grateful.

## INTRODUCTION

In 1948, Richard W. McGee, a white middle class college student and former US soldier, killed his fiancée's father, R. L. Allston, at the victim's residence in Lubbock, Texas.<sup>1</sup> One year later, a Lubbock county jury found McGee guilty of murder and sentenced him to death. At his trial, McGee plead not guilty by reason of insanity, and presented overwhelming evidence suggesting that he suffered from a severe mental health condition which undermined his ability to conform to legal requirements. The defence's witness list included prominent psychiatrists and psychoanalyst coming from some of the most prestigious institutions in the country, along with members of the defendant's family, and some childhood friends. All agreed that McGee was of 'unsound mind' and that his psychiatric condition impaired his capacity to distinguish right from wrong and to understand the nature and consequences of his actions, making him legally insane according to Texas standards.<sup>2</sup>

These views were substantiated by evidence suggesting that in the years preceding the murder, and particularly after his military service in World War II, McGee had engaged in increasingly odd behaviours. Witnesses reported that they had heard him singing and shouting military commands out of context,<sup>3</sup> preaching on the streets,<sup>4</sup> and asserting that he had supernatural powers which allowed him to 'read

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<sup>1</sup> McGee v. State, 238 S.W.2d 707, 709 (Tex.Crim.App. 1950).

<sup>2</sup> *Ibid.*, 710. See, e.g., Holcomb Test. Trial Tr. vol. 2, 270¶2, Dr. Stephens Test. Trial Tr. vol. 1, 166¶3-167¶2.

<sup>3</sup> Holcomb Test. Trial Tr. vol. 2, 268¶1.

<sup>4</sup> Stull Test. Trial Tr. vol. 3, 588¶1.

people's minds' and cure 'any disease, regardless of severity or type.'<sup>5</sup> Due to his strange conduct, McGee was charged with multiple lunacy complaints<sup>6</sup> and repeatedly hospitalised in psychiatric institutions, where he was kept in a straight-jacket,<sup>7</sup> and administered electroshock<sup>8</sup> and insulin shock treatments.<sup>9</sup> According to the hospital and military records presented at trial, McGee's mental illness eventually led to his discharge from the US army,<sup>10</sup> and to him being granted 100% service-related disability pay from the US government.<sup>11</sup> On appeal, the Texas Court of Criminal Appeals (hereinafter 'TCCA') acknowledged the strength of the evidence presented in support of McGee's insanity claim, arguing that 'it is difficult to understand how stronger defense of insanity could be developed in the trial of a criminal case'.<sup>12</sup> And yet, the county jury found McGee guilty and sentenced him to death. How could the jury reach a similar verdict in light of McGee's mental health condition?

A closer look at the facts of the crime and at the evidence presented at trial may provide some tentative answers. The killing followed a heated discussion regarding McGee's intention to marry Mr. Allston's daughter, Betty Jane Allston, the following December.<sup>13</sup> McGee and Miss Allston had met just a few months earlier in Denton,

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<sup>5</sup> Dr. White Test. Trial Tr. vol. 1, 132¶3.

<sup>6</sup> Dr. Stephens Test. Trial Tr. vol. 1, 165¶1, Stull Test. Trial Tr. vol. 3, 575-576, 579-580¶1.

<sup>7</sup> Dr. Sloan Test. Trial Tr. vol. 2, 319¶2.

<sup>8</sup> Def's Ex. R-6, Clinical Record- Electric Shock Treatment, Trial Tr. vol. 4, 793.

<sup>9</sup> Dr. Morrow Dep. Trial Tr. vol. 1, 179¶1, Dr. Mason Dep. Trial Tr. vol. 2, 298¶2-299¶1.

<sup>10</sup> Def's Ex. 4, Certificate of Disability for Discharge, Trial Tr. vol. 4, 777-778.

<sup>11</sup> *McGee*, 238 S.W.2d at 710; Young Test. Trial Tr. vol. 3, 526¶3-527¶2.

<sup>12</sup> *McGee*, 238 S.W.2d at 709.

<sup>13</sup> *Ibid.*

Texas, where they were both studying towards university degrees. While Mr. Allston agreed to the marriage, a fundamental requirement given the patriarchal culture of the time, he asked the young couple to postpone the event until after they had completed their college education. For McGee, the prospect of this delay was intolerable. After stating angrily that he would marry Miss Allston as planned notwithstanding her father's reservations, McGee stormed out of the Allstons' home taking his fiancée with him, threw away her engagement ring, and threatened to kill her whole family if they tried to stop the marriage. Two days later, realising that his fiancée was having second thoughts, McGee went to a pawnshop to purchase a pistol, returned to the Allston home, and used the gun to kill Mr. Allston. He was arrested the following day in Austin, Texas, still in possession of the murder weapon.

The defence's insanity case was built upon the theory that McGee suffered from a lifelong psychosis, most likely *dementia praecox* or schizophrenia, whose primary symptoms included incoherent speech patterns,<sup>14</sup> sudden and unjustified fits of rage,<sup>15</sup> insomnia,<sup>16</sup> suicide attempts,<sup>17</sup> religious obsession,<sup>18</sup> 'delusions of grandeur',<sup>19</sup> and hallucinations.<sup>20</sup> According to the defence's key expert witness, Dr. Paul L. White, the murder was part of a delusionary system which led McGee to believe that he was Jesus

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<sup>14</sup> Dr. White Test. Trial Tr. vol. 1, 129, Dr. Morrow Dep. Trial Tr. vol. 1, 184¶2.

<sup>15</sup> Eva McGee Test. Trial Tr. vol. 3, 471¶3-472¶1; Holcomb Test. Trial Tr. vol. 2, 263-264¶1.

<sup>16</sup> Holcomb Test. Trial Tr. vol. 2, 269¶3.

<sup>17</sup> Eva McGee Test. Trial Tr. vol. 3, 471¶2; Holcomb Test. Trial Tr. vol. 2, 262¶5-263¶1.

<sup>18</sup> Holcomb Test. Trial Tr. vol. 2, 269¶4-270¶1.

<sup>19</sup> Dr. White Test. Trial Tr. vol. 1, 132¶3.

<sup>20</sup> *Ibid.* See also Dr. Morrow Dep. Trial Tr. vol. 1, 179¶2-181¶2, Dr. Grotjahn Dep. Trial Tr. vol. 3, 551¶3.

Christ<sup>21</sup> and that he and his fiancée ‘were destined by heaven for a special mission’.<sup>22</sup> As Dr. White explained at trial, by opposing the marriage, Mr. Allston had created an obstacle for McGee and his fiancée’s mission, and ‘that shock and that frustration strengthened the necessity of carrying the delusion through and not reasoning as a normal person would.’<sup>23</sup> In McGee’s delusionary system, the doctor concluded, the murder was a necessary step to fulfil God’s plan and was therefore morally justified.

To challenge the defence’s case, the state presented testimony from members of the victim’s family, who only knew McGee superficially, and police officers, who observed McGee briefly following his arrest. All concurred that, based on their observation of the defendant’s appearance, attitude, and behaviour, McGee was a mentally ‘sound’ individual.<sup>24</sup> Most importantly, the state offered the opinion of a psychiatrist, Dr. W. L. Baugh, who testified that, while McGee was undeniably insane from a medical point of view, the circumstances of the offence suggested that he was nevertheless capable of knowing the difference between right and wrong and the nature and extent of his acts at the time of the killing.<sup>25</sup> As highlighted by the TCCA,

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<sup>21</sup> Dr. White Test. Trial Tr. vol. 1, 132¶3.

<sup>22</sup> *Ibid.*, 150¶3.

<sup>23</sup> Dr. White Test. Trial Tr. vol. 1, 160-161.

<sup>24</sup> See, e.g., O. W. Allston Test. Trial Tr. vol. 3, 632, Boling Test. Trial Tr. vol. 3, 665¶2.

<sup>25</sup> *McGee*, 238 S.W.2d at 710; Dr. Baugh Test. Trial Tr. vol. 3, 697¶2.

this statement... very clearly draws the distinction between medical and legal insanity. From a medical standpoint, one may be insane by reason of mental disease or mania, yet, from a legal aspect, not unless or until his mental condition has reached the point where he is unable to distinguish right from wrong and to know the nature and consequences of his acts is he exonerated or excused from crimes committed while in that condition.<sup>26</sup>

In light of this reasoning, the TCCA concluded that Dr. Baugh's opinion was sufficient to support the jury's conclusion that McGee was sane at the time of the killing, justifying the imposition of the death penalty on a severely mentally ill individual.

McGee's case raises a number of questions which will emerge, over and over again, in the trials analysed in this thesis. For example, how and why could a defendant with a severe mental illness such as the one suffered by McGee receive the death penalty for a crime purportedly committed under its influence? Did the tension between psychiatric and legal notions of insanity recognised by the TCCA play a role and, if so, in what ways? How did expert and lay witnesses, along with the TCCA, reach their conclusions regarding McGee's mental state and criminal accountability, and what were the underlying assumptions which informed these conclusions?

As this thesis will show, while McGee's case is in some respects unique, the psycho-legal dilemmas raised at his proceedings reappear in the trials of several other criminal defendants using insanity as a defence for crimes of rape and/or murder. The thesis will explore some of these dilemmas, by analysing the ontological and epistemological debates emerging when psychiatrists, legal actors, and lay observers are

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<sup>26</sup> *McGee*, 238 S.W.2d at 710.

asked to establish defendants' mental health and criminal responsibility in capital punishment proceedings. Recognising the historical specificity of these debates, the thesis will examine their developments between 1909 and 2002, a period in which new psychiatric theories of the mind, legal doctrines of insanity, and procedures for sentencing mitigation transformed American courts' responses to mental incapacity claims, particularly in death penalty cases. Acknowledging these developments, and their complex repercussions at the micro-level of trial proceedings, the thesis will zoom in on Texas, a jurisdiction which has historically played a central role in the American death penalty debate, both for its high execution rates and for its punitive approach towards mentally disabled capital defendants.

Drawing from psychiatric publications, mental health and capital punishment caselaw, and the court documents related to 88 cases of allegedly mentally ill men charged with capital crimes, the thesis will examine the ways in which shifting psycho-legal paradigms have influenced the discourse and practices of expert witnesses and lay actors participating in death penalty proceedings, to identify how their interactions contributed to the legitimisation of particular interpretations of the cases under analysis.<sup>27</sup> Moreover, the thesis will situate the psycho-legal debate within broader social, political, and cultural processes affecting American and Texan societies, to highlight the ways in which dominant values and standards of behaviour influenced representations of mental illness and crime, both in the psychiatric literature and in

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<sup>27</sup> 'Lay knowledge' will here encompass not only popular understandings, but also interpretations of legal actors who, in reference to mental incapacity, lack specific educational training (Loughnan 2012: 47). In contrast, 'expert knowledge' will comprise interpretations of mental health professionals whose specialised training distinguish them from lay persons.

courtroom practice. Specifically, building on the insights of social and cultural histories of psychiatry, the thesis will investigate the labelling processes through which marginalised men embracing ‘deviant’ lifestyles have been associated with specific psychiatric conditions, personality traits, and behavioural tendencies, and highlight how these associations may have influenced trial outcomes.

For the purposes of this thesis, the concept of mental incapacity will encompass exculpatory and non-exculpatory doctrines stemming from considerations of the mental state of the defendant that might call for a specialised response to law breaking (Loughnan 2012). Specifically, it will address two mental incapacity doctrines concerned with the mental health of the defendant, and which play a particularly significant role in capital punishment proceedings: the defence of insanity and sentencing mitigation due to mental illness. Given the centrality of capital punishment in the history of Texas’ penal system, along with the complex moral quandaries involved when considering the death penalty for defendants contending severe mental health conditions, the thesis will focus on trials involving defendants who claimed mental incapacity but who were, nonetheless, sentenced to death.

## Thesis Overview

The thesis is organised into two parts. **Part I (Chapters 1 through 4)** situates the thesis within contemporary debates on mental illness and capital punishment and provides the historical, theoretical, and methodological framing, along with the legal background, of the thesis. **Part II (Chapters 5 through 7)** focuses on the ways in

which psychiatrists, lay individuals, and legal actors have explained the underlying causes of mental illness and crime and classified particular mental conditions at different historical junctures. Each chapter in Part II moves between the theoretical knowledge discussed in the American psychiatric and psychological literature, and the practical knowledge emerging from psycho-legal discussions in Texas capital punishment trials.

### *Part I. Background*

**Chapter 1** outlines the rationales for choosing a timeframe stretching between 1909 and 2002, illustrates the reasons for focusing on Texas, and situates the discussion within the jurisprudential and ethical literature on mental incapacity in the American capital punishment system. Moreover, drawing from feminist criminology (Valverde 2009; Ussher 2012; Chan 2012), social and cultural history (Smith 1981; Harris 1989; Wiener 1994; Rafter 1997a, 2008), and cultural anthropology (Bourdieu 1977; Clifford 1986; Abu-Lughod 1991), the chapter develops a theoretical framework for the analysis of knowledge production processes in American capital punishment trials. The discussion pays particular attention to the notion of culture that informs the historical investigation, and to historical associations of mental illness, masculinity, and blackness in the American psychiatric literature as well as in its criminal justice system.

**Chapter 2** details the thesis' methodology, which is rooted in the theoretical framework developed in Chapter 1. It describes and justifies the use of a socio-historical methodology which, via a qualitative content analysis focusing on the texts' hidden

meanings and narrative qualities, unveils the dominant cultural values that influence expert and lay discourse and the narrative strategies aimed at silencing alternative points of view as well as defendants' voices in the process. Having described the archival data, sampling strategies, and analytical techniques used for the textual interpretation, the chapter explains the practical and emotional challenges encountered when conducting archival research in the field of capital punishment.

**Chapter 3** sets the legal context of the thesis. It specifically investigates Texas mental incapacity doctrines, caselaw, and rules of evidence to highlight the legislative strategies through which the judiciary has contained and influenced the content and impact of expert opinions in Texas courtrooms. In relation to mental incapacity doctrines, the chapter argues that Texas has historically taken a comparatively narrow approach to the insanity defence at the guilt stage of the trial, while seeking to reverse the mitigating effect of mental illness evidence at the sentencing stage. With regards to evidentiary rules, the chapter argues that Texas courts have historically used low standards of admissibility when dealing with psychiatry and psychology, leading to an indiscriminate acceptance of expert testimonies based on dubious scientific methods.

**Chapter 4** serves as a transition chapter which connects the background information provided in Part I with the empirical chapters included in Part II. It draws from the psycho-legal literature, Texas trial transcripts, and TCCA opinions to identify long-standing trends in the ways in which experts and lay people interpreted mental illness and criminal responsibility over the 20<sup>th</sup> century. The chapter highlights the existence of an underlying tension between scientific and legal views of human

psychology and behaviour, challenges a number of false beliefs that inform expert and lay understandings of mental illnesses and intellectual disabilities, and describes the different kinds of testimonies typically found in Texas death penalty proceedings.

## *Part II. Empirical Chapters*

**Chapter 5** investigates the time period spanning from the rise of biological criminology in the early 20<sup>th</sup> century, to its decline following the spread of Freudian psychoanalysis in the 1950s. The chapter examines the emergence of organic explanations of insanity and criminality, the moral framework within which early 20<sup>th</sup> century psychiatrists operated, and the ways in which psychiatrists and lay witnesses used evidence of heredity, brain damage, syphilis, feeble-mindedness and epilepsy to support or undermine defendants' insanity claims. The chapter argues that, despite their emphasis on science and objectivity, early 20<sup>th</sup> century psychiatrists provided morally charged descriptions of the personalities and lifestyles associated with mental illnesses and intellectual disabilities which unveil a far from dispassionate approach. Moreover, the chapter identifies a mismatch between the scientific theories developed in the psychiatric literature and the daily practice of expert witnesses, arguing that this mismatch was due to psychiatry's methodological limitations when confronted with individual cases, and to the difficulty of reconciling psychiatric explanations of criminal behaviour with the legal questions experts were required to answer in Texas courtrooms.

**Chapter 6** examines the time period spanning from the rise of psychoanalysis in the 1950s to its decline in the early 1970s. The chapter analyses the diffusion of Sigmund Freud's criminological theories in the United States, the relationship between psychoanalytic theory and the insanity defence, and the impact of Freudian ideas and American socio-cultural transformations on psychiatrists' interpretations of criminal psychopathy. The chapter shows that, in the two decades following the Second World War, challenges to the traditional family values of the 1950s, changes in the areas of male and female sexuality, and the emergence of a new culture of mass media, influenced the ways in which psychoanalysts framed insanity and criminal psychopathy in Texas courts, suggesting, once again, that their explanations and classifications were driven by a mix of moral and 'scientific' considerations.

**Chapter 7** covers the timeframe spanning from the decline of psychoanalysis in the 1970s to the US Supreme Court's decision to categorically exclude intellectually disabled defendants from capital punishment in 2002.<sup>28</sup> This period experienced a revival of biological explanations of mental illness and criminality, an increased attention to the association between child abuse and future violence, and a regular use of the diagnosis of antisocial personality disorder to label capital defendants in Texas courts. The chapter argues that Texas district attorneys have exploited these developments, along with the Texas capital punishment statute's focus on future dangerousness, to describe defendants' criminal conduct as an expression of their true character and turn mitigating evidence of mental illness into an aggravating factor at

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<sup>28</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

sentencing. Moreover, given the racist stereotypes which have historically linked African Americans and Hispanics with violence, the chapter suggests that these practices have been particularly prejudicial for members of these ethnic groups, prompting the imposition of death sentences even in cases which might have warranted a more lenient treatment.

The **Conclusion** synthesises the thesis' findings, highlights its contributions to the field, and offers some suggestions for future research.

## **PART I. BACKGROUND**

## CHAPTER 1. A NEW LOOK AT AN OLD DEBATE

### Introduction

The central concern of mental incapacity claims, the human mind, remains a mystery for both psychiatry and the law. Irrespective of their sophisticated theories, diagnostic techniques, and philosophical speculations, both disciplines have yet to find a way to fully understand it (Denno 2005: 605). Nevertheless, no other human mechanism plays such a central role in criminal trials. Defendants' reasoning processes, motivations, and feelings are essential for the establishment of *mens rea* or criminal intent and have been so from the mid-19<sup>th</sup> century onwards (*Ibid.*, 612-613).<sup>29</sup> Due to their elusiveness and complexity, mental incapacity claims have historically triggered conflict, disagreement, and confusion. Situated at the intersection of psychiatry and the law, such claims raise problematic issues regarding subjectivity and criminal responsibility, whose symbolic significance extends beyond the specifics of individual cases (Oosterhuis & Loughnan 2014: 2).

Solutions to issues of subjectivity and criminal responsibility depend on which view of human nature and behaviour stakeholders endorse. Psychiatry and the law start from different philosophical assumptions: correspondingly they are historically divided on these issues. Criminal law doctrines are framed in the context of classical legal theory

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<sup>29</sup> For a discussion of the gradual transition from 'character-based' to 'psychologised' notions of *mens rea* in 19<sup>th</sup> century English trials see Lacey (2001b: 266, 2010: 117-123, 2001a, 2007a, 2007b).

(e.g. Immanuel Kant and Cesare Beccaria) and Enlightenment notions of free will, which hold subjects morally accountable for their actions, and require a proportionate response to law breaking tailored to the severity of the offence committed. In contrast, forensic psychiatry starts from 18<sup>th</sup> and 19<sup>th</sup> century positivistic assumptions and explains human behaviour as the product of hereditary and physical traits, natural impulses, and environmental processes largely operating beyond the subject's control (Oosterhuis & Loughnan 2014: 2). From this perspective, a just response to criminality should start from a scientific investigation of the workings of the body and mind of the subject and take these evaluations into account in judicial determinations. Instead of focusing exclusively on the severity of the offence for the calculation of a proportionate legal response, the psychiatric approach emphasises the importance of evaluating defendants' psychological make-up to establish their individual moral responsibility. The dialectic between philosophical notions of free will and scientific explanations of human behaviour has vexed the legal system, the medical profession, and the wider public since its first manifestation in the 18<sup>th</sup> century to the present day.

As a result of this underlying tension, the role of forensic psychiatry in the courtroom has historically attracted significant criticism (see Melton et al 2007; Slovenko 2009; Gutheil 2009; Freckelton 2012, 2013). For example, a number of criminologists have warned that individualised considerations risk contributing to an erosion of the proportionality principle, facilitating prolonged detentions or non-consensual medical treatments, reminiscent of eugenics and 19<sup>th</sup> century asylum practices (Oosterhuis & Loughnan 2014; see Nye 1976; Foucault 1977; Foucault, Baudot & Couchman 1978; Garland 1985a, 1985b, 1992, 2001; Stover & Nightingale

1985; Scull 1991; Christie 2000; Wacquant 2009; Sim 2010). Along these lines, American legal commentators (Morse 1978, 1982), psychiatrists (Coleman 1984; Stone 1984a; Faust & Ziskin 1988), and state legislatures<sup>30</sup> have expressed doubts about psychiatry's ability to provide valuable information to judges or juries on topics of legal relevance, in extreme instances arguing that mental health experts should be banned from the courtroom altogether (see generally Fingarette 1972: 47-49; Slobogin 2006: 21-22).

While controversies surrounding mental incapacity in criminal law have a long history, this chapter proposes that the issue became increasingly contentious during the 20<sup>th</sup> century, particularly in American and Texan death penalty cases. To illustrate this point, Section 1 of this chapter will outline the rationales for concentrating on the 1909-2002 period and for selecting Texas as the jurisdiction of focus for the historical investigation. Section 2 will turn to a review of the scholarship tackling the legal, ethical, and medical issues stemming from the psycho-legal controversy in the American capital punishment context and set out the thesis' contribution to the field. Sections 3 and 4 will draw from critical theory, cultural studies, and social histories of mental incapacity to develop a theoretical framework for the analysis of knowledge production processes in American capital punishment trials. Finally, Sections 5 and 6 will investigate historical associations of mental illness, masculinity, and blackness in the American medical literature and in its criminal justice system, formulating hypotheses on the possible persistence of some of these associations in 20<sup>th</sup> century penal practices.

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<sup>30</sup> S. Floor Amend. 1 to S.B. 459, 42d Leg., 1st Sess. (N.M. 1995).

## 1. Why Mental Incapacity in Texas Capital Punishment Trials in the 20<sup>th</sup> Century?

Over the 20<sup>th</sup> century, the American debate regarding mental incapacity underwent a series of paradigmatic shifts which had dramatic consequences for defendants charged with capital crimes. The debate became particularly contentious in the first decades of the century, when a new stream of medico-legal research started challenging courts' retributive approach to sentencing, while advocating individualised assessments based on defendants' biological and psychological profiles (Harcourt 2003: 107-108). Legal scholars and forensic psychiatrists determined to join forces and transform the American legal system in light of recent scientific advancements made their bond official in 1909, during the National Conference on Criminal Law and Criminology held at Northwestern University in Chicago, Illinois (*Ibid.*, 108). At the conference, a number of prominent lawyers, judges, and physicians such as Ernst Freund, Roscoe Pound, and John Wigmore met to design new measures for the observation and treatment of the 'deviant classes'. The conference signalled the beginning of a new era for psychiatric inquiries into the roots of criminal behaviour which, supported by a series of legal developments, would powerfully influence the process of legal adjudication over the first three quarters of the 20<sup>th</sup> century (*Ibid.*, 109).

In his opening conference speech, American legal scholar Roscoe Pound lamented that while European forensic psychiatrists such as Emil Kraepelin, Eugen Bleuler, and Charles Goring had studied the physical make-up of prisoners since the mid-19<sup>th</sup> century, in the United States the law of due process had hindered similar

investigations (AICL 1910: 93). Consequently, American psychiatrists lacked a comparatively thorough dataset that would allow them to make generalisations about the physical marks of criminal types. According to the conference's committee, this knowledge gap needed to be filled through the creation of a number of laboratories across the United States, specifically dedicated to the medical and psychological examination of convicted criminals (*Ibid.*, 26).

The discussion led to the foundation of the Juvenile Psychopathic Institute in Chicago in 1909 (Beuttler & Bell 2010). At the institute, psychiatrists conducted intensive analyses of the 'juvenile delinquents' brought before the juvenile court, to identify the underlying causes of their criminal behaviour, formulate prevention strategies, and assist judges in determining appropriate forms of correction. Several American states later replicated this model, fulfilling the committee's wish and contributing to the expanding role of American forensic psychiatry in courts of law over the following decades (Grob 1983: 136-137). By virtue of its significant impact on the development of the medical study of criminal behaviour in the United States, the National Conference on Criminal Law and Criminology (1909) will be used as a starting point for the thesis' historical inquiry.

At the time of the conference, most American forensic psychiatrists believed in the existence of a close association between organic pathologies and criminal behaviour. Over the following decades, however, as somaticists failed to provide any conclusive proof of the organic nature and genetic origins of mental disorders, mental health professionals started turning their attention to the psychoanalytic theories of Sigmund

Freud (Hale 1995: 4-5; see Chapter 6: Section 1[a]). Dissatisfied with the 19<sup>th</sup> century biological paradigm, American forensic psychiatrists found Freud's emphasis on environmental influences and developmental psychology increasingly compelling.

The new psychoanalytic paradigm reached its highest peak of popularity in the two decades following the Second World War (*Ibid.*, 190; Grob 1991: 190-191). In the 1920s and 1930s, psychiatrists advocating hereditary and somatic explanations of mental disease typically endorsed biological theories of racial superiority, while actively promoting eugenic programs aimed at the mass sterilisation of 'mentally defective' individuals (Rafter 1997a: 149-161, 2008: 121-145). As the world discovered the horrors of Nazi eugenics, and information about the Holocaust filled American newspapers, these arguments lost the scientific legitimacy and public approval enjoyed in previous decades, paving the way for the rapid diffusion of Freudian psychoanalysis in the 1950s and 1960s (Hale 1995: 209).

The turn from biological to psychoanalytic explanations of mental disorder became official in 1952, when the American Psychiatric Association (hereinafter 'APA') published the first edition of the Diagnostic and Statistical Manual of Mental Disorder (hereinafter 'DSM-I'). The DSM-I provided the first officially recognised list of syndromes, symptoms, and diagnoses designed to guide the practice of American psychiatrists across the country (Morris & Haroun 2001: 1023). Since then, the APA has published four additional editions of the DSM (the last one in 2013), each aimed at updating the diagnostic criteria according to new scientific developments and purportedly more accurate psychiatric classifications. Each edition of the DSM is

framed according to the dominant scientific framework of the time, and to the training of the APA committee charged with drafting the manual (Denno 2005: 619-620). Members of the APA committee who worked on the DSM-I were overwhelmingly trained in the Freudian tradition, an aspect which arguably affected their proposed diagnoses and classifications (*Ibid.*, 608-609). Through their incorporation in the DSM-I's diagnostic criteria, psychoanalytic interpretations of human behaviour had a significant impact on psycho-legal evaluations in American criminal proceedings over the following years.

American psychiatry has undergone several transformations since the publication of the DSM-I. In the late 1960s and 1970s, in response to a declining trust in the rehabilitative potential of psychological interventions, American forensic psychiatry deemphasised the formerly influential psychoanalytic concepts, focusing its efforts on a new stream of research based on socio-biological, neurological, and genetic explanations of criminal behaviour (Oosterhuis & Loughnan 2014). In 1980, the new biological framework was officially incorporated in the third edition of the DSM, becoming the leading standard for psychiatric evaluations (Aneshensel, Phelan & Bierman 2012: 5). The publication of the DSM-III signalled the beginning of a new era of psychiatric diagnoses and has had a significant impact on the evidence and rationales guiding the adjudication of mental incapacity claims to the present day (see Chapter 7: Section 2[c]).

The impact of these scientific shifts on the legal field was fuelled by two major developments. Firstly, by the publication of the Model Penal Code in 1962,<sup>31</sup> which provided the first statutory guidelines for the assessment of mental states relevant for the establishment of *mens rea* in American criminal law (Denno 2005: 613; see Wechsler 1968: 1429). Secondly, by a series of US Supreme Court (hereinafter ‘Court’) decisions, which, starting in the 1960s and mid-1970s, progressively enhanced the influence of psychiatric and psychological evaluations on the process of legal adjudication<sup>32</sup> and transformed the procedures and criteria for mental incapacity evaluations in capital punishment cases.<sup>33</sup> While medical experts had been asked to testify on defendants’ mental competency at least from the mid-19<sup>th</sup> century, when most American jurisdictions adopted some version of the English test of legal insanity known as the *M’Naghten* Rules (1843),<sup>34</sup> their presence and influence increased dramatically as a result of these constitutional rulings, particularly in death penalty proceedings.

In *Furman v. Georgia* (1972),<sup>35</sup> a landmark decision in American capital punishment jurisprudence, the Court ruled that the death penalty was administered in an arbitrary and capricious fashion, making it unconstitutional in light of the 8<sup>th</sup> Amendment prohibition against ‘cruel and unusual punishment’. The Court argued

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<sup>31</sup> § 2.02 (Official Draft and Revised Comments 1985).

<sup>32</sup> See, e.g., *Dusky v. United States*, 362 U.S. 402 (1960); *Jenkins v. United States*, 307 F.2d 637 (D.C. Cir. 1962).

<sup>33</sup> See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 536 (1978).

<sup>34</sup> The *M’Naghten* test for insanity provided that people affected by a ‘mental disease or defect’ that prevented them from knowing ‘the nature and quality’ of their crime, and from understanding its wrongfulness, were to be considered not guilty for reasons of insanity and be excused for their criminal act (Fingarette 1972: 12).

<sup>35</sup> 408 U.S. 238 (1972).

that existing statutes gave capital jurors excessive sentencing discretion, and required states wishing to preserve the death penalty to provide appropriate legislative guidance to courts on this matter. During the four years of moratorium that followed *Furman*, more than thirty states struggled to design suitable safeguards to comply with the Court's request (Bowers, Pierce & McDevitt 1984: 181; Cheng 2010: 42).

When, through a number of key decisions, the Court reinstated the death penalty in 1976, it established a series of procedural criteria to mitigate the issue of juror discretion which would significantly affect courts' mental incapacity evaluations. Most significantly, in *Gregg v. Georgia* (1976),<sup>36</sup> the Court established that capital punishment trials should be split into a guilt stage and a penalty stage, and that legislators could provide a list of aggravating factors for jurors' consideration at sentencing. Concurrently, in *Woodson v. North Carolina* (1976),<sup>37</sup> the Court ruled the mandatory application of the death penalty unconstitutional, and established defendants' rights to individualised considerations, to be determined through the presentation of mitigating evidence at sentencing. No other area of American criminal law involves a comparable level of attention to the circumstances of individual defendants for the establishment of culpability and criminal responsibility (Dix 1971). According to the Court, the death penalty is 'qualitatively different from a sentence of imprisonment, however long'; its imposition therefore requires the evaluation of a broader range of mitigating information, and a closer attention to accuracy and reliability than any other

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<sup>36</sup> 428 U.S. 153 (1976).

<sup>37</sup> 428 U.S. 280 (1976).

punishment.<sup>38</sup> Diminished mental responsibility is today recognised as a mitigating factor in the majority of states' death penalty statutes. Correspondingly, the influence of psychiatric evaluations in capital murder cases has become exceptionally powerful.

The significance of mental health evaluations in capital punishment caselaw was further sustained in the mid-1980s, when the Court developed additional constitutional protections for mentally incapacitated defendants found guilty of capital murder. First, the Court argued, when the mental capacity of the defendant is at issue, defence lawyers ought to rely on the testimony of at least one mental health expert to build up the mitigation strategy.<sup>39</sup> Second, before proceeding with the execution of the sentence, courts ought to grant death row prisoners a 'competency to be executed' evaluation, again carried out with the support of a mental health professional.<sup>40</sup>

Yet, the most significant decision for the constitutional protection of mentally incapacitated defendants in capital cases only appeared in the early 2000s. In *Atkins v. Virginia* (2002),<sup>41</sup> the Court ruled the execution of 'mentally retarded' defendants unconstitutional, in light of 'the evolving standards of decency that mark the progress of a maturing society'.<sup>42</sup> According to the Court, in order to abide with the 8<sup>th</sup> Amendment protection, capital punishment procedures ought to reflect society's shifting values and sensibilities, established through the assessment of prevailing

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<sup>38</sup> *Lockett*, 438 U.S. at 604.

<sup>39</sup> *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>40</sup> *Ford v. Wainwright*, 477 U.S. 399 (1986).

<sup>41</sup> 536 U.S. 304 (2002).

<sup>42</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

opinions amongst judges, state legislatures, the American public and the wider international community. Since a growing number of national and international authorities at the time opposed the execution of intellectually disabled defendants, the Court concluded ‘that today society views mentally retarded offenders as categorically less culpable than the average criminal’, and therefore not deserving of the death penalty.<sup>43</sup>

The *Atkins* decision and the Court’s new ‘evolving standards of decency’ criteria had an exceptional impact on subsequent 8<sup>th</sup> Amendment challenges. However, the Court did not define the boundaries of ‘mental retardation’ (now referred to as ‘intellectual disability’) for the purpose of constitutional protection, leaving states with the freedom to independently establish the assessment standards to be followed in *Atkins* evaluations. Left without authoritative guidelines, several jurisdictions implementing the constitutional protection have relied on problematic clinical criteria, eventually prompting the Court to clarify the pertinent scientific standards for state intellectual disability evaluations in *Hall v. Florida* (2014).<sup>44</sup>

Texas has notoriously failed to implement the *Atkins* protection according to modern scientific criteria. Departing from the constitutional requirement, the Texas legislature has neither passed a statute banning the imposition of the death penalty for the intellectually disabled, nor established the medical standards and legal procedures to be followed in evaluating their cases (DPIC 2020). Correspondingly, rather than

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<sup>43</sup> *Atkins*, 536 U.S. at 8-12.

<sup>44</sup> 572 U.S. 701 (2014).

grounding their evaluations in established medical practice, Texas courts have relied on criteria which deviate from accepted medical conventions while relying on popular misunderstandings regarding the ways in which intellectually disabled individuals think and act (ABA 2017; Blume, Johnson & Seeds 2009: 711-714).<sup>45</sup>

The lack of proper regulations protecting the intellectually disabled from capital punishment has resulted in a number of defendants being unjustly sentenced to death in this jurisdiction (Hood & Hoyle 2015: 246-247; Blume et al 2009: 691-692, 702-703, 711-714; Aldhous 2012; ABA 2017). For instance, one study has shown that at least 13 individuals have been removed from death row due to a finding of intellectual disability since 2002, and that in 2010 *Atkins*' success rates<sup>46</sup> in Texas were much lower than the national average (28% in contrast to 40%), even when controlling for other factors such as the severity of the defendant's intellectual disability (Feltz 2010).

Texas has taken a similarly retributive stance towards severely mentally ill defendants. According to a recent report, Texas has executed at least 30 individuals with long histories of paranoid schizophrenia and other severe mental illnesses since 1982, and approximately 15-20% of Texas death row prisoners receive on-going mental health treatment (TCADP 2020). The high incidence of mentally ill prisoners on Texas death row may be partially explained by the state's approach to particular mental health conditions. For example, Texan law fails to exempt from the death

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<sup>45</sup> See *Ex Parte Briseno*, 135 S.W.3d 1, 13 (Tex.Crim.App. 2004).

<sup>46</sup> I.e., the proportion of defendants claiming intellectual disability obtaining a categorical exclusion from capital punishment.

penalty defendants affected by dementia and/or who have suffered a traumatic brain injury, if the disorder did not manifest before the age of 18 (ABA 2013a: xi). This is despite the fact that individuals suffering from these conditions display similar symptoms to those who are exempted from capital punishment due to severe intellectual disabilities. Similarly, Texas fails to protect from capital punishment both defendants whose crimes were caused by delusions and hallucinations associated with their mental illness, as well as defendants whose mental disorders undermine their ability to control their conduct (*Ibid.*).

As this discussion suggests, Texas has consistently taken a punitive approach towards individuals affected by intellectual disabilities and severe mental illnesses (ABA 2013a: x-xi; Amnesty International UK 2014). This aspect is particularly problematic given the high number of individuals receiving death sentences and being ultimately executed in this jurisdiction (see Acker 2017: 751-754). Throughout American history, Texas has consistently ranked amongst the highest execution states, ranking sixth in the period between 1608 and the moratorium on executions in 1972 (Espy & Smykla 2016), and first since the US Supreme Court approved Texas' new capital punishment statute in 1976.<sup>47</sup> Since resuming executions in 1982, the state has executed a total of 543 individuals, accounting 'for more than one-third of executions nationwide since 1977' (TCADP 2017). Harris County alone accounts for 127 of Texas' total number of executions in the post-*Furman* era. These numbers are particularly staggering if we

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<sup>47</sup> *Jurek v. Texas*, 428 U.S. 262 (1976).

consider that the second-highest execution state, Virginia, executed 113 death row prisoners over the same time-period (DPIC 2017).

While the Texas case is in many respects unique, its retributive penal culture and punitive approach towards mentally ill and intellectually disabled prisoners are not isolated phenomena. With the exception of California, Texas holds more representatives than any other state in the US Congress and can therefore exert a powerful influence on national politics. As a result, the federal government and several states have often embraced Texas' retributive philosophy, particularly in the 1980s and 1990s, when the country's prison population and execution rates increased to an extent unknown of before (Perkinson 2010: 4-5; Campbell 2011: 659; 2012: 290-291). Moreover, research has shown that other states, such as Florida and Alabama, have deviated from accepted medical standards in implementing the *Atkins* protection and in evaluating the criminal culpability of defendants with severe mental illnesses (Blume, Johnson & Seeds 2008, 2009; Hood & Hoyle 2015: 242; see generally Amnesty International 2006), suggesting that some of the popular misconceptions informing mental health assessments in Texas cases are likely to be found, albeit in modified forms, even in other jurisdictions.

## 2. Mental Incapacity and the Death Penalty

As mentioned above, the *Atkins* decision raised two fundamental issues that have attracted attention from legal scholars and dominated the debate on mental incapacity in the American capital punishment system. First, in leaving the issue of definition of

intellectual disability to the states, *Atkins* has created assessment inconsistencies across different jurisdictions (Hood & Hoyle 2015: 242). These inconsistencies have prompted complex debates on the best way to evaluate intellectual disability and tackle the arbitrary application of the *Atkins* protection (see, e.g., Blume et al 2009). Specifically, legal scholars have criticised states that, ignoring the minimum requirements provided by the Court in *Atkins*, have narrowed the scope of constitutional protection by relying on out-dated clinical standards and deep-rooted stereotypes in their evaluations (Blume et al 2008). Building on this critique, forensic psychiatrists have clarified the diagnostic methods and measurement techniques to be used in *Atkins* evaluations (Gresham 2009; Blume et al 2009; Greenspan 2009; Tassé 2009), while the Court has incorporated these techniques in the diagnostic guidelines set out in *Hall*.

Second, in excluding the intellectually disabled from the death penalty, *Atkins* inaugurated a new interpretation of the 8<sup>th</sup> Amendment protection which had deep implications for other vulnerable groups seeking categorical exemption. In *Atkins*, the Court sought for the first time to reflect the evolution of society's moral values, along with national and international consensus, around categorical protections. The decision triggered several 8<sup>th</sup> Amendment challenges, which resulted in the categorical exemption for juveniles<sup>48</sup> and non-homicidal offenders<sup>49</sup> on similar grounds to *Atkins*. In contrast, the Court has never accepted to hear a case arguing for the categorical exemption of the mentally ill from capital punishment,<sup>50</sup> state-level courts routinely

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<sup>48</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>49</sup> *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

<sup>50</sup> See, e.g., *Clark v. Arizona*, 548 U.S. 735 (2006); *Baumhammers v. Pennsylvania*, 558 U.S. 821 (2009).

uphold death sentences for individuals suffering from mental illness,<sup>51</sup> and circuit courts consistently deny categorical protections to mentally ill defendants in *habeas* review.<sup>52</sup> According to the courts, ‘the evolving standards of decency’ reasoning followed in *Atkins* cannot be extended to mentally ill defendants. Their argument is that when the Court deliberated on *Atkins*, the majority of American states had already passed laws excluding the intellectually disabled from capital punishment, whereas no state has yet passed similar laws to protect the mentally ill (Entzeroth 2011: 571).

The Court’s reluctance to extend the *Atkins* protection to the mentally ill has yielded a wide stream of research in the legal and psychiatric fields. Specifically, legal scholars criticise the approach followed by courts refusing the extension of *Atkins* protections to the severely mentally ill, and advocate a proportionality criterion based on the culpability and deterrability of offenders, rather than on state legislative consensus (Winick 2009; Entzeroth 2011; see also Slobogin 2003; Ghoshray 2006). Along these lines, forensic psychiatrists advocate the extension of the categorical exemption to mentally ill defendants who, based on a comparison of their cognitive, behavioural, and adaptive limitations to those of intellectually disabled offenders, have similarly diminished responsibility for their actions and are arguably less deserving of the death penalty (Blume & Johnson 2003; Izutsu 2004; Snodgrass & Justice 2007; Bryant 2008; Giardino 2009).

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<sup>51</sup> See, e.g., *Commonwealth v. Moser*, 549 A.2d 76 (Pa. 1988); *Commonwealth v. Logan*, 536 A.2d 439 (Pa. 1988); *Commonwealth v. Fahy*, 516 A.2d 689 (Pa. 1986); *Reese v. State*, 14 So.3d 913 (Fla. 2009); *Hall v. Brannan*, 670 S.E.2d 87 (Ga. 2008).

<sup>52</sup> See, e.g., *Alba v. Quarterman*, 621 F.Supp.2d 396 (E.D.Tex. 2008); *Green v. Quarterman*, 312 Fed.Appx. 635 (5<sup>th</sup> Cir. 2009).

Turning to the field of medical ethics, forensic psychiatrists' increasing participation in capital punishment proceedings have triggered complex moral debates amongst members of the profession and various medical associations (see, e.g., AMA 1980; APA & AMA 1990; BML 1992). Concerned with their possible complicity in a process aimed at inflicting death, psychiatrists discuss whether they should respond to public expectations that they assist the pursuit of justice; or otherwise privilege private expectations that they carry out the duty of care of the profession (Bonnie 1990, 2004, 2007; Bloche 1993; Stone 2002; Akinkunmi & Caruso 2007).

Addressing the conflict regarding psychiatry's role in criminal courts, Paul Appelbaum (1984, 1992, 2008) advocates an 'ethics of truth' which has been widely embraced by forensic psychiatrists seeking a moral justification for their participation in the criminal justice process. Distinguished from the Hippocratic tradition, this framework is founded on the pursuit of truth in the service of justice. Its goal is not to improve the wellbeing of the patient, but to serve the wider goal of delivering a fair and just response to law breaking. By removing the issue of extra-clinical harm altogether, this approach provides a strong justification for continuous psychiatric participation in criminal proceedings, even when the death penalty is at stake.

Challenging Appelbaum, Alan Stone (1984a, 2002), the former president of the APA, questions forensic psychiatry's ability to respond with any certainty to legal questioning. He criticises the 'ethics of truth' for undermining the Hippocratic tradition, and argues that psychiatrists' attempts to serve the purposes of justice challenge the ethical boundaries of the psychiatric profession (Stone 2002). In this view, if they wish

to maintain their moral integrity, psychiatrists should privilege their healing function, and refuse to be reduced to deceptive ‘truth seekers’ by participating in capital punishment proceedings.

As this overview suggests, the literature on mental incapacity in capital trials is dominated by jurisprudential, psychiatric, and ethical approaches. Legal scholars and mental health experts dominate the field, speaking within the normative frameworks of their respective disciplines, and reiterating the practices and discourses of their area of specialisation. They take a normative approach to the issue, advocating different interpretations of the mental health case law; arguing for constitutional, legislative, and procedural reform in the area; trying to identify the ethical boundaries of forensic psychiatry; and highlighting the diagnostic complexity of specific mental disabilities while advocating the use of more nuanced frameworks in capital proceedings.

While shedding light on fundamental constitutional, diagnostic, and ethical issues, these normative approaches are problematic in so far as they provide a decontextualized picture of prevailing notions of mental incapacity in capital punishment proceedings. They detach legal and medical categories from their social, cultural, and political background, overlooking their historical specificity, and taking for granted the universal assumptions upon which they build their authority and legitimacy. By endorsing the language of legal and medical normativity, scholars have failed to deconstruct the wider processes that allowed such normativity to establish itself in the first place.

By stepping back and bracketing the normative question, this thesis proposes we can refocus attention on the deeper dynamics which underlie the formation of specific understandings of mental incapacity, and shift the debate towards a more critically oriented, and historically situated, analysis. Following this approach, the regulation of mental incapacity will be addressed not as a moral quandary to be untangled, or as a policy issue to be solved, but as a social and cultural process to be elucidated (Garland 2010: 13-14). Rather than taking a position in the discussion, in line with existing literature, this thesis will engage with the discourse emerging from the psycho-legal debate and analyse it as an integral part of the capital punishment institution itself. It will include a detailed historical and sociological analysis, as opposed to a moral or legal critique. Instead of assessing the accuracy of new scientific techniques, or the legitimacy of reformed capital statutes, it will investigate the ways in which discourses and practices concerning mental incapacity are performed, represented, and experienced, both within the institution itself, and in American society at large.

### 3. Power, Culture, and Discourse

An increasing number of scholars recognise that scientific and legal theories, practices, and techniques do not exist in a metaphysical space detached from shifting political, economic, and cultural paradigms. Historians and sociologists of law (Kelman 1981; Humphreys 1985; White 1989; Collins 1986; Nelson & Gordon 1988; Lacey 1998; Kahn 2001), science (Jasanoff 2009; Cetina 2009; Edmond 2001), and medicine (Rosenberg 1976; Scull 1989; Porter 2004; Starr 1982; Bynum, Porter & Shepherd

1985; Bynum & Porter 1987; Foucault 1988; Smith 1981; Danziger 1994), inspired by critical theory, cultural studies, and constructivist approaches, have contributed to this debate, describing the contextual nature of knowledge and discourse, and the power dynamics within which they are framed. In line with this perspective, research regarding the role, history, and development of psychiatry in Western society has undergone a transformation over the past several decades. While previous approaches were dominated by intellectual histories and internalist perspectives detached from the social context, recent scholarship seeks to provide a more grounded framework (Oosterhuis & Loughnan 2014; Rothman 1971; Foucault 1975, 1978; Scull 1989, 1991; Bowsma 1981; Toews 1987; Harris 1989; Smith 1981; Wiener 1994; Eghigian, Killen & Leuenberger 2007).

Specifically, recent histories of forensic psychiatry seek to explore the ways in which ‘psycho-biological’ theories and practices relate to social policies and developments in other professional domains, and to frame their historical trajectory within specific institutional settings (see, e.g., Napoli 1981; Castel, Castel & Lovell 1982; Miller & Rose 1986; Rose 1985, 1988, 1990, 1992, 1998, 2001; Bartlett & Wright 1999; Capshew 1999; Moskowitz 2001). These authors question the naïve positivism which underpinned the assumptions of traditional historical analyses of madness and crime, and argue that a more fruitful approach would treat these categories as socially constructed, and the social and institutional responses to them, as shaped by specific and contingent understandings of reality (Wiener 1994: 19).

Despite the significant contributions of social and cultural historians, the intersection of medicine and the law over the 20<sup>th</sup> century has not received substantial scholarly attention. The bulk of the historical research on the topic has focused on the 19<sup>th</sup> and early 20<sup>th</sup> centuries, with limited attention to more recent developments (see, e.g., Foucault 1975, 1978; Smith 1981, 1985, 1988, 1989; Harris 1989; Guarnieri 1991; Wiener 1994, 1999, 2006a, 2006b; Eigen 1995, 2003, 2004; Ward 1997, 1999; Gibson 2002; Skålevag 2006). Exceptions are provided by scholars seeking to explain the penal-therapeutic network of modern liberal democracies drawing from the notion of ‘governmentality’. First coined by Foucault (1979), ‘governmentality’ refers to the technocratic managerial system that, thanks to the development of new scientific knowledges and practices, came to regulate the life and functioning of complex modern societies in the 17<sup>th</sup> century. The concept is now primarily used to describe a 20<sup>th</sup> century governmental strategy which, by promoting the retreat of the state from direct ‘interference’ with private matters, engages purportedly objective experts with the power to manage psycho-legal matters and other public issues (Oosterhuis & Loughnan 2014; see Garland 1992; Rose & Miller 1992; Osborne 1993; Barry, Osborne & Rose 1996; Dean 2010). Other authors inspired by Foucault suggest that the shift towards neoliberal economic policies in the 1980s and 1990s was accompanied by more punitive responses to crime, and by a transition in forensic psychiatry towards actuarial methods of risk prediction (Oosterhuis & Loughnan 2014; see Castel 1991; Beck 1992; O’Malley 1992, 1998, 2000, 2010, 2012; Feeley & Simon 1994; Garland 1992; Christie 2000; Rose 2001, 2010; Hannah-Moffatt 2004; Simon 2005; Maurutto & Hannah-Moffatt 2006; Hannah-Moffatt & O’Malley 2007; Seddon 2008; Wacquant 2009; Sim 2010). Said scholars interpret this paradigmatic shift as a symptom of the emergence

of a new form of social organisation, increasingly concerned with the management and control of ‘dangerous’ populations under the guise of public protection.

This scholarship, coupled with other historical analyses of the intersection of medicine, law, and society inspired by Foucault (1988), importantly highlights the interconnectedness of complex social networks and power structures, with penal and scientific developments in criminal justice institutions (see, e.g., Rothman 1971; Scull 1991). However, while playing an essential function in prompting a new and intellectually enriching direction in the history and sociology of knowledge, this line of inquiry presents a series of problems, as a number of critics now recognise (Scull 1989; Wiener 1994; Smith 2008; Garland 2012a; McNay 2013). Specifically, Foucauldian historiography tends to describe the development of the human sciences in penal institutions as a sequence of technical and materialistic power regimes, and to diminish the importance of shifting cultural values in the construction of authority and consensus. Foucault and his followers emphasise the role of political interests of social control in producing different power-knowledge complexes, but tend to discount ideological, moral, and emotional forces that operate alongside these utilitarian considerations to produce social cohesion around particular medical and penal institutions.

If previous analyses fail to perceive the intersection of power and discourse, the scholarship inspired by Foucauldian paradigms often overlooks other dimensions worthy of consideration. They elevate political power at the expense of cultural influence, ignoring the now well-established recognition that cultural features are more than underlying background structures, but are instead constitutive agents actively

participating in the production of intellectual and social life (Wiener 1994: 9; see generally Doyle 1996). Unlike prevailing and extant historiography in this area, this thesis does not limit itself to the analysis of power dynamics and truth effects along the lines of the now well-established power-knowledge dialectic described by Foucault. Instead, it combines what has predominantly been a political and economic analysis with a more culturally sensitive approach, aimed at investigating the meanings of particular psycho-legal constructs, and the representations, symbolisms, and rituals through which actors in the penal process incorporate such meanings in their linguistic exchanges (see, e.g., Harris 1989; Wiener 1994; Porter 2004; Smith 2008; Garland 2012a). It treats law as a cultural reality, and analyses its daily operations in terms of discourses, myths, and symbols that resonate - at least to some extent - with the values, ideologies, and beliefs of the era under analysis (see Valverde 2009: 19).

The central role of culture in shaping penal practices is today widely recognised both in the sociology of punishment (Garland 1991, 2002, 2006; Sarat 1999, 2001; Smith, Sparks & Girling 2000; Vaughan 2000, 2002a, 2002b; Melossi 2001; Simon 2001; Strange 2001; Tonry 2001; Lynch 2002; Whitman 2003; Zimring 2004; Crawley 2004; Penfold 2004; Piacentini 2004, 2005; Valier 2004; Sarat & Boulanger 2005; Gray & Salole 2006) and in criminological theory (Young 1996; Ferrell 1999, 2013; Presdee 2000; Ferrell et al 2004; Hayward & Young 2004; Hayward 2010). Influenced by a broader cultural turn in the humanities and the social sciences, and drawing from the work of Norbert Elias (1983, 1994), Émile Durkheim (1976[1891], 1983[1902], 1984[1893]), Max Weber (2012 [1905]), Pierre Bourdieu (1986b, 1990), Clifford Geertz (1973, 1981, 2006), and Mary Douglas (1992) amongst others, the sociology of

punishment currently situates cultural analysis at the heart of the investigation, producing compelling inquiries into the symbolic and affective meanings of various penal practices (Garland 2006; see, e.g., Spierenburg 1984; Wiener 1994; Gatrell 1994; Duncan 1996; Melossi 2001; Pratt 2002; Smith 2003a). However, by virtue of its elusive nature, scholars' understanding and use of the concept of 'culture' varies, bringing a significant degree of confusion to the field, and calling for a theoretical clarification of the sense and purpose of the notion for the present analysis.

In the context of this thesis, culture is interpreted as a permeable, fluid, and historically contingent construct, shaped by ongoing processes of social interaction in which individuals reinterpret collective meanings according to their interests, values, and beliefs (Wolf 1982: 387; Brightman 1995: 514). The concept builds on a critique of the notion of culture itself, articulated in the 1970s and 1980s by anthropologists inspired by postmodern and political economic theories (Clifford 1986, 1988; Abu-Lughod 1991; Bourdieu 1977). These authors challenge what they perceived as being the dominant conceptualisation of culture within their field - i.e. a notion inspired by the work of Charles Parsons (1949, 1951), Durkheim, and their followers - for drawing a monolithic, homogeneous, and ahistorical picture of social life. In this view, by hiding diversity and contradiction within homogeneous supra-individual structures (e.g. Durkheim's 'conscience collective'), these approaches overlook the plurality of traditions, values, and beliefs that coexist, often in an antagonistic relationship, with dominant frameworks. They assume that individuals universally accept and identify with the dominant culture, and thereby conceal asymmetrical power relations and

patterns of domination under the deceptive appearance of social consensus (Brightman 1995: 512).

To counteract these tendencies, Bourdieu (1977: 24-27), Clifford (1986, 1988), Abu-Lughod (1991), and others (e.g., Rosaldo 1989: 32; Wolf 1982: 387; Button 1991) advocate a 'practice-oriented' approach, which emphasises diversity and contradiction over universal consensus (Ortner 1984). This framework seeks to give a voice to non-dominant understandings and interpretations, and thereby to highlight unequal distributions of power and prestige, typically demarcated by differences in age, gender, race, and socio-economic status (see, e.g., Ardener 1975; Drummond 1980). It shifts the attention from the power of abstract collective entities in determining individual action, to the role of single actors in reproducing, transforming, or challenging the social system through their daily interactions (Brightman 1995: 514). Rather than seeing social action as the routinised enactment of entrenched rules, values, and cultural codes (Parson, Shils & Smelser 1965 [1951]), practice theories seek to elucidate the communicative and symbolic processes through which individuals actively participate in the creation of a broader framework of meaning. Collective systems are here seen as an integral (albeit not harmonious) whole, in which theory and practice (Abu-Lughod 1991: 147), superstructures and human actions, are closely interconnected, in an ongoing process of mutual coproduction (Ortner 1984: 148).

Practice theories have importantly emphasised that a totalising notion of culture that overlooks non-dominant values and contradiction risks entrenching social and political inequalities and patterns of domination. However, these theories' emphasis

on social conflict tends to provide a one-sided explanation, and to underplay ‘patterns of cooperation, reciprocity, and solidarity [which] constitute the other side of the coin of social being’ (Ortner 1984: 157). Often dismissed as ideological, notions of the social in terms of shared moral values and cultural frameworks - e.g. Durkheim, Elias, Geertz, and Weber - can add important analytical dimensions to socio-historical investigations. Incorporating some of their insights into our analysis does not need to entail a commitment to a homogeneous, timeless, and totalising notion of culture, especially if we bear in mind the practice-oriented critique.

Accordingly, this thesis proposes a concept of culture conceived as a historical confluence of dominant and non-dominant expressions, alternatively existing in an antagonistic, cooperative, or neutral relationship with one another (see Clifford 1986: 18). Rather than refusing any reference to a shared framework, it takes a bottom-up approach to cultural analysis, which emphasises the role of individual actions, linguistic exchanges, and symbolic rituals in reproducing, transforming, or counteracting hegemonic paradigms (Toews 1987: 892-893, 906). Specifically, the thesis starts from the analysis of the ways in which shifting beliefs (e.g. about normality and pathology), cultural traits (e.g. individualism, puritanism, and racism), and institutional ideologies (e.g. penal welfarism and retributivism) intersect within the discourses of psychiatrists and lay actors in trial proceedings, with the aim of shedding light on the ‘change of form and meaning of a given social/cultural whole’ (Ortner 1984: 149). In this view, the ways in which expert and lay actors discuss defendants’ personalities, life-styles, and habits at trial, along with the inferences they draw from these considerations to identify

underlying pathologies or ‘dangerous’ personalities, can open a window onto the wider moral, social, and political concerns of the era under investigation (Harris 1989: 20).

Discourse around mental incapacity and criminal responsibility is especially suited to elucidate how the boundaries of virtue and social respectability are historically redefined, often along gendered, racial, and socio-economic lines. Psychiatric diagnoses and lay interpretations of pathological behaviour are framed within cultural understandings of masculinity and femininity, and within pre-conceived ideas about how men and women ‘should’ approach their professional duties, familial relationships, love affairs, and daily routines. As Ruth Harris suggests, ‘from the Enlightenment onwards medical knowledge played an increasingly important role in devising prescriptive systems for women and men based on their differing “natural” capacities’ (1989: 21-22). Correspondingly, the medicalisation and/or moral condemnation of particular behaviours may be interpreted as a response to men and women’s ability or failure to conform to prescribed gender roles, modified according to their race and socio-economic status. Hence, the emergence and disappearance of particular pathologies in psychiatric accounts, and their association with specific social groups, may be the result not only of objective medical considerations, but also of individuals’ failure to live up to established social roles and expectations. Building on this idea, this thesis seeks to elucidate the reasons for such appearances and disappearances, and the ways in which cultural notions of masculinity and blackness intersect in psycho-legal representations of criminality and pathology at different historical junctures.

## 4. The Court and the Production of Truth

### *a. The Trial as a Site of Knowledge Production*

Legal truths are nebulous and dynamic. They are a matter of interpretation, an interpretation based on landmark cases, historical and cultural inheritance, new scientific developments, and shifting moral values and power dynamics (Sayre 1932; Olivecrona 1939; Holmes 1964; Denno 2005). The legal framework determined by case law precedent, and by rules of evidence and proof, limits what can be discussed, and ultimately what can be known, in the legal arena. It gives visibility and legitimacy to specific forms of knowledge, and shapes current ways of thinking and speaking about the world. For this reason, critical legal studies and cultural studies of law have often engaged with the process of knowledge production in legal contexts, attempting to reveal the ‘myth of legal neutrality’, and analysing the law as a crucial arena for the enactment and contestation of different views and interpretations, in turn influenced by broader power relations (Valverde 2009; see Kelman 1981; Humphreys 1985; Santos 1985, 1995; Collins 1986; Nelson & Gordon 1988; White 1989; Henry 1983, 1985; Goodrich 1987, 1990; Seidman 1989, 1990; Agger 1989; Arrigo 1995, 1996; Milovanovic 1997a, 1997b; Arrigo & Williams 1999; Kahn 2001).

Specifically, feminist scholars seek to problematise the persistence of gendered processes of domination, marginalisation, and stigmatisation, by showing how apparently neutral legal proceedings operate to both reinforce and disguise wider political interests (Flax 1987; Haraway 1988; Smart 1990, 1992, 1995, 2002, 2013;

Gagnier 1990; Lacey 1998). Other socio-legal scholars emphasise how social and cultural elements penetrate and shape criminal law doctrines and proceedings, playing an essential role in the determination of legal facts (Cheng 2010; Coombe 1998; Povinelli 2002; Merry 2003). Particularly, some authors emphasise the socially constituted nature of judicial verdicts, focusing on the ways in which pre-trial procedures filter the information entering the trial process, and contribute to the legal production of conviction (McBarnet 1981; Jones 1994). Similarly, the sociology of science recently turned to the analysis of forensic science in the courtroom, showing an increasing interest in the social, political, and cultural processes through which scientific expertise and legal truths are constituted in trial proceedings (Edmond 2001; Jasanoff 2009; Cole 2013).

While some scholars emphasise the importance of pre-trial procedures in setting the boundaries for the later discussion (McBarnet 1981; Jones 1994), this thesis proposes that the analysis of the production of truth in legal arenas needs to start from the site in which such truths are primarily discussed, publicly staged, and officially legitimised: the trial itself. In contrast to other stages of the criminal justice process, the trial has the power to grant status and authority to a specific version of the truth by virtue of the public nature of the discussion, and of the finality and official recognition of its verdicts (Bourdieu 1986b; Edmond 2001). Trials are public spaces in which society evaluates individual actions and consolidates shared values (Smith 1981). They are the privileged public arena for moral discussion and are by definition and structure meant to appeal to, and in turn be scrutinised by, the wider community (Garland 2012a). At no other

stage of the criminal justice process is the community involved to a similar extent, not only as an audience of observers, but also as sovereign decision makers.

Owing to their public nature, discourses occurring in criminal trial proceedings must appeal to dominant notions of justice, subjectivity, and criminal responsibility to establish their legitimacy. They need to resonate with expert and lay assumptions about autonomy and free will, the psychological origins of particular behaviours, and the level of accountability involved in such behaviours. As we have seen, these beliefs are not part of a cohesive, consistent, and widely shared framework. Legal professionals, psychiatric experts, and lay people are often divided on these issues. Bearing this in mind, this thesis proposes that the criminal trial can be considered as a public arena of ontological and epistemological debate, in which different assumptions regarding the true nature and knowability of reality emerge, conflict, and negotiate at different historical junctures. As Bourdieu (1986b: 55) suggests, the trial can be taken to represent ‘a paradigmatic staging of the symbolic struggle inherent in the social world’, a struggle in which, what is at stake, is ‘monopoly of the power to impose a universally recognised principle of knowledge of the social world’. Accordingly, by analysing discussions occurring at the micro-level of trial proceedings, we might be able to 1) elucidate wider controversies regarding subjectivity, free will, and criminal responsibility, and 2) show the ways in which particular understandings of such issues gain recognition and legitimacy through the process of legal adjudication.

*b. The Capital Punishment Trial*

Debates occurring in the context of American capital trials are particularly suited to shed light on expert and lay discussions regarding mental incapacity. The reasons are twofold. First, as a result of their distinct procedural arrangements, capital trials allow for a broad range of information on the culpability and criminal responsibility of defendants to influence the sentencing evaluation. As Cheng (2010) argues, the procedural bifurcation of capital trials has divided the judicial process into two different epistemological domains. The guilt phase is more tightly regulated and resolution-oriented: knowledge presented at this stage is limited by traditional rules of evidence and proof, and by doctrinal demands of logical pairing. In contrast, freed from conventional procedural boundaries, the sentencing stage allows the consideration of a wide spectrum of mitigating information aimed at a thick reconstruction of the developmental history of the defendant, and of the psychological and social circumstances leading to the crime itself.<sup>53</sup>

Correspondingly, the sentencing stage of capital trials involves the participation of a broader range of expert and lay actors than traditional criminal proceedings. Mitigating evidence presented at this stage aims to draw a humanising narrative of the past life of the defendant, which may convince jurors that, due to adverse social and psychological circumstances, the defendant cannot be held fully responsible for his or her actions, and therefore deserves a less severe sentence than death. To assess

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<sup>53</sup> *Woodson*, 428 U.S.

defendants' psychological traits, defence teams rely on two sources of information: expert opinions of mental health professionals, and lay testimonies by family members, friends, teachers, and/or probation officers who have had a direct relationship with the defendant. While the former can help to identify possible underlying pathologies and disabilities, the latter can help to reconstruct the defendant's experiences, character, and behaviour.

Moreover, while in other criminal proceedings the process of legal adjudication is often carried out by judges, in capital trials the Court has established that, in order to ensure the particular reliability of the proceedings, the power to decide over life or death needs to be ascribed to a jury of citizens.<sup>54</sup> As a result, in death penalty trials the wider community is the ultimate decision maker at both stages of the bifurcated process, shaping the nature and quality of the controversies, and determining judicial verdicts. Again, compared to other judicial processes, capital trials allow for a wider range of expert and lay actors to influence the discussion, and thus facilitate the analysis of the points of view not only of psychiatric and legal authorities, but also of members of the wider community.

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<sup>54</sup> *Ring v. Arizona*, 536 U.S. 584 (2002); see Sarat (2001).

## 5. Men, Madness, and Capital Punishment

Feminist scholars have long recognised that mental health professionals and criminal justice officials tend to interpret offenders' mental health condition and criminal culpability along gendered lines (see, e.g., MacKinnon 1987, 1989; Smart 1990, 1992, 1995, 2002, 2013; Cornell 1991; Frug 1992; Daly 1997; Lacey 1998; Haney 2000; Thompson 2010; Chan 2012; McNay 2013). According to these authors, cultural constructions of women as passive and emotionally unstable, and of men as rational and assertive, trigger gendered expectations amongst legal stakeholders (MacKinnon 1989: 1616; McNay 2013: 30). On the one hand, legal actors tend to believe that women violating gender stereotypes - by committing violent crimes, for instance - are affected by some underlying abnormality and pathology (Smart 1995; Peter 2006). On the other hand, they tend to assume that men engaging in similarly violent behaviour are 'bad' rather than 'mad' and should therefore be held accountable for their actions. This is despite the empirical evidence available suggesting that, grouping all psychological syndromes together, men and women register equal rates of mental disorder (Rosenfield 1982; Kessler et al 1994).

This literature has highlighted important dimensions concerning stereotypical associations between women and mental disorder, casting new light on the ways in which such associations can affect women's interactions with criminal justice institutions. However, while some feminist critics have included in their analyses discussions about the ways in which cultural stereotypes about manliness influence perceptions of men's mental health and criminal culpability (see, e.g., Showalter 1985:

167-194; MacKinnon 1989: 1616; Harris 1989: 244-284, 286-320; Lunbeck 1996: 229-255; Rafter 2008: 156-159; Chan 2012), criminological studies focusing on the intersection of masculinity, mental illness, and crime in psychiatric and legal discourse are comparatively rare.

This lack of attention is particularly striking in light of criminologists' growing interest in the concept of masculinity, and in its utility for empirical investigations on men's experience with crime and criminality (see, e.g., Messerschmidt & Connell 1993; Newburn & Stanko 1994; Jefferson et al 1996; Collier 1998; McFarlane 2013). Inspired by R. W. Connell's (1987: 183) concept of 'hegemonic masculinity', this literature has emphasised male offenders' struggle in achieving the ideal model of manhood which dominates their society and culture, and their recourse to compensatory forms of machismo which help building masculine identities through criminal involvement (see, e.g., Frazier 1949; Parsons 1954; Miller 1958; Schultz 1969; Perkins 1975; Cohen 1976; Anderson 1989; Stafford 1991; Majors & Billson 1993; Gibbs & Merighi 1994). In Connell's framework, 'hegemonic masculinity' is achieved through a complex interplay of socio-economic, political, and cultural forces which shape the organisation of private life while establishing the standards which should regulate men's behaviour inside and outside the family unit (Connell 1987: 184; McFarlane 2013: 323-324). In this framework, men who fail to live up to these behavioural standards are cast as 'subordinated masculinities', i.e. marginalised men displaying nonconformist behaviours and characteristics which 'undermine or threaten the supremacy of hegemonic masculinity' and therefore need to be suppressed (McFarlane 2013: 324).

The overwhelming majority of defendants sentenced to death in American and Texan courts are men, and the trials analysed for this thesis reflect this gendered composition (see Chapter 2: Section 1[d]). Hence, the thesis will seek to complement traditional feminist analyses of women's association with mental illness and criminal unaccountability, with an examination of the ways in which dominant notions of masculinity influence forensic psychiatrists and criminal justice professionals' interpretations of defendants' mental health and criminal behaviour. Specifically, the thesis hypothesises that medical and legal professionals have historically associated mentally ill male offenders with the characteristics and behaviours perceived as being most threatening for the 'hegemonic masculinity' of their time, casting them as emblematic examples of 'subordinated masculinity' in Connell's terms (1987: 183-184).

Social and cultural historians have repeatedly highlighted that psychiatrists operating inside and outside criminal justice institutions tend to cast men affected by various forms of mental disorder as lacking the virtues typically associated with 'real manhood' (see, e.g., Showalter 1985; Harris 1989; Rafter 1993, 2007; Wiener 1994; Bederman 2008; Lunbeck 1996; Zaretsky 2005). Deviating from the essentialist conceptualisations found in some social constructionist accounts, which tend to assume 'the existence of a unitary masculine cultural form' which frames men's efforts to become 'real' men (Collier 1998: 16, 17-23; see also Newburn & Stanko 1994: 2), these historians interpret 'real manhood' as a historically specific concept, modified by the race and social class of the groups involved (see, e.g., Tolson 1977).

For example, in her discussion of male hysteria amongst British soldiers during World War I, Elaine Showalter (1985: 167-168) emphasises how the emotional collapse experienced by many men as a result of combat stress was reframed as a biological reaction triggered by a 'shell shock', i.e. the explosion of a shell in close proximity to the soldier during combat. At the time, hysteria and mental illness were seen as quintessentially feminine conditions, whose symptoms were the direct opposite of maleness (*Ibid.*, 172-173). Hence, men affected by a similar pathology were recast as emotional, weak, and impotent individuals, unfit for the stoic strength required to serve in the British Army (*Ibid.*, 169-171). As Showalter explains, at a time in which 'duty, patriotism, and honor' were held in highest regard, and men were required to tolerate 'the constant threat of death with stoic good humour', military doctors and psychiatrists often dismissed hysterical soldiers as 'cowards', implying that they were either effeminate or homosexuals (*Ibid.*, 170, 169; see also Harris 1989; Lunbeck 1996).

The traits associated with hysterical soldiers during the Great War reappeared in connection with other types of 'subordinated masculinity' throughout the 20<sup>th</sup> century (e.g. the male sexual psychopath; see Chapter 6: Section 2[b]). However, different epochs prompt significant variations in emphasis and nuance, and the introduction of new 'undesirable' characteristics depending on the social pressures and political struggles of the time. For example, 1910s and 1920s psychiatric descriptions of the 'defective delinquent' echoed in many respects the characterisations of criminal atavism provided by 19<sup>th</sup> century criminal anthropologists, with traits such as 'moral turpitude', impulsiveness, and lack of work ethic and ambition recurring in both 19<sup>th</sup> and early 20<sup>th</sup> century accounts (Rafter 2008: 157).

However, the growing tension between capital and labour characteristic of the Progressive Era (1890-1920) prompted new symbolic associations between mental defectiveness, crime, and working-class dissent (*Ibid.*, 157-158). At a time defined by strikes, unemployment, and the formation of a mass socialist movement, psychiatrists started depicting defective delinquents as individuals ‘incapable of long endurance and sustained effort and concentration of attention’, who were more likely to revolt against the new efficiency requirements and display uncooperative behaviours (Fernald 1912: 525; Hickson 1914: 402). Thanks to these characterisations, psychiatrists were able to create an ontological association between mental defectiveness, criminality, and the unruly working classes, while recasting the defective delinquent as the living antithesis of the ‘hegemonic masculinity’ of their time, i.e. the responsible breadwinner who cooperates with his employer and works hard to provide for his wife and children.

Inspired by the work of these and other historians (e.g., Freedman 1987; Harris 1989; Wiener 1994; Lunbeck 1996; Zaretsky 2005), the thesis sets to explore the nuanced ways in which intellectual, social, and cultural trends spanning the 20<sup>th</sup> century have modified the behavioural standards men are expected to adjust to in order to be considered ‘real’ men. As the following chapters will show, changes to the socially dominant model of manhood have strongly influenced psychiatric and lay depictions of male offenders affected by mental health conditions, providing a powerful yardstick for their moral and legal condemnation in Texas courts.

## 6. African Americans, Madness, and Capital Punishment

Gender is not the only social category that warrants consideration in the cultural analysis of the intersection of mental incapacity and crime. Feminist and critical race theorists have repeatedly highlighted how social distinctions such as gender, race, and social class intersect and shape cultural representations, medical diagnoses, and patterns of differentiation and domination in criminal justice processes (see, e.g., Crenshaw 1989, 1995; Lacey 1998; Delgado & Stefancic 2012; Carbado 2013; Carbado et al 2013; Cho et al 2013). When relevant for the case analysis, this thesis will engage with these multiple social dimensions, and particularly with the ways in which representations of masculinity intersect with racial stereotypes about mental illness and crime (see Chapter 4: Section 2[c]; Chapter 7: Section 2[e]).

Race and mental illness share a contentious history in the United States. In the mid-19<sup>th</sup> century, when the abolition of slavery challenged the old racial order, psychiatrists argued that African American slaves who ran away from the plantation did so because they were affected by a black pathology called *drapetomania*. Some medical journals even suggested that, if not held under the control of the white master, black slaves were likely to contract a form of madness called *dysaesthesia aethiopsis* which could only be cured through corporal punishment, enslavement, and paternalistic measures (Cartwright 2004[1851]; Evarts 1914; Lind 1914). These journals created a cultural association between African Americans' search for freedom, their rebellion against the white order, and a psychiatric pathology. They suggested that white

domination and physical coercion had a beneficial effect over blacks' mental health and moral development, and that slavery played a therapeutic function in society.

While these medical categorisations have fallen into disuse, psychiatric diagnoses and definitions of mental illness continue to reproduce deep-rooted racial stereotypes and tensions, albeit sometimes in more indirect ways. In the early 20<sup>th</sup> century, for instance, the association of blackness and madness was reframed, either in eugenic terms - as a natural consequence of blacks' genetic inferiority - or as a result of blacks' simple and childlike nature, which made them inapt to live in complex modern societies (Gilman 1985: 142; see Chapter 5: Sections 3[c], 4[c]). Perhaps even more strikingly, in the 1960s and 1970s schizophrenia was reframed as a black disease (Metzl 2009). From a typically docile and harmless illness, predominantly affecting white housewives, schizophrenia came to be depicted as a violent social pathology, disproportionately affecting African American men (Taube 1971). According to Metzl (2009: xiii-xiv), this psychological reframing is associated with the social anxiety that accompanied the American civil rights era and its political unrests. In these years, newspaper articles started describing schizophrenia as a condition of 'angry black masculinity'. Accordingly, articles in prestigious psychiatric journals started conflating symptoms of schizophrenia in African American patients with the 'pathology' of civil rights protesters, who developed hostile feelings against their white oppressors, and aggressive behaviour against the existing social order. By challenging the status quo, the civil rights movement prompted a popular and medical association between blackness, madness, violence, and criminality. Again, as in the mid-19<sup>th</sup> century, a threat to the racial order came to be reframed as a form of mental illness.

This thesis hypothesises that cultural associations of blackness, madness, and violence still linger through the diagnostic practices of American psychiatrists, and in the language of participants in courtroom proceedings, albeit in modified forms. This idea is supported by a series of studies which have suggested that, while criminal justice procedures tend to characterise women involved in violent criminal activity as ‘mentally ill’, African Americans involved in similarly violent behaviour are labelled as dangerous and criminal, but not as affected by a psychological disease (Sniderman & Piazza 1993; Quillian & Pager 2001). In this view, legal institutions tend to interpret African Americans’ criminal behaviour as a normal manifestation of their psychological tendencies, and not as the result of some underlying pathology (Chiricos & Escholz 2002). The pathological dimension of the association between blackness and violence seems to have been de-emphasised, leaving African Americans with a more simplistic psychological characterisation.

The prejudiced association of blackness and violence has been consistently supported in death penalty research. A number of studies today suggest that, especially if combined, both the race of the defendant and the race of the victim influence jurors’ perceptions of the defendant’s dangerousness, and their responsiveness to mitigating psychological evidence (Haney 2005). According to these findings, jurors are most likely to impose a death sentence on a defendant accused of killing a white victim, especially if the defendant is black (Bedau 1998: 271; Donohue 2014). Particularly in conditions of limited information, racial stereotypes tend to exert a powerful influence on lay audiences, provoking strongly biased psychological reactions, thinking patterns, and decision-making processes (Devine & Elliot 1995; Quillian & Pager 2001). Texas’ long

history of racial conflict (Perkinson 2010; Campbell 2011, 2012), coupled with empirical evidence confirming the existence of a race-of-victim and race-of-offender effect among Texas jurors (Koeninger 1969; Bowers & Pierce 1980; Ekland-Olson 1988; Ralph, Sorensen & Marquart 1992; Brock, Sorensen & Marquart 1999), makes the analysis of racist stereotypes connecting blackness with violence particularly relevant in this jurisdiction.

## Conclusion

As this chapter suggests, discourse surrounding mental incapacity in capital trials is complex. The resolution of legal controversies concerned with mental incapacity requires the participation of psychiatric, legal, and lay actors who start from different professional trainings, philosophical assumptions, and preconceived beliefs about human behaviour and psychological pathologies. These beliefs are in turn influenced by historically entrenched cultural stereotypes, as the instances of gendered and racial associations with madness and violence suggest. Furthermore, they change according to the dominant psychiatric and legal paradigms of the era under analysis, which are in turn the expression of wider economic, political, and cultural transformations. As we have seen, the epistemology of mental incapacity has undergone a series of pivotal shifts in the American capital punishment system between 1909 and 2002. This thesis will investigate these transformations through the analysis of evolving debates occurring within the microcosm of capital trial proceedings, with the aim of elucidating how different assumptions regarding the true nature and knowability of reality emerge at different historical junctures.

As Chapter 2 will illustrate in more detail, in order to uncover the socio-historical dimensions that influence discourse surrounding mental incapacity in capital trials, the thesis incorporates various levels of analysis. It explores the shifting penal paradigms within which the psycho-legal debate takes place, the scientific world of mental health professionals, and the lay knowledge of legal actors and the wider community. Furthermore, it examines the social circumstances of the defendants themselves, whose cases provide the material upon which public discussions around mental incapacity and criminal responsibility can be construed. The attention is directed towards issues of free will, responsibility, and subjectivity raised in court, to elucidate the main concerns of the era under analysis; including political unrest, racial conflicts, and gender roles (Harris 1989). Rather than focusing exclusively on legal and medical knowledge developed in seminal texts, the thesis integrates such accounts with an analysis of the discourses, practices, and knowledge exchanges occurring between different actors involved in courtroom settings. It emphasises the dynamic relationship between the theoretical and the practical dimensions of knowledge about mental incapacity, while situating them within the wider historical context that contributed to their formation. The aim of the thesis is to draw a historical sociology of knowledge that allows the competing value systems underlying divergent interpretations of human behaviour to emerge as integral elements of the psycho-legal controversy.

## **CHAPTER 2. ADDRESSING THE PSYCHO-LEGAL CONTROVERSY THROUGH A SOCIO-HISTORICAL LENS**

### Introduction

This chapter details the thesis' research methods, which are rooted in the theoretical framework developed in Chapter 1. The thesis starts from the idea, shared by a number of critical theorists (Foucault 1980; Harcourt 2008; Valverde 2009), cultural historians (Harris 1989; Wiener 1994; Garland 2011) and feminist criminologists (Smart 1990; Lacey 1998; Ussher 2012), that psychiatry and the law make claims that elevate them above other discourses and points of view, and use a series of narrative strategies which help reify their paradigms and categories over time while silencing diverging perspectives. Specifically, the thesis argues that the positivist approach endorsed by the psychiatric establishment, coupled with attorneys' tendency to overlook defendants' social backgrounds in their reconstruction of the circumstances leading to the alleged offence, has created a trial narrative which denies the relevance of the social context in which defendants exist, and the influence of cultural values and political interests on psychiatric and legal interpretations of human behaviour.

Drawing from the social constructionist critiques of the positivist paradigm discussed in Chapter 1, the thesis aims to challenge these tendencies and to provide a counternarrative to the one that can be elicited from the exclusive reading of trial court records and appellate opinions. The purpose of this counternarrative is to reveal the

influences of political interests and cultural values on the ways in which defendants' mental health conditions were diagnosed, classified, and represented in 20<sup>th</sup> century death penalty trials, and to highlight the crucial role played by linguistic exchanges in constructing different interpretations of such conditions, regardless of their empirical reality.

To construct this counternarrative, the thesis situates courtroom debates on mental illness and criminal responsibility within the broader intellectual, moral, and political context of their time (see generally Wodak 2011). To accomplish this goal, it uses a socio-historical methodology which, starting from a close analysis of American forensic psychiatric journals, Texas courtroom documents, and histories of American forensic psychiatry and Texas' penal culture, aims at reconstructing the intellectual traditions, moral values, and professional interests which informed expert and lay actors' opinions in selected death penalty proceedings over the 20<sup>th</sup> century.

Inspired by the methods of social history, with its attention to issues of gender, class, and ethnicity (see, e.g, Smith 1981; Grob 1983; Burnham 1988; Harris 1989; Wiener 1994; Lunbeck 1996; Rafter 1997a, 2008), and cultural studies, with their focus on texts, values, and latent beliefs (see, e.g., Haraway 1988; Smart 1995; Ussher 2012; Chan 2012), the thesis subjects the historical data to a qualitative content analysis and a discourse analysis which, via a close reading of the texts, aims at revealing the hidden meanings of experts and lay actors' linguistic exchanges as well as their narrative qualities (Lévy & Srebnick 2017: xiii-xiv; Srebnick 2017: 4-5; see generally Bowsma

1981; Chartier 1982; White 1990; Wiener 1998; LaCapra 2000; Ginzburg 1999; Kelley 2017).

In so doing, the thesis aims to: 1) disclose the ontological and epistemological assumptions underpinning lay and expert interpretations of defendants' mental illnesses and behaviours; 2) single out the different narrative registers encountered in courtroom debates, paying particular attention to missing voices and silenced points of view; and 3) identify the ways in which lay people and experts have represented different categories of mentally disordered defendants through time, focusing on their use of rhetoric, symbolism, and metaphor to make sense of 'deviant personalities' and criminal conduct.

The chapter is divided into three main sections. Section 1 describes the archival documents collected during the fieldwork and illustrates the sample design of the thesis along with its limitations. Section 2 discusses the interpretative approach chosen for the analysis of the data and its limitations. Finally, Section 3 examines the practical and emotional challenges encountered during the archival research and the strategies used to overcome them.

## 1. Data, Access, and Sample Design

The thesis relies on archival data drawn from multiple sites over the course of several months. The nature of the data varies significantly, and includes: publications in the fields of forensic psychiatry and psychology spanning the 20<sup>th</sup> century; Texas mental

incapacity doctrines, rules of evidence, capital punishment statutes and caselaw; trial court documents (e.g. trial transcripts, affidavits, motions, briefs, and opinions) related to cases in which the defendant presented evidence of insanity or of mental illness calling for a mitigation of the sentence; and social and cultural histories of American forensic psychiatry and psychology and of the Texas criminal justice system.

#### *a. Court Records*

The primary documents of this research - the trial transcripts - were collected at the Texas State Library and Archives Commission and at the Texas Court of Criminal Appeals in Austin, Texas. The transcripts are part of the historical records of the TCCA. The TCCA is the highest criminal court in the state and has appellate jurisdiction in all criminal cases. When a Texas county or district court sentences a defendant to death the case is automatically appealed to the TCCA (Koeninger 1969: 140). The archives of the TCCA therefore include the most thorough, comprehensive, and complete historical collections of trial transcripts of death penalty cases in the state of Texas, providing an invaluable source for the historical analysis conducted in this thesis. Besides the trial transcripts (which include the pre-trial hearings, *voir dire*<sup>55</sup> of prospective jurors, the guilt/innocence phase, the punishment phase, and exhibits), the archives contain several other documents filed with the TCCA, such as writ of *habeas*

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<sup>55</sup> The procedure by which prospective jurors or expert witnesses are questioned about their backgrounds, biases, and/or qualifications before being allowed to sit on a jury or give testimony on a specific subject (Cleary & Tarantino 2007: § 201)

*corpus* files, the district clerk's file, as well as documents created for or by the TCCA, such as motions, briefs, orders, and opinions.

The majority of the transcripts selected for analysis were found in two archival collections: the 'Court of Criminal Appeals Centralized Court Case Files' (1909-1990) and the 'Court of Criminal Appeals Execution Case Files' (1968-2012), both held at the Texas State Library and Archives Commission. The *Case Files* document the appeals of all defendants sentenced to death in Texas between January 1909 and December 1990, whereas the *Execution Files* document approximately 43% of the executions that occurred between November 1993 and December 1998, and all but one of the executions that occurred between January 1999 and April 2012. Missing cases for the period 1993-1999 were found at the TCCA. The catalogue of the *Case Files* is divided into three time periods: 1909-1950, 1950-1975, and 1975-1990, whereas the *Execution Files* are all listed in the same catalogue; both catalogues are searchable online (TSLAC [n.d.] a, b, c, d)

The *Case Files* and *Execution Files* are publicly available and not copyrighted. However, since both can contain personal information on jurors or prospective jurors, archivists regularly review the files and remove such information before giving access to researchers. This is because art. 35.29 of the Texas Code of Criminal Procedure<sup>56</sup> holds that 'information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, is confidential and may not

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<sup>56</sup> TEX. CODE CRIM. PROC. ANN. art. 35.29 (West 1993).

be disclosed.’ A similar process occurs if non-court documents or documents sealed by the court according to § 552.107(2) of the Texas Public Information Act<sup>57</sup> are found in the records.

*b. Sampling*

Since the fieldwork was conducted under time and resource constraints, the transcripts of interest were selected and requested in advance of travelling to Texas, to allow the archivist to review the files before granting access. The case selection was conducted by using the LexisNexis search engine and selecting all Texas death penalty cases appealed between 1909 and 2002 in which the defendant: 1) had claimed insanity or mitigation due to mental illness, and 2) had no pending appeals (i.e. the defendant had died of natural causes or via state execution or had his sentence commuted to life imprisonment).

The selection yielded a total of 88 cases. The cases were divided into three time periods: 1) pre-DSM-I (1909-1952); 2) pre-*Furman* (1952-1972), and 3) post-*Woodson* (1976-2002). Defendants’ race was identified through a triangulation of data drawn from the ESPY files, a database compiled by M. Watt Espy and John Ortiz Smykla (2016) which includes a list of executed inmates in the US from 1608 to 2002, the Texas Department of Criminal Justice website (2020), which provides a list of executed inmates from 1982 to the present, and research conducted by James Marquart, Sheldon

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<sup>57</sup> TEX. GOV’T CODE ANN. § 552.107(2) (West 1993).

Ekland-Olson, and Jonathan Sorensen (1998: 201-233), which includes a list of death row prisoners from 1923 to 1988. While these lists covered information about the race of the defendant, none of them were complete. Whenever possible, the race of the defendants of missing cases was identified through a close reading of the opinions and/or trial transcripts. Two tables detailing the sample design follow.

Table 1: Cases Used in Research by Time Period

Case Year	Case Name	Defendant Name	Defendant Race	Claim	Cited
<b>Used in Research - Period 1 (1909 - 1952)</b>					
1910	Jones v. State, 131 S.W. 572 (Tex.Crim.App. 1910)	K. C. Jones	Unknown	Insanity	
1912	Maxey v. State, 145 S.W. 952 (Tex.Crim.App. 1912)	Wood Maxey	African American	Insanity	Yes
1913	Asbeck v. State, 156 S.W. 925 (Tex.Crim.App. 1913)	William Asbeck	White	Insanity	
1913	Stanton v. State, 158 S.W. 994 (Tex.Crim.App. 1913)	Floyd Stanton	African American	Insanity	Yes
1915	Harris v. State, 172 S.W. 975 (Tex.Crim.App. 1915)	Belton Harris	Unknown	Insanity	Yes
1915	Myers v. State, 177 S.W. 1167 (Tex.Crim.App. 1915)	C. A. Myers	Unknown	Insanity	
1916	Burgess v. State, 181 S.W. 465 (Tex.Crim.App. 1916)	Robert H. Burgess	White	Insanity	Yes
1922	Apolinar v. State, 244 S.W. 813 (Tex.Crim.App. 1922)	Clemente Apolinar	Hispanic	Insanity	
1923	Morris v. State, 255 S.W. 744 (Tex.Crim.App. 1923)	Ewell Morris	African American	Insanity	Yes
1924	Lindsey v. State, 260 S.W. 862 (Tex.Crim.App. 1924)	Charlie Lindsey	African American	Insanity	Yes
1926	McKenny v. State, 288 S.W. 465 (Tex.Crim.App. 1926)	Pete McKenny	African American	Insanity	Yes
1926	Langhorn v. State, 289 S.W. 57 (Tex.Crim.App. 1926)	William H. Langhorn Jr.	Unknown	Insanity	
1927	Snow v. State, 291 S.W. 558 (Tex.Crim.App. 1927)	F. M. Snow	White	Insanity	Yes
1928	Francks v. State, 5 S.W.2d 157 (Tex.Crim.App. 1928)	Clifford Francks	Unknown	Insanity	
1928	Alexander v. State, 8 S.W.2d 176 (Tex.Crim.App. 1928)	O.T. Alexander	African American	Insanity	Yes
1928	Blake v. State, 7 S.W.2d 579 (Tex.Crim.App. 1928)	Robert F. Blake	White	Insanity	
1928	Dodd v. State, 201 S.W. 1014 (Tex.Crim.App. 1928)	Leonard Dodd	White	Temporary Insanity	
1931	Shield v. State, 38 S.W.2d 76 (Tex.Crim.App. 1931)	Joe Shield	White	Insanity	Yes
1932	Rollins v. State, 53 S.W.2d 786 (Tex.Crim.App. 1932)	Carter Rollins	African American	Insanity	
1933	Blackshear v. State, 58 S.W.2d 105 (Tex.Crim.App. 1933)	Barney Blackshear	African American	Insanity	
1934	Dobbins v. State, 76 S.W.2d 1057 (Tex.Crim.App. 1934)	C. B. Dobbins	White	Insanity	
1934	Thompson v. State, 77 S.W.2d 538 (Tex.Crim.App. 1934)	Lister Thompson	White	Insanity	
1935	Arnold v. State, 79 S.W.2d 130 (Tex.Crim.App. 1935)	Doyle Arnold	White	Insanity	
1935	Pappas v. State, 78 S.W.2d 619 (Tex.Crim.App. 1935)	James Pappas	White	Insanity	Yes
1936	Covin v. State, 93 S.W.2d 428 (Tex.Crim.App. 1936)	Donald E. Covin	Unknown	Insanity	Yes
1936	Jordan v. State, 94 S.W.2d 741 (Tex.Crim.App. 1936)	Henry Jordan	African American	Insanity	Yes
1937	Banks v. State, 112 S.W.2d 745 (Tex.Crim.App. 1937)	Johnnie Banks	African American	Insanity	
1937	Boss v. State, 101 S.W.2d 253 (Tex.Crim.App. 1937)	Vince Boss	White	Temporary Insanity	
1938	Edwards v. State, 114 S.W.2d 572 (Tex.Crim.App. 1938)	Charlie Edwards	African American	Insanity	Yes
1938	Morgan v. State, 117 S.W.2d 76 (Tex.Crim.App. 1938)	Collin H. Morgan	White	Insanity	Yes
1939	Winn v. State, 126 S.W.2d 481 (Tex.Crim.App. 1939)	Edward S. Winn	White	Insanity	Yes
1943	Gutierrez v. State, 175 S.W.2d 968 (Tex.Crim.App. 1943)	Juan Gutierrez	Hispanic	Insanity	Yes
1944	Duke v. State, 182 S.W.2d 808 (Tex.Crim.App. 1944)	George Duke	Unknown	Insanity	Yes
1944	Miner v. State, 178 S.W.2d 268 (Tex.Crim.App. 1944)	Harold A. Miner	White	Insanity	Yes
1944	Murray v. State, 182 S.W.2d 475 (Tex.Crim.App. 1944)	Allen Murray	African American	Insanity	Yes
1948	McCaine v. State, 211 S.W.2d 190 (Tex.Crim.App. 1948)	Riley McCaine	White	Insanity	
1948	Ross v. State, 220 S.W.2d 137 (Tex.Crim.App. 1948)	Lloyd I. Ross	White	Insanity	Yes
1949	Morrow v. State, 224 S.W.2d 481 (Tex.Crim.App. 1949)	J. W. Morrow Jr.	White	Insanity	Yes
1950	McGee v. State, 238 S.W.2d 707 (Tex.Crim.App. 1950)	Richard W. McGee	White	Insanity	Yes
1951	Jones v. State, 243 S.W.2d 848 (Tex.Crim.App. 1951)	William K. Jones	White	Insanity	Yes
1951	McCune v. State, 240 S.W.2d 305 (Tex.Crim.App. 1951)	Billie George McCune	White	Insanity	Yes

Case Year	Case Name	Defendant Name	Defendant Race	Claim	Cited
<b>Used in Research - Period 2 (1952 - 1972)</b>					
1952	Gephart v. State, 249 S.W.2d 612 (Tex.Crim.App. 1952)	Foley Ford Gephart	White	Insanity	Yes
1954	Whitaker v. State, 268 S.W.2d 172 (Tex.Crim.App. 1954)	Walter E. Whitaker, Jr.	White	Insanity	Yes
1954	Brinkley v. State, 277 S.W.2d 704 (Tex.Crim.App. 1954)	Lonnie Brinkley	White	Insanity	Yes
1956	Bingham v. State, 290 S.W.2d 915 (Tex.Crim.App. 1956)	Leonard Lionel Bingham	White	Insanity	Yes
1956	Houston v. State, 287 S.W.2d 643 (Tex.Crim.App. 1956)	Billy Joe Houston	White	Insanity	Yes
1957	Hall v. State, 301 S.W.2d 161 (Tex.Crim.App. 1957)	Wilburn Monroe Hall	White	Insanity	
1958	Freeman v. State, 317 S.W.2d 726 (Tex.Crim.App. 1958)	Robert E. Freeman	White	Insanity	Yes
1958	Kizzee v. State, 312 S.W.2d 661 (Tex.Crim.App. 1958)	Norman Kizzee	African American	Insanity	Yes
1959	Moon v. State, 331 S.W.2d 312 (Tex.Crim.App. 1959)	Nearvel Moon	White	Insanity	Yes
1960	Martinez v. State, 333 S.W.2d 370 (Tex.Crim.App. 1960)	Eusebio Regalado Martinez	Hispanic	Insanity	
1961	Leath v. State, 346 S.W.2d 346 (Tex.Crim.App. 1961)	Fred Thomas Leath	White	Insanity	Yes
1961	Singleton v. State, 346 S.W.2d 328 (Tex.Crim.App. 1961)	Joe Cephas Singleton	African American	Insanity	Yes
1961	Wilson v. State, 352 S.W.2d 114 (Tex.Crim.App. 1961)	Donald Ray Wilson	White	Temporary Insanity	
1962	Hagans v. State, 372 S.W.2d 946 (Tex.Crim.App. 1962)	Edward Otho Hagans	Unknown	Insanity	
1962	Bradley v. State, 353 S.W.2d 864 (Tex.Crim.App. 1962)	Herbert Lemuel Bradley	African American	Insanity	Yes
1963	Welch v. State, 373 S.W.2d 497 (Tex.Crim.App. 1963)	Eugene Welch	African American	Insanity	Yes
1964	Crain v. State, 394 S.W.2d 165 (Tex.Crim.App. 1964)	Paul R. Crain	White	Insanity	
1965	Johnston v. State, 396 S.W.2d 404 (Tex.Crim.App. 1965)	Leon Willis Johnston	White	Insanity	Yes
1966	Rubenstein v. State, 407 S.W.2d 793 (Tex.Crim.App. 1966)	Jack Rubenstein	White	Insanity	Yes
1966	Bryan v. State, 406 S.W.2d 210 (Tex.Crim.App. 1966)	William Clark Bryan	White	Insanity	Yes
1970	Morales v. State, 458 S.W.2d 56 (Tex.Crim.App. 1970)	Leopoldo Morales, Jr.	Hispanic	Insanity	Yes

Case Year	Case Name	Defendant Name	Defendant Race	Claim	Cited
<b>Used in Research - Period 3 (1976 - 2002)</b>					
1979	Burks v. State, 583 S.W.2d 389 (Tex.Crim.App. 1979)	Stanley Keith Burks	African American	Insanity	Yes
1979	Adams v. State, 577 S.W.2d 717 (Tex.Crim.App. 1979)	Randall Dale Adams	White	Mitigation / Aggravation	Yes
1981	Hawkins v. State, 613 S.W.2d 720 (Tex.Crim.App. 1981)	Samuel Hawkins	African American	Insanity	Yes
1984	Smith v. State, 683 S.W.2d 393 (Tex.Crim.App. 1984)	Larry Smith	African American	Mitigation / Aggravation	Yes
1984	Thompson v. State, 691 S.W.2d 627 (Tex.Crim.App. 1984)	John Russell Thompson	White	Mitigation / Aggravation	
1985	Nethery v. State, 692 S.W.2d 686 (Tex.Crim.App. 1985)	Stephen Ray Nethery	White	Mitigation / Aggravation	Yes
1986	Granviel v. State, 723 S.W.2d 141 (Tex.Crim.App. 1986)	Kenneth Granviel	African American	Insanity	
1987	Cordova v. State, 733 S.W.2d 175 (Tex.Crim.App. 1987)	Joe Angel Cordova	Hispanic	Mitigation / Aggravation	
1988	Holland v. State, 761 S.W.2d 307 (Tex.Crim.App. 1988)	David Lee Holland	White	Mitigation / Aggravation	Yes
1989	Sattiewhite v. State, 786 S.W.2d 271 (Tex.Crim.App. 1989)	Vernon Lamar Sattiewhite	African American	Mitigation / Aggravation	
1989	Lackey v. State, 819 S.W.2d 111 (Tex.Crim.App. 1989)	Clarence Allen Lackey	White	Mitigation / Aggravation	Yes
1989	James v. State, 772 S.W.2d 84 (Tex.Crim.App. 1989)	Johnny James	White	Mitigation / Aggravation	
1990	Madden v. State, 799 S.W.2d 683 (Tex.Crim.App. 1990)	Robert Madden	White	Mitigation / Aggravation	
1991	Long v. State, 823 S.W.2d 259 (Tex.Crim.App. 1991)	David Martin Long	White	Insanity	
1991	Cook v. State, 821 S.W.2d 600 (Tex.Crim.App. 1991)	Kerry Max Cook	White	Mitigation / Aggravation	Yes
1992	Wilkins v. State, 847 S.W.2d 547 (Tex.Crim.App. 1992)	James Joseph Wilkins, Jr	White	Insanity	Yes
1992	Mines v. State, 852 S.W.2d 941 (Tex.Crim.App. 1994)	Charles E. Mines, Jr.	African American	Insanity	Yes
1993	Satterwhite v. State, 858 S.W.2d 412 (Tex.Crim.App. 1993)	John T. Satterwhite	African American	Mitigation / Aggravation	Yes
1993	Arnold v. State, 873 S.W.2d 27 (Tex.Crim.App. 1993)	Jermarr Carlos Arnold	Hispanic	Insanity	Yes
1995	Heiselbetz v. State, 906 S.W.2d 500 (Tex.Crim.App. 1995)	Earl Carl Heiselbetz	White	Mitigation / Aggravation	Yes
1995	Alvarado v. State, 912 S.W.2d 199 (Tex.Crim.App. 1995)	Steven Brian Alvarado	Hispanic	Mitigation / Aggravation	Yes
1996	Soria v. State, 933 S.W.2d 46 (Tex.Crim.App. 1996)	Juan Soria	Hispanic	Mitigation / Aggravation	
1998	Colburn v. State, 966 S.W.2d 511 (Tex.Crim.App. 1998)	James Blake Colburn	White	Insanity	Yes
1998	Griffith v. State, 983 S.W.2d 282 (Tex.Crim.App. 1998)	Michael Durwood Griffith	White	Mitigation / Aggravation	
1999	Jackson v. State, 992 S.W.2d 469 (Tex.Crim.App. 1999)	Donell O'Keith Jackson	African American	Mitigation / Aggravation	
2005	Penry v. State, 178 S.W.3d 782 (Tex.Crim.App. 2005)	John Paul Penry	White	Mitigation / Aggravation	Yes

Table 2: Cases by Availability Status, Time Period, and Defendant Race

Time Period	African American	Hispanic	White	Unknown	Total
<b>Used in Research</b>	<b>24</b>	<b>8</b>	<b>48</b>	<b>8</b>	<b>88</b>
Period 1 (1909-1952)	12	2	20	7	41
Period 2 (1952-1972)	4	2	14	1	21
Period 3 (1976-2002)	8	4	14	--	26
<b>Missing from Archive</b>	<b>3</b>	<b>--</b>	<b>7</b>	<b>6</b>	<b>16</b>
Period 1 (1909-1952)	1	--	1	6	8
Period 2 (1952-1972)	1	--	--	--	1
Period 3 (1976-2002)	1	--	6	--	7
<b>Total</b>	<b>27</b>	<b>8</b>	<b>55</b>	<b>14</b>	<b>104</b>

Once the cases of interest had been identified, the online catalogue was screened to ascertain the box number containing the case files, and the archivist of the Texas State Archive was contacted to request the transcripts. After reviewing the content of the boxes and excluding the information protected by Texas privacy law, the archivist gave full access to the documents. Given the vastness of the material and the limited time available for review (the archive is only open between 8:00 am and 5:00 pm, Monday through Friday, and the fieldwork could only last three months), the transcripts, exhibits, affidavits, and motions of interest were photographed and analysed at a later date, rather than being analysed and transcribed on-site. The archive allows researchers to take photographs and, given the high costs of the scanning and copying service, this was found to be the most convenient and expeditious way of proceeding.

### *c. Forensic Psychiatric Publications*

Further historical material was gathered from the online archives of the *Journal of Criminal Law and Criminology* and other academic publications that had a powerful influence on the development of biological and psychological interpretations of mental illness and criminal responsibility in the 20<sup>th</sup> century (e.g. *The American Journal of Insanity*, *The American Journal of Psychiatry*). The papers that discussed the intersection of mental illness and criminal behaviour, the insanity defence, criminal responsibility, and the use of medical expert testimonies in criminal proceedings were carefully analysed in order to map the development of psychiatric knowledge on the intersection of mental illness and crime over the period under scrutiny. These multiple sources were combined with statutes and court opinions gathered from traditional legal databases (LexisNexis and Westlaw) to capture as complete a history as possible of the debates surrounding the intersection of mental illness and criminal responsibility in the medical, legal, and public fields.

### *d. Limits of the Sample*

Due to a series of practical constraints, the sample excluded a number of categories of defendants that were worthy of consideration. Firstly, women are very rarely sentenced to death in the United States (Streib 1989, 2002, 2005) and, as a result, no woman fit the criterion used in the sample selection. While this problem could have been addressed by including cases of women who successfully claimed insanity or who were

sentenced to life imprisonment, this option presented significant problems of its own, as will be discussed below.

Another significant exclusion concerns defendants who have not exhausted their appeals and are still on death row. The reason for this exclusion is that requesting the trial transcripts of cases currently on appeal can bring inappropriate attention to the case, prompt speedier procedures, and lead to a swifter execution of the inmate. To remedy this issue, a list of desired transcripts was sent to Kate Black, a Senior Staff Attorney at the Texas Defender Service, for approval and vetting.

Finally, and most importantly, the sample excluded both cases of defendants who were charged with a capital crime but were either found not guilty by reason of insanity or sentenced to life imprisonment. In other words, the data set only included instances of unsuccessful insanity pleas and mitigation claims, an aspect that had a significant impact on the nature and quality of the cases under study. For instance, it is reasonable to speculate that the expert evidence presented in support of a successful insanity plea is typically more powerful and comprehensive than one presented in support of an unsuccessful one. Indeed, a number of defendants included in the data set presented only weak evidence of insanity at trial, either because the symptoms of mental disease were missing or because the attorneys failed to thoroughly investigate the issue. However, as the next chapters will show, this limitation was counteracted by

the fact that, in a number of instances, defendants presented strong evidence of insanity at trial and were nevertheless sentenced to death.<sup>58</sup>

The reason for excluding successful insanity and mitigation claims was related to access issues. As mentioned above, cases of defendants sentenced to death are automatically appealed to the TCCA. When a case is appealed, the trial court sends the trial transcript to the TCCA, which then reviews the petitioner's claims of error in light of the evidence contained in the transcript. After having reviewed the case and ruled on the petitioner's claims, the court sends the transcript and all the additional documentation related to the case to its archive, which stores them for future consultations. Once the case has exhausted all its appellate procedures and the ruling is final, the case files are traditionally transferred to the Texas State Archives, which preserves them for historical record.

In contrast, cases of defendants who are found not guilty by reason of insanity or sentenced to life imprisonment are never or rarely appealed. This is because given Texas' high death sentencing rates, a finding of not guilty by reason of insanity or a sentence of life imprisonment are considered to be a victory in this jurisdiction. When a case is not appealed to the TCCA the trial transcripts are very difficult to track down, given the decentralised structure of the court system and the lack of regulations

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<sup>58</sup> See, e.g., *Apolinar v. State*, 244 S.W. 813 (Tex.Crim.App. 1922); *McGee v. State*, 238 S.W.2d 707 (Tex.Crim.App. 1950); *Rubenstein v. State*, 407 S.W.2d 793 (Tex.Crim.App. 1966); *Penry v. State*, 178 S.W.3d 782 (Tex.Crim.App. 2005).

regarding the conservation of these legal documents.<sup>59</sup> This means that the transcripts are often either destroyed or simply lost, leaving the researcher with only one possibility for gathering the data: contacting the lawyers who worked on the case and asking if they are willing to provide the documentation.

However, this strategy is only effective if the research focuses on recent cases and is, for obvious reasons, inappropriate for historical investigations stretching back to the beginning of the 20<sup>th</sup> century. To address this data limitation, the thesis has abstained from drawing inferences on the possible impact of particular expert and lay testimonies on jurors' decision-making and final verdicts. Any such inference would necessarily require a comparison between successful and unsuccessful insanity claims and between cases that led to a death sentence and cases that ended with a life verdict. Rather than emphasising case outcomes, the thesis has therefore focused on the ways in which courtroom interactions have contributed to the construction of a shared set of meanings at specific points in time, limiting its inferences and generalisations to cases in which defendants were ultimately sentenced to death.

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<sup>59</sup> Information gathered from conversations with Kate Black (Texas Defender Service) and Elizabeth Vartkessian (Advancing Real Change).

## 2. Data Analysis and Interpretation

Once the fieldwork was completed, the data was subjected to a qualitative content analysis.<sup>60</sup> This was done by coding segments of the material to categories and subcategories that would provide the building blocks of the coding frame (Schreier 2013: 2). The preliminary analysis suggested three possible classification criteria: a chronological criterion, based on the division of the data into three timeframes corresponding to significant medical and legal developments (i.e. 1909-1952, 1952-1976, 1976-2002); a legal criterion, based on the organisation of the data according to the mental incapacity claim and legal issues at stake (i.e. insanity, mitigation, future dangerousness); and a thematic criterion, based on the coding of the data according to *aetiology* (i.e. how psychiatrists and lay individuals explain the underlying causes of mental illness and crime) and *nosology* (i.e. the ways in which such actors classify particular mental conditions and their associations with criminal behaviour).

After careful evaluation and testing of the three criteria, the choice fell on the first coding method. The reason for this choice was twofold. First, it was felt that a chronological framework would more easily capture the paradigmatic shifts occurring in the medico-legal field at different historical junctures. Second, it was believed that this organisation of the data would more accurately highlight how shifting political

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<sup>60</sup> I.e. 'an approach to analysis that focusses on interpreting and describing, meaningfully, the topics and themes that are evident in the contents of communications when framed against the research objectives of the study' (Williamson, Given & Scifleet 2017: 464).

interests, moral values, and standards of behaviour influenced forensic psychiatric theories and courtroom debates over the period under analysis. However, it is worth noting that while the academic literature may show a paradigmatic shift in the ways in which psychiatrists explained particular mental health conditions; courtroom testimonies may not reveal a concurrent change, creating a mismatch between timeframes applicable across different data sources. This issue was tackled by using relatively broad timeframes and by properly acknowledging and explaining the chronological mismatch whenever the analysis of the data suggested a similar occurrence (see Chapter 5: Section 4[b]).

The first coding stage led to the identification of three macro-categories of analysis which would each turn into an empirical chapter of the thesis. The first macro-category focused on the period spanning from 1909 to 1952 and included segments of data related to biological explanations of mental illness and criminal behaviour and to different diagnostic categories associated with criminal conduct, such as brain damage, epilepsy, syphilis, and feeble-mindedness (Chapter 5). The second macro-category covered the period spanning from 1952 to 1972, and encompassed parts of data related to psychoanalytic explanations of criminal behaviour and the use of a diagnosis of psychopathy to explain defendants' personality traits and antisocial acts (Chapter 6). The third macro-category reviewed the period spanning from 1976 to 2002, and included fragments of data related to explanations of mental illness as a 'chemical imbalance' in the brain, the association between child abuse and adult criminality, and the use of a diagnosis of antisocial personality disorder to show that the defendant constitutes an on-going threat to society (Chapter 7). As the content of these macro-

categories suggests, each chapter was structured to include parts of data focused on *explanations* and segments of data focused on *classification*, a strategy which allowed me to incorporate the thematic and chronological criteria outlined above within the same coding frame.

It is important to highlight that while this chronological organisation reflects important paradigmatic shifts, the transition from one paradigm to the next is often gradual, and the boundaries separating them blurred. This means that multiple paradigms can sometimes coexist within the same case, forcing the researcher to make decisions as to which theme to emphasise to fit the chronological coding frame while avoiding redundancies and repetitions. For example, while the trial of Samuel Hawkins could have been used to illustrate one of the themes emerging from the analysis of the 1952-1972 timeframe; i.e. the description of the psychopath as a narcissistic attention craver, it was also well suited to demonstrate one of the central themes of the 1976-2002 period; i.e. the depiction of the psychopath as a cunning and manipulative subject.<sup>61</sup> While both aspects were worthy of consideration, the chronological organisation of the data forced me to emphasise the aspects related to the third time period and use other examples to illustrate the themes relative to the second one.

Once the main categories had been identified, the analysis proceeded with the creation of subcategories that would illuminate different themes emerging within each macro category. The subcategories were created by combining the analysis of forensic

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<sup>61</sup> Hawkins v. State, 613 S.W.2d 720 (Tex.Crim.App. 1981).

psychiatric publications and trial transcripts with a reading of social and cultural histories of psychiatry (e.g., Smith 1981; Grob 1983; Burnham 1988; Harris 1989; Wiener 1994; Hale 1995; Lunbeck 1996; Rafter 1997a, 2008; Zaretsky 2005; Weisman 2008; Murray 2006, 2009, 2011) and of the US and Texas criminal justice systems (for the US see, e.g., Simon 2007; Melossi 2008; Alexander 2010; Garland 2012b; Harcourt 2015; for Texas see, e.g., Perkinson 2010; Campbell 2011, 2012). By combining the analysis of the primary data with contextual information gathered from secondary source material, it was possible to identify the moral framework and penal culture which informed psychiatric and legal interpretations of mental illness and criminality in the three periods under investigation. An outline illustrating the categories and subcategories used for the analysis of the data follows:

## **Chapter 5**

Macro-category: chronological timeframe 1909-1952

Subcategories:

- 1) *Psychiatric framework:*
  - a. *Aetiology.* Biological explanations of criminal behaviour: genetic inheritance and brain pathology;
  - b. *Nosology.* Diagnostic categories based on biological explanations: brain damage, epilepsy, syphilis, feeble-mindedness.

2) *Legal framework:*

a. Insanity defence:

- i. Ontological and epistemological clash between biological explanations of mental illness and criminal behaviour and 'right and wrong' standard (*M'Naghten* rules): mechanistic versus folk psychological views of human behaviour.

3) *Cultural framework:*

- a. Darwin's evolutionary theories and the doctrine of civilisation: criminality as savagery and lack of control over the 'lower' impulses;
- b. 'Race science' and eugenics: eugenic theories of racial superiority and cultural stereotypes prompted psychiatrists to link particular ethnic groups with lower intelligence, mental illness, and criminality;
- c. The culture of character and the puritan work ethic: moral condemnation of idle and self-indulgent habits and behaviours.

## **Chapter 6**

Macro-category: chronological timeframe 1952-1972

Subcategories:

1) *Psychiatric framework:*

- a. *Aetiology*. Psychoanalytic explanations of criminal behaviour: mental illness and criminality stemming from arrested psychosexual development in childhood;
- b. *Nosology*. Diagnostic categories based on psychoanalytic explanations associated with criminal conduct: criminal psychopathy.

2) *Legal framework:*

a. Insanity defence:

- i. Ontological and epistemological clash between psychoanalytic explanations of mental illness and criminal behaviour and 'right and wrong' standard (*M'Naghten* rules): irresistible impulse versus cognitive defect.

3) *Cultural framework:*

- b. Tolerant versus authoritarian views on parental and sexual education;
- c. Family centred ideology: psychopaths as 'emotionally immature' and socially maladjusted individuals;
- d. Challenge to traditional codes of sexual morality: psychopaths as 'sexual perverts' and 'latent homosexuals';
- e. Culture of personality and mass media: psychopaths as 'narcissistic' and 'egocentric' attention cravers.

## **Chapter 7**

Macro-category: chronological timeframe 1976-2002

Subcategories:

1) *Psychiatric framework:*

- a. *Aetiology.* Biological and environmental explanations of criminal behaviour: chemical imbalance in the brain and psychopharmacology, child abuse and neglect and future criminality;

- b. *Nosology*. Diagnostic categories based on biopsychosocial explanations and associated with criminal conduct: antisocial personality disorder and paranoid schizophrenia.

2) *Legal framework*:

- a. Insanity defence and mitigation of the sentence:
  - i. Evidence of mental illness presented in support of insanity defence and/or as part of mitigation strategy turned into aggravating factor increasing likelihood of future violence at sentencing.

3) *Cultural framework*:

- a. Crime control rhetoric and culture of fear:
  - i. Essentialised explanations of criminal behaviour, seen as the simple product of defendants' evil natures rather than of difficult social upbringing;
  - ii. Individualist versus communitarian notions of criminal responsibility: crime explained as the product of individual choice versus crime interpreted as the result of environmental circumstances.

- b. Mental disorder, social stigma, and perceptions of dangerousness.

Factors exacerbating such stigma in Texas death penalty proceedings:

- i. Biological reductionism and shadowing of defendants' social backgrounds;
- ii. Emphasis on side effects and noncompliance associated with psychotropic drug treatment;

- iii. Deinstitutionalisation of the mentally ill;
- iv. Dispositional view of antisocial personality disorder and its association with criminal behaviour;
- v. Membership to ethnic minority groups:
  - 1. Racial stigma associating African Americans and Hispanics with violence, criminality, and future dangerousness;
  - 2. Tendency to medicalise social issues and behavioural patterns associated with ethnic minority groups through psychiatric labelling.

Once this coding stage was completed, each category and subcategory were assigned a name, brief description, and typical or paradigmatic examples selected from the sample to illustrate the emerging themes and/or conduct in-depth case-studies (Schreier 2013: 7-17; Patton 2014: 236). The coding frame was then reviewed to check for possible redundancies and overlaps that might call for a revision of the structure of the frame. If such overlaps were found, similar subcategories were collapsed into the same group, and particularly comprehensive subcategories were reframed as main categories.

Finally, the data was coded to identify examples confirming and deviating from the typical or paradigmatic cases identified in the first analytical stages (Patton 2014: 239). Confirming cases were used as additional examples to support the initial findings, adding credibility, depth and richness to the emerging themes. Deviating cases, on the other hand, were used as examples that did not fit the general pattern, providing

alternative interpretations and placing boundaries around the initial findings. This ‘deviant case analysis’ allowed to test for the quality, consistency and validity of the category definitions, lending credibility and support to the initial findings.

Besides the deviant case analysis, the thesis relied on a triangulation of proof to test for possible consistencies or inconsistencies across different data sources (*Ibid.*, 247). This approach was used to provide a textured account of the knowledge production processes informing courtroom interactions, and an accurate reflection of the complexity and diversity of the various institutional frameworks informing such interactions. As the following chapters will show, different kinds of documents (i.e. forensic psychiatric publications and trial transcripts) reflect different intellectual traditions and social realities and can therefore yield different results. So long as these inconsistencies are properly addressed and explained, they should not be considered a factor weakening the credibility of the findings (*Ibid.*, 248).

The following step involved the interpretation of the analytical categories of the coding frame. In line with the theoretical traditions discussed in Chapter 1, the thesis endorses an interpretative approach based on ‘suspicion’, meaning that it does not take appearances at face value but instead uses them as signs that may lead to more significant, hidden, truths (Willig 2013: 137-138). Starting from the idea that the phenomena under investigation are ‘merely the surface level manifestations of underlying processes and structures which generate them’ (*Ibid.*, 138), the thesis proposes that if we aim to reach a real understanding we need to dig under the surface, unveil underlying assumptions, and demystify the symbols that have become

entrenched in our culture (see, e.g., Ricoeur 1996: 152). To accomplish this goal, the thesis employed a number of analytical strategies aimed at ‘denaturalising’ entrenched categories, while exposing the ‘persuasive or manipulative character of discursive practices’ through a process of linguistic deconstruction (Wodak 2011: 65; see also Berkhofer 1997: 4-11). In the context of this thesis, ‘denaturalising’ meant challenging the biological foundations of categories such as mental illness, criminality, and masculinity, by highlighting their socially and culturally constituted nature (Berkhofer 1997: 4).

Methodologically, the process of denaturalisation involved two analytical steps. The first step entailed identifying in the historical context of the time ideological trends such as racism, puritanism, misogyny, individualism, and/or punitiveness which could help explain subjects’ reliance on particular contents and use of certain linguistic strategies in their descriptions of the defendants on trial (*Ibid.*, 4-5). The second step involved revealing how discourse surrounding abstract categories contributed to the legitimation of particular points of view (e.g. individualist vs. communitarian notions of criminal responsibility), and to the empowerment of particular social categories (e.g. Puritan white middle classes vs. Catholic immigrant working classes), over others. This was done by exploring the presence of multiple and diverging points of view within the text and by formulating hypotheses as to their possible connection to wider ideological conflicts, social inequalities, and power imbalances.

Besides focusing on the ideological functions and effects of language, the thesis incorporated an attention to the interpersonal aspects of discourse (Wetherell & Potter

1988: 169), such as the ways in which trial actors used language to accuse, justify, and blame defendants for their actions. The purpose of this strategy was to reveal the explicit and implicit functions of discourse and show how speakers' arguments, choice of terminology, and narrative styles can have subtle and, in some cases, unintended effects. In practice, this was done by 'developing hypotheses about the purposes and consequences of language' and by testing these hypotheses against the documentary evidence and the secondary literature available (*Ibid.*, 170).

For example, when analysing the trial transcripts, particular attention was paid to the versions of the facts and medical arguments developed by the defence and the prosecution, along with the rhetorical devices used by the two parties, to prove lack of guilt or secure a conviction. Once these tactics were identified, it was possible to formulate hypotheses as to the possible consequences of each party's reconstruction of the criminal event, psychiatric interpretations, and linguistic strategies, and test them against 1) the dominant psycho-legal paradigm of the time and 2) the trial outcomes.<sup>62</sup>

#### *a. Limits of the Interpretation*

This approach starts from the assumption that to understand a particular phenomenon one needs to adopt a perspective from which to interpret it (Willig 2013: 138). This inevitably shapes how one sees such phenomenon and what one can know about it. Neutrality and objectivity are unreachable: every interpretation is necessarily partial

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<sup>62</sup> See, e.g., *Burks v. State*, 583 S.W.2d 389 (Tex.Crim.App. 1979); *Colburn v. State*, 966 S.W.2d 511 (Tex.Crim.App. 1998).

and subjective. To limit the influence of personal bias and ensure that the interpretation fit the data under analysis, the thesis integrated concept-driven and data-driven categories into the coding frame. The concept-driven categories were based on the theoretical assumptions outlined in Chapter 1 and on previous knowledge of the topic, whereas the data-driven categories were identified through a strategy of ‘subsumption’ (Schreier 2013:10). This strategy involved examining one passage after the other to identify relevant concepts and checking whether a subcategory covering such concepts had already been created. If a similar subcategory already existed, the concept was subsumed under the existing category, whereas if such subcategory did not exist, a new subcategory covering the concept was created. This process was pursued until the point of saturation, meaning until no new relevant concepts could be identified.

A further way of addressing this issue was to reflect on my position as a researcher with respect to the field under study (see Winter 2014: 6; May & Perry 2014). In the context of this thesis, for instance, it is worth highlighting that while the thesis does not take an open stance against capital punishment, I am personally quite critical of this criminal justice institution. I have always condemned the death penalty on both moral and pragmatic grounds and criticised the ways in which it was and still is administered, particularly in Texas. Growing up in Tuscany, Italy, the first region in the world to ever abolish capital punishment in 1786 in the then independent Grand Duchy of Tuscany, probably had an influence on my perception of capital punishment as a backwards and unnecessarily harsh penalty, an aspect which in turn might have affected my reading of the data and interpretation of the findings.

An additional aspect worthy of consideration is my scepticism with respect to the medical model of mental illness and to the neutrality and objectivity of scientific and legal knowledge (see, e.g., Ussher 2012). These critical views and epistemological assumptions have arguably resulted in a bleak view of the field which may not provide a full picture of the historical reality under study. This negative perspective was exacerbated by the fact that the analysis of the trial transcripts involved dealing with detailed accounts of horrific crimes while facing prosecutors' striking lack of empathy for the defendants' mental illnesses and Texas' systematic use of legalised state violence. These aspects strongly challenged my trust in the ability of the Texas criminal justice system to respond to the psychosocial complexities found in cases involving mentally ill capital defendants, prompting a moral reaction which might have led me to emphasise the setbacks, rather than the achievements, of the medico-legal establishment analysed in this thesis.

### 3. Challenges of Archival Research

#### *a. Practical Challenges*

The archival research conducted for this dissertation presented a number of practical and emotional challenges. From a practical point of view, while the trial transcripts were all typewritten, the quality of the paper of the oldest documents had decayed and the written content had faded, making several records difficult to read. Moreover, the inventory for the 1975-1990 Centralised Court Case Files held at the Texas State Archives and Library Commission was full of errors, meaning that several cases were

either missing or displaced, making their tracking complicated, if not impossible. While the clerks of the TCCA argued that they had already sent some of these missing transcripts to the archives, the archivists stated that they had never received them, and that if the case was missing from the catalogue it meant that it had never been delivered. These mysterious disappearances forced me to exclude 16 of the selected cases from the final sample, regardless of their relevance to the thesis and its research questions (see Table 3 below).

Table 3: Cases Missing from the Archive by Time Period

Case Year	Case Name	Defendant Name	Defendant Race	Claim	Cited
<b>Missing from Archive - Period 1 (1909 - 1952)</b>					
1908	Macklin v. State, 109 S.W. 145 (Tex.Crim.App. 1908)	Willis Macklin	African American	Insanity	
1916	Marion v. State, 190 S.W. 499 (Tex.Crim.App. 1916)	Hodge Marion	Unknown	Insanity	
1920	Perea v. State, 227 S.W. 305 (Tex.Crim.App. 1920)	Jose Perea	Unknown	Insanity	
1921	Parker v. State, 238 S.W. 943 (Tex.Crim.App. 1921)	Carl Parker	Unknown	Insanity	
1922	Shell v. State, 240 S.W. 546 (Tex.Crim.App. 1922)	J. L. Shell	Unknown	Insanity	
1922	Toussaint v. State, 244 S.W. 514 (Tex.Crim.App. 1922)	Henry John Toussaint	Unknown	Insanity	
1922	Sagu v. State, 248 S.W. 390 (Tex.Crim.App. 1922)	Manuel Sagu	Unknown	Insanity	
1933	Kelly v. State, 63 S.W.2d 1024 (Tex.Crim.App. 1933)	Ira Kelley	White	Insanity	
<b>Missing from Archive - Period 2 (1952 - 1972)</b>					
1954	Barnes v. State, 266 S.W.2d 861 (Tex.Crim.App. 1954)	Charles Waymon Barnes	African American	Insanity	
<b>Missing from Archive - Period 3 (1976 - 2002)</b>					
1978	Hughes v. State, 563 S.W.2d 581 (Tex.Crim.App. 1978)	Billy George Hughes Jr	White	Insanity	
1985	Thomas v. State, 701 S.W.2d 653 (Tex.Crim.App. 1985)	Danny Dean Thomas	White	Insanity	
1986	Duhamel v. State, 717 S.W.2d 80 (Tex.Crim.App. 1986)	Emile Pierre Duhamel	White	Insanity	
1987	Tompkins v. State, 774 S.W.2d 195, (Tex.Crim.App. 1987)	Philip Daniel Tompkins	African American	Mitigation / Aggravation	
1988	Zimmerman v. State, 750 S.W.2d 194 (Tex.Crim.App. 1988)	John Charles Zimmerman	White	Insanity	
1991	Boggess v. State, 855 S.W.2d 645 (Tex.Crim.App. 1991)	Clifford Holt Boggess	White	Mitigation / Aggravation	
1994	Robison v. State, 888 S.W.2d 473 (Tex.Crim.App. 1994)	Larry Keith Robison	White	Insanity	

To tackle this data limitation, primary and secondary source material was used to situate the cases within the broader social and cultural context of the time, paying particular attention to developments in the fields of religion, gender relations, sexuality, penal politics and racial tensions (see Bosworth 2001: 434-437; Corbin 1998; Farge 1974, 1993). Through this background information, an attempt was made to reconstruct the missing information and to build a narrative that could help enshrine the wider context within which defendants, witnesses, attorneys, and medical experts operated, and illustrate how these socio-cultural factors influenced psycho-legal discourse in theory and in practice. While the construction of any historical narrative involves imposing linearity on non-linear events, and a synthetic order over a chaotic and fragmented reality, it is an essential step to make sense of the archival material and provide a meaningful interpretation of past events.

Another limitation of the data is that it only yields an institutional perspective. Both the psychiatric literature and the trial transcripts provide information which is filtered through the language, methods, and procedures of medical research and courtroom interactions, and designed to serve particular professional and institutional purposes. Neither of these contexts acknowledge defendants' perspectives; to the contrary, with few exceptions, both tend to actively challenge defendants' credibility and reliability, in diagnostic settings as well as during the trial proceedings. In the legal arena, for example, the defence attorneys invariably filter the defendant's version of the story to make it fit the defence strategy they decide to pursue. As Carol Smart (1990: 197-198) highlights,

most of the story will be chaff as far as the lawyer is concerned, no matter how significant the rejected elements are to the client...the parts of the story that are cast aside are deemed immaterial to the case and the good solicitor is the one who can effect this translation as swiftly as possible.

Through this routine practice, 'alternative accounts of events are disqualified. The legal version becomes the only valid one' (*Ibid.*, 198). By relying on official court records, we are limited in our ability to grasp alternative accounts and forced to look at the cases from the perspective and through the language of the legal and medical actors involved. To tackle this issue, the thesis used the analytical techniques illustrated above to reveal how institutional accounts contribute to the silencing of defendants' voices in the process, and how psychiatrists, lawyers and lay witnesses' linguistic choices and narrative strategies reflected and in turn constituted the structures of inequality and power imbalance characteristic of Texas society in general, and of its capital punishment system in particular.

Finally, the data provided very limited information about the emotional context of the trial proceedings. As Sarah Kaufman (2017) argues, the capital punishment courtroom is an emotionally charged environment. To fully grasp this emotional dimension, one needs to immerse oneself in its reality, by participating in the proceedings and witnessing the psychosocial dynamics occurring, not only between the attorneys, witnesses, jurors, and the judge, but also between the audience and the other actors involved. Participant observation and ethnographic methods are particularly suited to capture these psychosocial dynamics but are clearly inappropriate for the analysis of past trials. Hence, when dealing with old cases, the researcher can only rely on trial transcripts and court opinions to reconstruct these emotionally charged events.

However, trial transcripts typically exclude commentaries on the attorneys and witnesses' facial expressions, tone of voice, body language and pauses as well as on the jury and audience's reactions to the evidence presented (Kaufman 2017: 1165). Manifestations of anger, feelings of incredulity, sorrow, indignation and shock are all filtered and neutralised in the transcription of court reporters, making a complete evaluation of the emotional tone of historical proceedings untenable.

Moreover, relying on transcripts alone make a full assessment of the power dynamics occurring in the courtroom complicated, since the record only includes the interactions between the attorneys and the witnesses while on the stand, and between the attorneys and the judge, with or without the presence of the jury (*Ibid.*, 1165,1167). By excluding other aspects, such as witnesses' positioning in the courtroom, along with the nature of their interactions with the audience, attorneys, and police officers, the official records leave out crucial information that could give a clearer sense of the antagonism and power imbalance that tends to characterise courtroom interactions.

For example, the organisation of the courtroom itself, which in most American states entails a clear demarcation between the two parties, with the witnesses for each side respectively positioned behind the defence or the prosecution, creates a hostile environment which reflects the adversarial nature of the proceedings (cf. *Ibid.*, 1168). Law enforcement officials typically testify for the prosecution and therefore tend to position themselves on the state's side of the courtroom, giving the prosecution an aura of authority and legitimacy. Such legitimacy is further reinforced by the presence of

mourning co-victims (the victims' family and friends) who, through open displays of sorrow and desperation, elicit feelings of empathy in the observer.

The trial transcripts make such emotional reactions and power dynamics 'institutionally invisible and unavailable for researchers and appellate courts reviewing the cases' (*Ibid.*, 1170). While an analysis of the language used by the attorneys and witnesses during direct and cross examination, along with the judge's commentaries on attorneys' motions and objections, can give a sense of such dynamics, the picture offered by such linguistic interactions is necessarily partial. Without directly witnessing the proceedings, several questions remain unanswered.

To illustrate the kinds of questions which may remain unsolved by relying exclusively on trial records, the following paragraphs will conduct a case study of the trial of Allen Murray, an African American man sentenced to death in 1944.<sup>63</sup> Murray was charged with the rape of a 17-year-old white girl, and with the robbery and physical assault of the victim's boyfriend, in Longview, Texas.<sup>64</sup> Reflecting the racist language of the time, at trial all the witnesses for the state, including some police officers (e.g. Sheriff of Danton County Roy Moore), consistently referred to the defendant as 'the negro', never calling him by his name.<sup>65</sup>

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<sup>63</sup> Murray v. State, 182 S.W.2d 475 (Tex.Crim.App. 1944).

<sup>64</sup> *Ibid.*, 475-476.

<sup>65</sup> See, e.g., Dunaway Test. Trial Tr. 5:2-6, 8:24, 10:1, Moore Test. Trial Tr. 13:23, 14:13, Jureka Test. Trial Tr. 17:9, Nicholson Test. Trial Tr. 20:17-18, Lee Martin Test. Trial Tr. 28:1,8, 29:13-15, 22, Embry Test. Trial Tr. 36:27-37:12.

As the state closed its case, the court was informed that the defendant had been adjudged insane and committed to an insane asylum by a court in Oklahoma just a few months prior to the alleged offence and had escaped such institution after only twelve days of commitment.<sup>66</sup> While in most cases the burden of proving insanity lies on the defence, if the defendant has been adjudged insane by a civil court prior to the charged offence, Texas law requires courts to reverse the traditional presumption of sanity and shift the burden of proof to the prosecution.<sup>67</sup> In these cases, in order to secure a conviction, the state needs to demonstrate ‘beyond a reasonable doubt’ that the defendant had regained his legal sanity at the time of the crime.

To accomplish this goal, the prosecution in Murray’s case called a mental health officer and a few lay witnesses, including two farmers and a number of members of law enforcement.<sup>68</sup> The mental health officer stated that while the defendant could not have recovered from his insanity after only two weeks of hospitalisation, his observation of the defendant during the mental health evaluation suggested that he was probably sane at the time of the crime.<sup>69</sup> The lay witnesses corroborated this finding, arguing that from their observation of the defendant following the crime and during his arrest, they believed that the defendant was sane.<sup>70</sup> Strikingly, the prosecution failed to elicit from its witnesses what specific facts, conversations, and/or conduct had led them to

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<sup>66</sup> *Murray*, 182 S.W.2d at 476-477.

<sup>67</sup> *Ibid.*, 477. See also *Davidson v. State*, 4 S.W.2d 136 (Tex.Crim.App. 1928); *Gunter v. State*, 139 S.W.2d 116 (Tex.Crim.App. 1940); *Herring v. State*, 148 S.W.2d 416 (Tex.Crim.App.1941).

<sup>68</sup> *Murray*, 182 S.W.2d at 478.

<sup>69</sup> *Dr. Hutcheson Test. Trial Tr.* 34:25-28, 35:12-14.

<sup>70</sup> *Jureka Test. Trial Tr.* 35:27-38:11, *Embry Test. Trial Tr.* 39:12-28, *Gonzales Test. Trial Tr.* 40:9-16, *Allen Test. Trial Tr.* 41:8-18.

reach a similar conclusion, a lacuna which the defence should have objected to and/or raised during cross examination.

However, not only did the defence fail to highlight the prosecution's omission, it also failed to present a list of witnesses who could support Murray's insanity claim, choosing to rely exclusively on the presumption of insanity stemming from the Oklahoma judgment. As a result, the evidence presented by the state was left almost unchallenged, an aspect which led the jury to conclude that the defendant was sane at the time of the rape and therefore deserving of a death sentence.

The defendant's court-appointed attorney, T. B. Davis, clearly provided inadequate representation in this case. He only realised that Murray had a history of hospitalisation mid-way through the proceedings, and even after having realised this fact, he failed to present a motion for continuance which could have allowed him to identify some witnesses who could corroborate Murray's insanity claim. As a result, the trial proceeded at its normal speed, effectively leaving Murray without any form of defence, apart from the cross examination of the state's witnesses. This ineffective assistance of counsel had dramatic consequences for the defendant's fate, especially if considered in light of empirical evidence suggesting that when a black defendant rapes a white victim in Texas, his chances of receiving a death sentence increase exponentially (see, e.g., Johnson 1941; Garfinkle 1949; Koeninger 1969; Bowers & Pierce 1980; Ekland-Olson 1988; Ralph, Sorensen & Marquart 1992; Brock et al 1999; see Chapter 7: Section 2[e]).

The witnesses' use of denigrating racist terms throughout the trial, coupled with the defence's failure to present *any* witness for the defendant, suggest that Murray was effectively left alone in his defence. This raises several questions regarding the racial composition of the courtroom and the emotional tone and power dynamics of the trial which court records alone are unsuited to answer. However, it is possible to combine the textual clues found in the trial transcripts with a background knowledge of Texas history, society, and culture to formulate hypotheses about the missing information, and reconstruct what the courtroom dynamics of the time might have looked like from the perspective of an external observer.

Three background factors are here worthy of consideration. First, the news that a black man had raped a white woman elicited strong public outrage in white southern communities at the time of Murray's trial (Myrdal cited in Brock et al 1999: 160).<sup>71</sup> Second, African Americans have been systematically excluded from jury service in Texas criminal courts based on racial considerations, a practice which, as established by the US Supreme Court in *Batson v. Kentucky* (1986),<sup>72</sup> violates the 14<sup>th</sup> Amendment Equal Protection Clause.<sup>73</sup> Third, in Murray's case the defence failed to call representatives of the defendant's family and friends to the witness stand. In light of this background information, it is possible to speculate that the audience, witnesses, and

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<sup>71</sup> According to Johnny Dunaway, the victim's boyfriend, immediately before assaulting the victim Murray told him that 'he wanted some white pussy', a detail which likely contributed to exacerbate Longview's white community's outrage as well as the racial tensions surrounding the proceedings. See Dunaway Test. Trial Tr. 7:21.

<sup>72</sup> 476 U.S. 79 (1986).

<sup>73</sup> See, e.g., *Whitsey v. State*, 796 S.W.2d 707 (Tex.Crim.App.1989); *Emerson v. State* 851 S.W.2d 269 (Tex.Crim.App. 1993); *Musick v. State*, 862 S.W.2d 794 (Tex.App.-El Paso 1993); *Moore v. State*, 265 S.W.3d 73 (Tex.App.-Houston [1<sup>st</sup> Dist.] 2008); *Jones v. State*, 431 S.W.3d 149 (Tex.App.-Houston [14<sup>th</sup> Dist.] 2013).

jury in Murray's trial were primarily, if not exclusively, composed of white people. Assuming this to be the case, it is possible to infer that this racial composition, which evokes old southern practices of vigilante justice and lynching, had a powerful influence on the witnesses' testimonies and on jurors' decision-making, depriving the defendant of a fair trial and dramatically tipping the scales in favour of a death verdict.

As this example has shown, while archival court documents leave significant gaps in our knowledge of the past, by constantly moving between the text and the context, and by formulating tentative hypotheses about their potential links, it is possible to reconstruct some elements of this missing history, and highlight how the social dynamics and power struggles of the era under analysis can play out in particular cases.

### *b. Emotional Challenges*

The previous discussion alerts us to an important aspect that is often overlooked in criminological studies focusing on language and discourse: the essential role played by emotions in criminal justice contexts and their implications for criminological research (Bosworth 2001: 437-438). With a subject matter such as crime and punishment, criminological research inevitably involves reading and writing about human suffering and dealing with morally troubling issues. In the context of this thesis, this has entailed being confronted with the suffering of the victims' family and friends, as they give detailed accounts of the loss experienced from the death of their loved one, or with the pain of the defendants' relatives, as they describe the severe abuse and/or psychiatric

symptoms suffered by the defendant during his childhood. In reading the trial transcripts, one further encounters police officers and district attorneys' detailed descriptions of the scene of the crime, and of the gruesome violence involved in the rapes and/or murders with which the defendants are charged, which are specifically designed to elicit strong emotional reactions of disgust, anguish, and sorrow in jurors.

The emotional impact of these testimonies is not diminished by the fact that the crimes and trials occurred in the past. On the contrary, these tales of human suffering are 'immune to the passing of time' and present a strong emotional challenge for the socio-historical criminologist (*Ibid.*, 438). In dealing with the cases analysed in this thesis, the researcher is confronted with the same moral dilemma which confronts any other participant in the proceedings. On the one hand, one is prompted to condemn the defendants' behaviour based on the gruesome descriptions of the crime provided by the state witnesses and the prosecutors; on the other hand, one is urged to empathise with the defendant's mental health condition and to balance the moral outrage with an attempt to understand what might have led an individual to the level of desperation required to engage in a similar behaviour. Despite opposing capital punishment and believing that individuals with mental illnesses should be categorically exempted from executions, conducting this kind of research forced me to regularly confront this moral dilemma, and reflect on my personal biases, as I proceeded with the analysis.

## Conclusion

As this chapter has shown, the thesis uses a socio-historical methodology based on in-depth archival research. Starting from a close reading of forensic psychiatric publications and Texas court records, the thesis aims at providing a textured account of the intellectual traditions and cultural assumptions informing debates on the intersection of mental illness and criminal behaviour, along with a historical reconstruction of selected death penalty proceedings involving mentally disordered capital defendants. The next chapter sets the legal context of the thesis, providing the first building block of this historical reconstruction.

## **CHAPTER 3. A LEGAL FRAMEWORK THAT MILITATES AGAINST MERCY**

### Introduction

This chapter analyses the historical development of Texas mental incapacity doctrines during the 19<sup>th</sup> and 20<sup>th</sup> centuries. It specifically focuses on transformations affecting the Texas legal insanity defence, procedural issues associated with considerations of mitigating evidence under Texas' 1976 capital sentencing statute, and rules concerning the admission of expert evidence and proof in Texas courtrooms. The purpose of the chapter is to investigate the strategies through which the law has contained the impact of expert opinions regarding mental illness and criminal responsibility in Texas capital punishment trials and shed light on the types of knowledge allowed to inform psycho-legal discussions in this jurisdiction.

The chapter is divided into three sections. Sections 1 and 2 investigate how Texas' approach to the insanity defence and to mitigation due to mental illness was reconfigured as a result of a series of federal and state court decisions. After having analysed the historical development of the Texas insanity defence and capital punishment statute, the sections argue that this jurisdiction has historically taken a comparatively narrow and conservative approach in relation to the insanity defence at the guilt stage of the trial, while trying to limit and reverse the mitigating effect of mental illness evidence at the punishment stage.

Section 3 turns to the development of standards concerning the admission of expert evidence, to investigate the types of knowledge allowed to inform discussions surrounding mental illness and criminal responsibility in Texas courtrooms. After having reviewed Texas case law regulating the admissibility of expert testimony in civil and criminal courts, this section argues that Texas courts have traditionally applied different standards depending on the nature of the evidence presented. While evidence from the ‘hard’ sciences is subjected to strict admissibility criteria, the so-called ‘soft’ sciences, such as psychiatry and psychology, have historically been admitted using lower standards. This has affected the nature and quality of the psychiatric and psychological evidence presented, leading to an indiscriminate acceptance of testimonies based on dubious scientific methods.

### 1. History of the Texas Insanity Defence

Texas has historically taken a narrow approach to the insanity plea, trying to limit it to a very small proportion of the mentally ill population (Shannon 2006: 68; see also Cassel 2002: A25; Seligman 2002: A6; Denno 2003: 10). From the mid-19<sup>th</sup> century until 1973, the Texas insanity defence was based on the *M’Naghten* rules, a landmark test first formulated in England in 1843, which has had a long-lasting influence on American insanity jurisprudence (Hermann & Sor 1983: 508).<sup>74</sup> Also known as the ‘right and wrong test’, the *M’Naghten* rules were developed following the trial of Daniel M’Naghten, a mentally disordered individual who attempted to kill the then Prime

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<sup>74</sup> See also *State v. Roy*, 60 P.2d 646 (N.M. 1936).

Minister of England but killed his secretary by mistake. At trial, M’Naghten pleaded insanity and presented testimony of nine medical witnesses who argued that the defendant had committed the murder under the influence of an insane delusion that led him to believe that the Prime Minister was part of a larger tory conspiracy to take his life (Robin 1997: 226; Slobogin 2000: 1203; Maeder 1985: 27-29).<sup>75</sup> The jury found M’Naghten ‘not guilty on the ground of insanity’ and committed him to a mental health asylum. The decision prompted strong public outrage, to the point that Queen Victoria, herself having been subject to several assassination attempts, urged a review of the decision (Biggs 1955: 95-97; Glueck 1925: 162-163).

To address the concerns of the Queen and the public, the House of Lords summoned the 15 common law court judges of England to discuss the development of appropriate legal requirements for acquitting defendants by reason of insanity. At the end of the deliberation, and speaking for the judges, Lord Chief Justice Tindal articulated the standard to be followed in evaluating future insanity pleas. According to the judges

To establish a defence on the ground of insanity, it must be proved that, at the time of the committing of the act, the party accused was labouring 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 he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been whether the accused at the time of doing the act knew the difference between right and wrong.<sup>76</sup>

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<sup>75</sup> See also *United States v. Freeman*, 357 F.2d 606, 616-617 (1966).

<sup>76</sup> *M’Naghten’s Case*, House of Lords, 8 Eng. Rep. 718, 719 (1843).

The *M'Naghten* rules thus excused individuals who, due to a severe mental disorder, did not know the nature and quality of their act or that the act was wrong. Mentally ill defendants who were rationally aware of the wrongfulness of their act were traditionally excluded from legal protection (Slobogin 2000: 1210-1211). The only exception to this rule occurred in cases in which a defendant maintained a delusional belief that, if true, would have justified the offence. Lord Chief Justice Tindal explained that in a similar situation, the mentally ill defendant

must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting or taking away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.<sup>77</sup>

With this additional passage, the judges extended the insanity defence to all individuals who, while aware of the wrongfulness of their act, were at the time of the alleged offence affected by a delusional belief that, if real, would have legally justified the commission of the act.

In the years following their formulation, the *M'Naghten* rules attracted numerous critiques from medico-legal writers (see, e.g., Maudsley cited in Guttmacher 1955: 325; Ray 1838: 47; Glueck 1928: 580; Cardozo 1931: 32; Menninger 1937: 450; Zilboorg 1944: 507, 552; Gowers 1953: 73-129; Guttmacher & Weihofen 1952: 403-408). There were two significant objections. First, critics argued, the rules focused exclusively on

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<sup>77</sup> *M'Naghten's Case*, 8 Eng. Rep. at 723.

defendants' cognitive abilities, leaving the issue of volitional capacity completely unaddressed (Cardozo 1931: 70, 106, 108; Gowers 1953: 102; De Grazia 1954: 341; Douglas 1956; Brennan 1963; Ray 1962[1838]: 42-43).<sup>78</sup> In so doing, the rules failed to protect mentally ill individuals who, while rationally aware of the wrongfulness of the act, were incapable of resisting the impulse to commit the act as a result of their mental condition. The second criticism focused on the narrow scope of the legal protection (Zilboorg 1943: 273; Glueck 1962: 46; Hermann & Sor 1983: 512). In this view, the test failed to include severely mentally ill individuals who, while cognitively aware of the wrongful nature of their conduct, were either incapable of relating emotionally to its consequences, or believed, due to a delusional construction, that their behaviour was morally justified despite the legal prohibition.

To address these critiques, a number of American jurisdictions developed new standards to expand the scope of the insanity protection (Slobogin 2000: 1211-1212). At first, the reform took two separate directions. Some states decided to broaden the notion of wrongfulness implicit in the *M'Naghten* rules (Goldstein 1967: 49). In contrast to the traditional insanity test, which required defendants to prove that they did not know that their act was *legally* wrong, they established that defendants only had to prove that they did not know that it was *morally* wrong, a significantly lower threshold.

Other jurisdictions decided to complement the traditional right and wrong standard with an 'irresistible impulse' test (Slobogin 2000: 1212; Goldstein 1967: 241-

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<sup>78</sup> See also *Parsons v. State*, 81 Ala. 577, 856-857 (1887); *Holloway v. United States*, 148 F.2d 665, 667 (U.S.App.D.C. 1945); *Durham v. United States*, 214 F.2d 862, 871 (D.C.Cir. 1954); *Freeman*, 357 F.2d at 616-618.

242). According to this test, a defendant is legally insane if, while capable of distinguishing right from wrong and understanding the nature and quality of his act, he is unable to control the impulse to commit the act due to a severe mental impairment which completely and involuntarily undermined his free will.<sup>79</sup> By embracing this ‘control’ test, states officially recognised volitional impairment as a ground for exculpation, thereby aligning their insanity standards with prevailing medical views that saw mental disease as a condition affecting the mind in its totality, including its affective and volitional components (Gowers 1953: 116).<sup>80</sup>

Texas took a more conservative approach to the insanity defence. Until the publication of its reformed Penal Code in 1974, the state maintained the narrow approach of the original rules, with scant regard to psychiatrists’ on-going critiques and pressures for reform. For example, Texas courts maintained that the word ‘wrong’ in the *M’Naghten* test should be intended in the sense of ‘legal’ and not ‘moral’ wrong.<sup>81</sup> In so doing, they refused to expand the scope of the legal protection to individuals who were aware of the criminality of their act at the time of the alleged offence but were persuaded by a delusional belief that their conduct was morally justified. Similarly, the Texas legislature never complemented the *M’Naghten* rules with an irresistible impulse test and state courts regularly upheld this approach.<sup>82</sup>

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<sup>79</sup> See, e.g., *United States ex Yel. Kling v. Commonwealth*, 90 F.Supp. 208, 211 (W.D.Pa. 1950); *State v. Blair*, 99 A.2d 677, 686 (Vt. 1953); see generally Satten et al (1960).

<sup>80</sup> For a critique of the irresistible impulse test see, e.g., *Freeman*, 357 F.2d at 620-662; Wechsler (1955: 393).

<sup>81</sup> See, e.g., *Ruffin v. State*, 270 S.W.3d 586, 592 (Tex.Crim.App. 2008); *Fisher v. State*, 397 S.W.3d 740, 744 (App.14<sup>th</sup> Dist. 2013); *Pham v. State*, 463 S.W.3d 660, 671 (App.7<sup>th</sup> Dist. 2015).

<sup>82</sup> See, e.g., *Mikeska v. State*, 182 S.W.1127, 1131 (Tex.Crim.App. 1916); *Anderson v. State*, 148 S.W. 802, 804 (Tex.Crim.App. 1941); *Ross v. State*, 220 S.W.2d 137, 139 (Tex.Crim.App. 1948); *Simpson v.*

Over the first half of the 20<sup>th</sup> century, however, psychiatrists' influence in governmental and legal matters increased, prompting a radical transformation in the public's sensitivity towards the treatment of mental disease and offenders' rehabilitation (see generally Garland 1985b; Harcourt 2003). This changed intellectual climate found its most powerful expression in the 1950s, when psychiatrists and courts across the United States renewed their challenges to the insanity defence, in a concerted effort to expand the old 'right and wrong' test. The most expansive and influential attempt in this direction came with *Durham v. United States* (1954),<sup>83</sup> a landmark decision for American insanity jurisprudence (see Bazelon 1976). In this case, the Court of Criminal Appeals of the District of Columbia decided to re-evaluate the old insanity rules, arguing that they failed to account for the latest medical advancements, were based on an archaic view of mental disorder as an 'all or nothing' condition, and required psychiatrists to answer moral questions for which they were unprepared.<sup>84</sup>

To address these issues, Judge Bazelon, who delivered the opinion for the court, proposed a 'product test', which established that 'an accused is not criminally responsible if his unlawful act was the product of mental disease or defect'.<sup>85</sup> This approach drew from the work of 19<sup>th</sup> century medical scholar Isaac Ray (1838), who believed that all defendants whose crimes were the direct product of a mental disease ought to be exculpated, regardless of their level of cognitive or volitional impairment

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State, 291 S.W.2d 341, 345 (Tex.Crim.App. 1956); *Freeman v. State*, 317 S.W.2d 726, 730 (Tex.Crim.App. 1958).

<sup>83</sup> 214 F.2d 862 (D.C. Cir. 1954).

<sup>84</sup> *Durham*, 214 F.2d at 869-872.

<sup>85</sup> *Ibid.*, 874-875.

(Slobogin 2000: 1213; Weihofen 1956: 5).<sup>86</sup> The new rules, the judge argued, would help psychiatrists and courts communicate more effectively, align the insanity test with recent developments in the field of medical science, and broaden the category of mentally ill defendants who would receive treatment rather than death or incarceration.<sup>87</sup>

The *Durham* decision prompted a number of American states to abandon the *M'Naghten* rules and adopt the new 'product test'. Texas deviated from the reformist trend and, despite mounting pressures from the medical community, chose to maintain the 'right and wrong' test. Texas courts hold trial by jury to be an essential pillar of the state's legal system and a fundamental instrument of political participation.<sup>88</sup> Hence, they are typically reluctant to incorporate reforms that may infringe upon jurors' sovereignty and extend the influence of psychiatrists' opinions over legal verdicts.

The 'product test' arguably expanded experts' authority over judicial decision-making in problematic ways. Within the new framework, if a psychiatrist conclusively testified that a defendant was affected by mental illness, and that the criminal act was the product of the illness, he or she essentially decided on the ultimate issue of the defendant's criminal responsibility (Robin 1997: 229; Weihofen 1973).<sup>89</sup> As a result, jurors' decision-making was reduced to choosing the most convincing expert opinion, rather than weighing the totality of the evidence and forming an independent

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<sup>86</sup> See also *State v. Pike*, 49 N.H. 399, 422 (1870).

<sup>87</sup> *Durham*, 214 F.2d at 875-876; see also Robin (1997: 228-229).

<sup>88</sup> TEX. CONST. art. I, § 10.

<sup>89</sup> See also *Freeman*, 357 F.2d at 621-622.

assessment. Texas courts and legislatures refused to follow this path and, deviating from the expansive medical rationale adopted by the federal government and several American states, chose to maintain the moral language and narrow scope of the traditional rules.

However, the decades following *Durham* saw some significant legal developments that would briefly transform Texas' approach to the insanity defence. Almost twenty years following the application of the *Durham* rule, in *United States v. Browner* (1972),<sup>90</sup> the United States Court of Appeal for the District of Columbia acknowledged the limits of the 'product test' and substituted it with the insanity standard developed by the American Law Institute (ALI) for the Model Penal Code in 1962.<sup>91</sup> The ALI test represented a compromise between the old *M'Naghten* rules, the *Durham* test, and the irresistible impulse standard.<sup>92</sup> It established that a defendant 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 of his conduct or to conform his conduct to the requirements of the law.'<sup>93</sup>

The wording of the ALI test suggests three significant innovations. First, by including lack of appreciation of legal wrongfulness as well as inability to conform behaviour to legal requirements, the test clearly recognised both cognitive and volitional impairment as grounds for exculpation (Denno 2003: 13). Second, by

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<sup>90</sup> 471 F.2d 969 (D.C.Cir. 1972).

<sup>91</sup> § 4.01(1) (Official Draft and Revised Comments 1985).

<sup>92</sup> *Browner*, 471 F.2d at 972.

<sup>93</sup> *Ibid.*, 971.

substituting the word 'know' with the broader term 'appreciate', the test expanded the notion of cognition proposed by the *M'Naghten* rules, which focused on rational understanding alone, to include emotional comprehension as a fundamental element of culpability (Robin 1997: 229). Finally, by using a lack of 'substantial capacity' as a threshold for establishing the insanity defence, the test recognised that mental illness and criminal responsibility are a matter of degree, and that defendants need not prove total impairment to justify an insanity claim (Gaylin 1965).<sup>94</sup>

The *Brawner* decision was immediately met with widespread approval across the country. Virtually all states abandoned the *Durham* rules and enthusiastically incorporated the ALI test, or some modified version of it, in their statutes (Perlin & Cucolo 2001: 162; Denno 2003: 12). The Texas legislature followed broader trends and, for the first time since the mid-19<sup>th</sup> century, updated the *M'Naghten* rules to incorporate more modern scientific criteria. The revised standard appeared in the 1974 edition of the Texas Penal Code, which represented the text's first substantive revision since its initial publication in 1857 (Shannon 2006: 72-73). Texas' 1974 standard was a modified version of the ALI test. It established that in a successful insanity claim the defendant must prove, by a preponderance of the evidence, that

at the time of the conduct charged... as a result of mental disease or defect [he] either *did not know* that his conduct was wrong or *was incapable* of conforming his conduct to the requirements of the law he allegedly violated.<sup>95</sup>

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<sup>94</sup> See also *Freeman*, 357 F.2d at 618-619.

<sup>95</sup> TEX. PENAL CODE ANN. § 8.01(a) (West 1974).

The rule's second prong incorporated the volitional component of the ALI test. However, it used a different wording that narrowed the scope of the defence in two significant ways. First, while the ALI test only asked defendants to prove that they lacked 'substantial capacity' to appreciate the criminality of their conduct and abide by the law, the Texas standard required them to demonstrate that they were 'incapable' of conforming their conduct to legal standards, a significantly higher threshold. Through this adjustment, the Texas standard deviated from the more nuanced notion of criminal responsibility embraced by the ALI test, and asked defendants in insanity cases to prove 'complete impairment of either cognitive or volitional capacity' (Bubany 1974: 312).<sup>96</sup>

Moreover, while the ALI test only required defendants to prove *lack of appreciation*, the Texas standard asked them to demonstrate *lack of knowledge* of the criminality of their conduct (Shannon 2006: 73). By refusing to adopt the term 'appreciate' for the cognitive prong of the test, the Texas legislature excluded the emotional and affective aspects of cognition from jurors' consideration, forcing them to focus on impairments of the reasoning faculties as the sole basis for exculpation. Texas' formulation resulted from the state legislature's deliberate attempt to narrow the scope of the defence. Former Texas Senator Ray Farabee, one of the proponents of the reform, explicitly recognised this aspect when he explained that 'the use of the term "know" in reference to whether conduct was wrong was [meant to be] more restrictive' (Farabee & Spearly 1983: 674). As this analysis suggests, even when Texas opted for a

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<sup>96</sup> See also *Carter v. United States*, 325 F.2d 697 (5<sup>th</sup> Cir. 1963).

broader test that included volitional impairment as a ground for exculpation, it applied critical word changes that imposed tighter conditions and higher thresholds, significantly narrowing the scope of the defence.

Despite these restraints, Texas' version of the ALI test proved to be short-lived. In 1984, in response to public upheaval following the insanity acquittal of John Hinckley (Hans & Slater 1983: 202-203), a mentally disturbed man charged with the attempted murder of American President Ronald Reagan,<sup>97</sup> Congress developed a new insanity test which narrowed the scope of the defence in federal courts by eliminating the volitional prong and adopting a more stringent version of the *M'Naghten* rules (Reisner 1999: 526-527). The new rule, known as the 'Insanity Defense Reform Act',<sup>98</sup> allowed exculpation for reason of insanity only when the defendant 'as a result of mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts'. The test was stripped of any reference to control or irresistible impulse and eliminated the 'substantial capacity' standard, emphasising that only severe mental disease could potentially excuse defendants from criminal responsibility.

Texas, along with other American jurisdictions, embraced the federal government's restrictive proposal and revised its insanity test accordingly (Farabee & Specially 1983: 674). Its new 'right and wrong' standard, published in 1984, eliminated the volitional prong from the 1974 version and maintained the term 'know' instead of

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<sup>97</sup> United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981); see Robin (1997: 231); Perlin & Cucolo (2001: 325-328).

<sup>98</sup> Insanity Defense Reform Act 18 U.S.C. §17(A) (1984).

‘appreciate’. The result was a simplified version of the *M’Naghten* rules, which restricted the insanity defence to defendants who ‘as a result of mental disease or defect, did not know that [their] conduct was wrong.’<sup>99</sup> The new test failed to define ‘mental disease or defect’ for the purpose of the stipulation, but clearly provided that the terms should not be held to include ‘an abnormality manifested only by repeated criminal or otherwise antisocial conduct’. With this specification, the legislator meant to exclude defendants affected by psychopathy and other antisocial personality disorders from the legal protection.

Texas applies the 1984 version of the *M’Naghten* rules to this day. The historical pattern of the insanity standard in this jurisdiction suggests that Texas has consistently maintained a narrow approach to the exculpation of mentally ill defendants as compared to the federal government and other American states. While Texas’ decision to return to the old ‘right and wrong’ standard may have been prompted by the weaknesses of the volitional prong of the ALI test, the state’s departure from virtually every historical attempt to expand the reach of the rules and adapt them to the advancements of modern medicine suggests the influence of a penal culture that consistently opposes similar reforms in this jurisdiction. For instance, Texas’ reluctance to embrace more inclusive and medicalised tests may be due to its ‘law and order’ tradition, which tends to favour retributive interventions over rehabilitative efforts (Denno 2003: 9). As a Texan man witnessing a murder trial in 2003 emblematically

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<sup>99</sup> TEX. PENAL CODE ANN. § 8.01 (West 1984).

put it, '[t]here's the rule of law, and there's the rule of law in Texas... The rule of law in Texas is kind of cowboy law' (Zernike 2003: A18).

Texas' restrictive approach to the insanity defence is particularly significant if we consider that this jurisdiction does not recognise a diminished capacity doctrine based on mental disease or defect (Dix 1984). In fact, Texas only allows jurors to consider evidence of mental illness not amounting to legal insanity under two particular circumstances. First, if defendants can show that their mental condition at the time of the offence deprived them of the capacity to form intent, evidence of mental illness can be used to negate the *mens rea* element of the crime and reduce the conviction to an offence of lower degree.<sup>100</sup> Second, if presented at the punishment stage of a capital punishment trial, evidence of mental illness can be used to reduce a sentence from death to life imprisonment. Given the controversies raised by Texas procedures with regard to jurors' consideration of mitigating and aggravating evidence at sentencing, the next section will focus on this aspect of the debate and leave the discussion of defence strategies based on the negation of *mens rea* for future consideration.

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<sup>100</sup> TEX. PENAL CODE ANN. § 6.03(a) (West 1974).

## 2. History of the Texas Capital Punishment Statute

The Texas capital punishment statute was developed following *Furman v. Georgia* (1972),<sup>101</sup> a landmark US Supreme Court decision that ruled all existing capital statutes unconstitutional due to their rarity, arbitrariness and discriminatory application. To reinstate capital punishment on their penal codes and abide by the constitutional requirement, the Court argued, states needed to regulate judicial discretion and make the imposition of the ultimate penalty of death more reliable.<sup>102</sup>

The four years following *Furman* saw a flurry of legislative activity amongst states determined to reinstate capital punishment. Some jurisdictions proposed more stringent guidelines to direct jurors' decision-making, whereas others suggested mandatory death sentences for particular kinds of crime. Through a series of crucial decisions, in 1976 the Court struck down North Carolina and Louisiana's plan to impose mandatory death sentences for particular felonies,<sup>103</sup> while approving Georgia, Florida, and Texas' proposals to regulate jurors' discretion by imposing specific sentencing guidelines.<sup>104</sup>

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<sup>101</sup> 408 U.S. 238 (1972).

<sup>102</sup> *Furman*, 408 U.S. at 2734-2735.

<sup>103</sup> *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

<sup>104</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

The Court justified these decisions by arguing that, to pass the constitutional requirement, the statutes needed to guide courts as to what circumstances should warrant a death sentence over a life verdict, while leaving jurors with enough discretion to exert mercy.<sup>105</sup> Specifically, the law ought to allow jurors to consider a wide range of mitigating and aggravating evidence at sentencing and balance the conflicting factors against each other before reaching a final verdict (Dix 1976: 1364). This approach, the Court argued, would lead to a more consistent application of the death penalty, without depriving jurors of their ability to mitigate punishment when warranted by the particular circumstances of the offence.

As mentioned above, the Texas capital punishment statute passed the Court's constitutional scrutiny.<sup>106</sup> The approved statute included two crucial reforms. First, it included a list of aggravating factors that elevated the felony of murder to capital murder.<sup>107</sup> Second, it imposed rigid sentencing guidelines aimed at regulating jurors' discretion. According to the guidelines, at the end of the penalty phase of the trial and before the jury's deliberation, courts ought to ask jurors two or three 'special issue' questions.<sup>108</sup> The first question concerned the deliberateness of the crime and asked, 'whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.'<sup>109</sup>

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<sup>105</sup> *Gregg*, 428 U.S. at 88-195, 206-207, 220-226; *Woodson*, 428 U.S. at 302-305.

<sup>106</sup> *Jurek*, 428 U.S. at 272-278; see Citron (2006).

<sup>107</sup> TEX. PENAL CODE ANN. § 19.02(b)(1), § 19.03 (West 1974).

<sup>108</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 1974).

<sup>109</sup> *Ibid.*, art. 37.071(b)(1).

The second question addressed the defendant's future dangerousness and asked, 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.'<sup>110</sup> The third question was only included if the evidence raised the issue of provocation and asked, 'whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.'<sup>111</sup> Having read the special issues, courts ought to instruct jurors to answer 'yes' or 'no' to each question. If jurors unanimously answered 'yes' to all questions, the defendant would be sentenced to death.<sup>112</sup> If ten out of twelve jurors answered 'no' to at least one question, the defendant would be sentenced to life imprisonment.<sup>113</sup>

On the surface, these changes seemed to advance the Court's objective of regulating jurors' discretion and making capital punishment more reliable. However, the Texas statute failed to comply with another crucial constitutional requirement. As the Court stressed in *Woodson v. North Carolina* (1976),<sup>114</sup> in order to be held constitutional, states' capital punishment statutes must allow jurors to consider and give effect to defendants' mitigating evidence at sentencing. The Texas special issue questions failed to ask jurors to consider defendants' mitigating evidence, effectively undermining their ability to give effect to such evidence in their sentencing decision (Dix 1976: 1353-1355, 1365; Vartkessian 2011; Vartkessian, Sorensen & Kelly 2017:

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<sup>110</sup> *Ibid.*, art. 37.071(b)(2).

<sup>111</sup> *Ibid.*, art. 37.071(b)(3).

<sup>112</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071(e) (West 1974).

<sup>113</sup> TEX. CODE CRIM. PROC. ANN. art. 37.071(f) (West 1974).

<sup>114</sup> *Woodson*, 428 U.S. at 271.

18-19).<sup>115</sup> Instead of prompting jurors to weigh the mitigating and aggravating factors presented, the questions required them to focus on the likelihood that the defendant would commit acts of violence in the future, effectively turning speculations about defendant's future conduct into the sole criteria capable of establishing defendant's culpability. In upholding the constitutionality of the Texas statute, the Court assumed that jurors would interpret the second special issue question broadly enough to include considerations about the mitigating evidence presented at trial,<sup>116</sup> an assumption which would be repeatedly challenged over the following years (see Dix 1976: 1367-1377).

The first successful constitutional challenge to the Texas capital punishment statute came thirteen years after its first implementation, in *Penry v. Lynaugh* (1989).<sup>117</sup> The petitioner in this case, Johnny Paul Penry, was a severely intellectually disabled man who had suffered violence and abuse from his mother throughout childhood.<sup>118</sup> The jury convicted him for rape and murder and, after having listened to his mitigating evidence at the punishment stage, unanimously answered 'yes' to the special issue questions and sentenced him to death.

In reviewing the case, the Court highlighted a crucial problem ignored in its previous constitutional review. It specifically found that the special issue questions of the Texas statute prevented the jury from considering Penry's evidence as mitigating,

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<sup>115</sup> See *Jurek v. State*, 522 S.W.2d 934, 939-940 (Tex.Crim.App. 1975).

<sup>116</sup> *Jurek*, 428 U.S. at 2952.

<sup>117</sup> 109 S.Ct. 2934 (1989).

<sup>118</sup> *Penry*, 109 S.Ct. at 2937.

effectively turning it into a ‘two-edged sword’.<sup>119</sup> While Penry’s intellectual disability and childhood abuse arguably diminished his criminal culpability, the Court explained, without a question designed to give mitigating effect to the evidence, jurors were forced to consider it within the context of the second special issue question and ask whether Penry’s mental health issues and family background increased his likelihood to engage in future violent conduct.<sup>120</sup> Since people tend to mistakenly believe that mental disabilities incline individuals towards violent conduct, the Texas statute risked turning Penry’s mental condition into an aggravating factor at sentencing, tipping the scale in favour of death. To address this issue, the Texas legislature needed to formulate a statutory mechanism that would allow jurors to give mitigating effect to Penry’s intellectual disability. Without a similar provision, jurors risked perceiving the special issue questions as requiring them to impose a death sentence, even if the defendant’s personal history compelled them to exert mercy.

The *Penry* decision had widespread implications for the Texas capital punishment procedure. Concerned that future litigation might prompt the Court to strike down its statute as unconstitutional, in 1991 the Texas legislature amended the old provision to allow jurors to give effect to mitigating evidence at sentencing (Vartkessian et al 2017: 4). To accomplish this goal, the legislature reformulated the special issue questions by substituting the question concerning the deliberateness of the act with an inquiry into the defendant’s moral culpability. In the language of the new statute, capital jurors were required to assess

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<sup>119</sup> *Ibid.*, 2939; see Vartkessian et al (2017: 3-4).

<sup>120</sup> *Penry*, 109 S.Ct. at 2939.

whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society... [and] whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life rather than a death sentence be imposed.<sup>121</sup>

If, after having reviewed all the evidence, the jury answered 'yes' to the first question and 'no' to the second question, it had to pass a death sentence.

In the two decades following its formulation, Texas courts consistently worked to limit the application of the *Penry* requirement to a restricted category of mentally incapacitated defendants. In a concerted effort to maintain the emphasis on future dangerousness, trial courts regularly failed to instruct the jury on the use of mitigating evidence, while the TCCA consistently upheld such measures.<sup>122</sup> Over the years, several defendants challenged these restrictions on the grounds, already acknowledged in *Penry*,<sup>123</sup> that when asked to consider mitigating evidence of mental illness within the scope of the second special issue question, Texas jurors are inclined to consider it as a factor increasing defendant's likelihood to commit acts of violence in the future, a claim which has been supported by empirical research (Vartkessian 2011; Vartkessian et al 2017).

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<sup>121</sup> TEX. CODE CRIM. PROC. ANN. art. 37.01(b)1-2 (West 1991).

<sup>122</sup> See, e.g., *Lackey v. State*, 819 S.W.2d 111, 118-120 (Tex.Crim.App. 1989); *Satterwhite v. State*, 858 S.W.2d 412, 425-426 (Tex.Crim.App. 1993); *Robison v. State*, 720 S.W.2d 808, 485-489 (Tex.Crim.App. 1994); *Mines v. State*, 852 S.W.2d 941, 817-818 (Tex.Crim.App. 1994).

<sup>123</sup> *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989).

To tackle this issue while maintaining the limited application of the *Penry* provision, the US Supreme Court for the Fifth Circuit, which has jurisdiction over Texas, proposed that courts follow three criteria when evaluating whether they should provide jurors with special instructions on the use of mitigating evidence at sentencing. First, the court argued,

for jury instruction concerning defendant’s mental state before and during murder to be warranted pursuant to *Penry v. Lynaugh*, mitigating evidence at issue must demonstrate uniquely severe permanent handicap, or mental impairment of such severity and permanence to render it impossible for defendant to even learn from his or her mistakes.<sup>124</sup>

Second, even if defendants demonstrate that their mental disability is so critical as to constitute a ‘severe permanent handicap’, to qualify for the instruction defendants must present evidence demonstrating the existence of a ‘nexus’ between their handicap and the criminal act.<sup>125</sup> Finally, the Fifth Circuit established that the mitigation instructions are only necessary when the evidence presented has meaningful relevance beyond the scope of the special issue questions or has ‘an aggravating potential when considered within the scope of the special issues.’<sup>126</sup>

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<sup>124</sup> *Turner v. Johnson*, 106 F.3d 1178, 1189 (5<sup>th</sup> Cir. 1997); see also *Wilkerson v. Collins*, 950 F.2d 1054, 1060 (5<sup>th</sup> Cir. 1992); *Hughes v. Johnson*, 991 F.Supp 621, 632 (Dist.Ct.Tex.-Galveston 1998).

<sup>125</sup> *Harris v. Johnson*, 81 F.3d 535, 539 (5<sup>th</sup> Cir. 1996); *Jones v. Johnson*, 171 F.3d 270, 276 (5<sup>th</sup> Cir. 1999); *Goss v. State*, 826 S.W.2d 162, 165 (Tex.Crim.App. 1992); *Nobles v. State*, 843 S.W.2d 503, 506 (Tex.Crim.App. 1992); *Lackey*, 819 S.W.2d at 134-136; *Satterwhite*, 858 S.W.2d at 427; *Robison*, 720 S.W.2d at 487.

<sup>126</sup> *Ex parte Smith*, 309 S.W.3d 53, 60 (Tex.Crim.App. 2010); following the Fifth Circuit’s reasoning in *Roy Gene Smith v. Quarterman*, 515 F.3d 392 (5<sup>th</sup> Cir. 2008); see also *Lackey*, 819 S.W.2d at 131-132; *Satterwhite*, 858 S.W.2d at 426.

In other words, while the Fifth Circuit recognised that courts ought to provide jurors in capital cases with a means to give a reasoned moral response to mitigating evidence, it deemed such instructions unnecessary when: (1) the evidence suggested that the defendant suffered from a less severe mental disability, (2) the disability only had a weak connection to the defendant's moral culpability, and (3) the evidence had a clear aggravating potential if considered within the frame of the special issue questions. These restrictions have resulted in a high number of severely mentally ill defendants being denied the *Penry* instruction and receiving a death sentence (Amnesty International 2006; TCADP 2007), raising serious doubts about the legitimacy and constitutionality of the criteria.<sup>127</sup>

In line with their approach to the insanity defence, over the 20<sup>th</sup> century Texas courts have regularly resisted external pressures to reform and refused to embrace a more compassionate outlook towards defendants affected by mental disabilities. In a joint effort to maintain Texas' punitive approach to crime, they have developed a set of strategies based on a partisan interpretation of the Supreme Court's rulings, which have effectively excluded nuanced notions of moral blameworthiness from jurors' consideration at sentencing, while channelling their attention towards unreliable predictions of future violence (see Monahan 1981; Wiebusch et al 1995).

Having reviewed the historical development of the Texas insanity defence and the controversial effects of the Texas capital punishment statute with regard to

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<sup>127</sup> See, e.g., *Lackey*, 819 S.W.2d; *Satterwhite*, 858 S.W.2d; *Robison*, 720 S.W.2d; *Mines*, 852 S.W.2d.

mitigation, the next section will turn to an examination of the rules regulating the admissibility of expert evidence in Texas courts. The purpose of the following discussion is to identify how these rules have demarcated the kind of knowledge allowed to inform jurors' decision-making in capital punishment proceedings, paying particular attention to cases involving questions of mental illness and criminal responsibility.

### 3. The Admissibility of Expert Evidence in Texas Courtrooms

Over the past 200 years, expert witnesses' influence in US courtrooms has expanded dramatically (Slobogin 2006: 3). Acknowledging this development, prominent legal scholars and forensic psychiatrists have expressed serious concerns about the use of expert opinions to establish defendants' criminal liability, arguing that mental health professionals lack the necessary expertise to address legal questions (Morse 1978: 604-605, 620, 1982: 1037; Coleman 1984: 45, 61-64, 86-87; Stone 1984b: 96; Faust & Ziskin 1988: 31; Faigman 1989: 1073-1077; see generally Slobogin 2006: 6).

To limit the potentially harmful impact of expert testimonies, federal and state legislatures have developed a set of rules aimed at controlling the quality of scientific information allowed to influence judicial decision-making. According to these rules, before being admitted into the courtroom, experts need to satisfy specific requirements, for example by proving that they are sufficiently qualified to testify or that their evidence is based on reliable scientific principles.

Texas courts have historically applied different standards of admissibility depending on the nature of the expert evidence presented. While the ‘hard sciences’, such as chemistry and epidemiology, have been subjected to increasingly stringent standards of admissibility, the so-called ‘soft sciences’, such as psychology and psychiatry, have been subjected to less rigid criteria. Following a brief analysis of the main developments concerning the admissibility of hard scientific evidence, this section will examine the extent to which such standards have influenced the criteria applied to the presentation of psychiatric and psychological evidence in federal and Texas courts. The section will show that while in theory ‘hard’ and ‘soft’ scientific evidence should be ruled by the same standards of admissibility, in practice psychological and psychiatric evidence is rarely, if ever, excluded from the courtroom.

#### *a. Hard Sciences*

In the first three quarters of the 20<sup>th</sup> century, American courts, including Texas, applied a low threshold of admissibility to expert opinions. The general rule was that to qualify as experts, witnesses needed to base their statements on specialised knowledge believed to be ‘beyond the ken of [the] jury’ (Weinstein & Berger 1975: 702–10). An opinion based on information accessible to the average lay individual was not admissible under this category.

Texas’ first official departure from the ‘beyond the ken of the jury’ rule came in 1986, with the publication of the Texas Rules of Evidence and the formulation of Rule 702 (see Black 1977: 994). Rule 702 regulated the admissibility of expert witness

testimonies in criminal courts and was based on the language used in the 1975 edition of the Federal Rules of Evidence. According to Rule 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise (Goode & Sharlot 1988: 501§702.2).

The TCCA officially adopted Rule 702 in *Kelly v. State* (1992),<sup>128</sup> a historical decision which established the criteria to evaluate the scientific reliability of expert testimony in Texas courts. The petitioner in this case appealed his murder conviction on the grounds that the trial judge had wrongfully admitted DNA fingerprint evidence that was based on tests which was not commonly accepted as reliable within the relevant scientific community.<sup>129</sup> In so doing, petitioner argued, the judge had violated the ‘general acceptance’ test established in *Frye v. United States* (1923),<sup>130</sup> an influential ruling which set out the criteria of admissibility for novel scientific evidence in federal and several state courts.

The TCCA rejected the ‘general acceptance’ test embraced by petitioner, choosing instead to apply Rule 702 of the Texas Rules of Evidence (see Goode & Sharlot 1988). Speaking for the court, Judge Campbell argued that the sole principle guiding the admissibility of expert evidence in Texas courts should be whether the evidence is ‘sufficiently reliable and relevant to help the jury in reaching *accurate*

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<sup>128</sup> 824 S.W.2d 568 (Tex.Crim.App. 1992).

<sup>129</sup> *Kelly*, 824 S.W.2d at 570.

<sup>130</sup> 293 F. 1013 (D.C.Cir. 1923).

results'.<sup>131</sup> In order to be admissible, expert evidence derived from a scientific theory must meet three fundamental criteria: 'a) the underlying scientific theory must be valid; b) the technique applying the theory must be valid; and c) the technique must have been properly applied on the occasion in question'.<sup>132</sup> In determining the validity of the evidence, the trial court may consider the following non-exhaustive list of factors:

(1) the extent to which the underlying theory and techniques are accepted as valid by the relevant scientific community; (2) the qualifications of the expert(s) testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained in court; and (7) the experience and skill of the person(s) who applied the technique on the occasion in question.<sup>133</sup>

By adopting Rule 702 and developing new validity criteria, the *Kelly* court openly rejected the *Frye* standard, laying the foundations for Texas' adoption of the *Daubert* test a few years later.

The *Daubert* test was developed by the US Supreme Court in 1993 in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>134</sup> In this decisive opinion, the Court rejected the *Frye* standard and established new reliability criteria based on Rule 702 of the Federal Rules of Evidence (Redden & Saltzburg 1975). According to the *Daubert* ruling, federal courts ought to judge the admissibility of scientific evidence by evaluating, not whether the underlying theory was generally accepted, but 'whether the reasoning

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<sup>131</sup> *Kelly*, 824 S.W.2d at 572.

<sup>132</sup> *Kelly*, 824 S.W.2d at 573.

<sup>133</sup> *Ibid.*

<sup>134</sup> 509 U.S. 579 (1993).

or methodology underlying the testimony is scientifically valid [i.e. reliable] and properly can be applied to the facts in issue'.<sup>135</sup> In evaluating reliability under Rule 702, the trial judge may consider a number of factors,

including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.<sup>136</sup>

States' reaction to the *Daubert* opinion varied, with approximately half the states embracing the new standard and the other half maintaining the *Frye* test or some variation of it (Slobogin 2006: 12-14). Texas fell within the first group. Two years after *Daubert*, in *E.I. du Pont de Nemours & Co.v. Robinson* (1995),<sup>137</sup> the Supreme Court of Texas established the standards to be adopted when evaluating the admissibility of scientific expert testimony under Rule 702, essentially adopting the *Daubert* criteria. According to the Texas Supreme Court, to be admitted, expert testimony must not only be qualified but also relevant and reliable. To be judged relevant, the evidence must be 'sufficiently tied to the facts of the case', whereas to be considered reliable, the opinion must be based on principles or techniques that are 'grounded "in the methods and procedures of science"'.<sup>138</sup> In making the threshold determination of admissibility, the court explained, trial judges may consider any of the factors listed by *Daubert*.<sup>139</sup>

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<sup>135</sup> *Daubert*, 509 U.S. at 2796-2798.

<sup>136</sup> *Ibid.*

<sup>137</sup> 923 S.W.2d 549, 550 (Tex. 1995).

<sup>138</sup> *Robinson*, 923 S.W.2d at 556.

<sup>139</sup> *Ibid.*, 557.

*b. Soft Sciences*

While providing clearer standards of admissibility, the *Daubert* decision did not explain whether its criteria only applied to the evaluation of scientific evidence or if it could be used for technical and specialised knowledge more generally (Slobogin 2006: 14). Since the *Daubert* case concerned the admissibility of epidemiology studies, federal circuit courts, including the Fifth Circuit, limited the use of the *Daubert* criteria to evaluate the admissibility of hard scientific evidence, and used different criteria for the ‘soft’ sciences.<sup>140</sup> The US Supreme Court clarified its position on the matter in 1999, in *Kumho Tire Co v. Carmichael*,<sup>141</sup> where it applied the *Daubert* standard to all types of expert opinion, including clinical evidence. According to the *Kumho* Court,

The *Daubert* ‘gatekeeping’ obligation applies not only to ‘scientific’ testimony, but to all expert testimony. Rule 702 does not distinguish between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule’s word ‘knowledge’, not the words (like ‘scientific’) that modify that word, that establishes a standard of evidentiary reliability.<sup>142</sup>

A number of critics have argued that, if applied literally, the *Daubert/Kumho* test would virtually exclude all clinical opinions on culpability and future dangerousness from jurors’ consideration (Slobogin 2006: 28). However, the evidence suggests that the majority of American courts do not apply the *Daubert* test to behavioural science opinion,

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<sup>140</sup> *Tyus v. Urban Search Management*, 102 F.3d 256, 263 (7<sup>th</sup> Cir. 1996); *Compton v. Subaru of America*, 82 F.3d 1513, 1518 (10<sup>th</sup> Cir. 1996); *Moore v. Ashland Chemical, Inc.*, 126 F.3d 679, 685-689 (5<sup>th</sup> Cir. 1997); *United States v. Jones*, 107 F.3d 1147, 1156, 1158 (6<sup>th</sup> Cir. 1997); *United States v. Bighead*, 128 F.3d 1329, 1330 (9<sup>th</sup> Cir. 1997).

<sup>141</sup> 526 U.S. 137 (1999).

<sup>142</sup> *Kumho*, 526 U.S. at 1174-1175.

preferring to limit its application to the hard sciences. As Christopher Slobogin (2006: 22) highlights,

under both *Frye* and *Daubert*... diagnostic testimony has pretty much been left alone... [and] contrary to what one might expect after *Daubert*, reliability does not seem to be the linchpin of the analysis.

Whether their jurisdiction has endorsed the *Frye* or *Daubert* evidentiary rules, American courts rarely reject clinical testimony. As a result, most psychologists and psychiatrists who testify in criminal cases and rely on traditional diagnostic categories have never had their opinion excluded or significantly restricted (*Ibid.*, 27-28). In 2005 Dahir and colleagues conducted a survey of judges operating in *Daubert* jurisdictions. Their study revealed that

*Daubert's* influence on judicial admissibility decisions for [psychological] evidence is insignificant, leading us to conclude that one reason that psychology is still considered part of the 'soft sciences' is that judges seldom hold the discipline to the same rigorous methodological standards as the 'hard sciences' (78).

Their findings confirmed the results of another investigation that compared the admission of mental health expert testimony on culpability and dangerousness in the five years before and after the *Daubert* decision. According to the researchers, rather than diminishing, the proportion of opinions admitted after *Daubert* actually increased (Bersoff et al 2000; see also Shuman 2001: 282; Fradella et al 2003).

Texas courts have taken a similarly lax approach to clinical evidence, leaving mental health professionals free to say virtually anything in court, regardless of the accuracy and soundness of their opinions. Until the late 1990s, when asked to evaluate

the admissibility of psychiatric opinions in capital punishment trials, Texas county courts typically used experts' qualifications, knowledge and experience as the sole criteria for admissibility, an approach regularly upheld by the TCCA in its rulings.<sup>143</sup> In *Jenkins v. State* (1993),<sup>144</sup> for instance, the TCCA held that Dr. Field, a prison psychologist called to testify regarding the defendant's future dangerousness, was properly found competent to express an opinion since the witness

had a bachelor's degree in psychology, a master's degree in social psychology and a Ph.D. in counseling psychology... was a licensed professional counselor who recently had passed the state board for clinical psychologist... [and] had practiced in his field for about 15 years.<sup>145</sup>

Similarly, in *Clark v. State* (1994),<sup>146</sup> the TCCA denied the defendant's claim that the trial court had abused its discretion in admitting the testimony of a future dangerousness expert, since the record reflected that over the course of his career the psychiatrist had examined 'over 8,000 people charged with criminal offenses' and 'testif[ied] in approximately 97 capital murder trials in Texas and other states'.<sup>147</sup> Unfortunately, as the trials analysed in this thesis will reveal, education and experience are not always accompanied by scientific rigour and professional integrity, and are therefore insufficient to shield juries from the influence of fraudulent 'experts' serving

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<sup>143</sup> See, e.g., *Watson v. State*, 273 S.W.2d 879, 882 (Tex.Crim.App. 1954); *Nenno v. State*, 970 S.W.2d 549, 562 (Tex.Crim.App. 1998).

<sup>144</sup> 912 S.W.2d 793 (Tex.Crim.App. 1993)

<sup>145</sup> *Jenkins*, 912 S.W.2d at 814.

<sup>146</sup> 881 S.W.2d 682, 698 (Tex.Crim.App. 1994).

<sup>147</sup> See also *Fuller v. State*, 829 S.W.2d 191, 195 (Tex.Crim.App. 1992); *Joiner v. State*, 825 S.W.2d 701, 708 (Tex.Crim.App. 1992); *McBride v. State*, 862 S.W.2d 600, 607-608 (Tex.Crim.App. 1993); *Massey v. State*, 933 S.W.2d 141, 156-157 (Tex.Crim.App. 1996).

personal agendas rather than the interests of justice (see Acker 2017: 763-778; Chapter 7: Section 2[a]).

The limits of the ‘education and experience’ approach emerged particularly strikingly in the 1990s, following the *Daubert* and *Robinson* rulings. Acknowledging that courts were admitting the opinions of ethically problematic future dangerousness experts based on their qualifications alone, a number of capital defendants started challenging courts’ indiscriminate approach to clinical evidence, arguing that psychological and psychiatric opinions should be subjected to the same reliability standards required for the hard sciences.<sup>148</sup> However, the TCCA regularly upheld the trial courts’ reasonings, stating that since both psychology and psychiatry can be classified as ‘soft sciences’, future dangerousness predictions should be subjected to less rigorous standards of scrutiny than the ones required for the physical sciences.<sup>149</sup>

As this line of cases suggest, Texas courts’ uncritical approach to clinical testimony has proven particularly problematic when applied to future dangerousness predictions in death penalty proceedings. The reasons are twofold. First, criminologists (Monahan 1981: 47-49; Wiebusch et al 1995; Steadman 1977; Thornberry & Jacoby 1979; see generally Slobogin 2006: 99-108) and mental health experts (APA 1974, 1983; APA 1978) have repeatedly highlighted the scientific unreliability of clinical predictions of future dangerousness and challenged their utility in forensic contexts. For example, scholars have suggested that psychiatrists and psychologists conducting clinical

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<sup>148</sup> See, e.g., *McBride*, 862 S.W.2d at 707; *Massey*, 933 S.W.2d at 156-157; *Nemmo*, 970 S.W.2d at 562.

<sup>149</sup> See, e.g., *Nemmo*, 970 S.W.2d at 562.

assessments are only accurate in ‘one out of three predictions of violent behaviour’, an excessively low success rate to justify their qualification as experts in courts of law (Monahan 1981: 47; Kozol, Boucher & Garofalo 1972; Steadman & Cocozza 1974; Cocozza & Steadman 1976).<sup>150</sup> Second, as Chapter 7 will discuss in more detail, the Texas capital punishment statute places future dangerousness predictions at the heart of jurors’ sentencing decision, making a rigorous evaluation of the scientific principles and methodologies informing expert opinions on this topic particularly significant in this jurisdiction.

## Conclusion

Texas courts have historically resisted legislative attempts aimed at expanding the legal protections available for defendants suffering from mental illnesses and intellectual disabilities. For most of the 20<sup>th</sup> century, as the federal government and other US jurisdictions expanded the scope of the insanity defence, Texas maintained a comparatively narrow criteria, based on a simplified version of the traditional *M’Naghten* rules. Furthermore, while the US Supreme Court urged state legislatures to create statutory mechanisms which would allow jurors to mitigate the sentence for mentally ill capital defendants, Texas designed a system which effectively prompted jurors to impose death verdicts in such cases. Finally, as defendants asked courts to hold

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<sup>150</sup> For defence attorneys drawing from this accumulated evidence to challenge state experts’ predictions of future dangerousness in the 1980s and 1990s see, e.g., *Smith v. State*, 683 S.W.2d 393 (Tex.Crim.App. 1984), Def. Att’y Huff Quest. Dr. Dickerson Test. Trial Tr. vol. 3, 633:16-639:2; *Nethery v. State*, 692 S.W.2d 686 (Tex.Crim.App. 1985), Def. Att’y Goodwin Quest. Dr. Grigson Test. Trial Tr. vol. 5, 10:23-15:16, Def. Att’y Goodwin Quest. Dr. Dickerson Test. Trial Tr. vol. 5, 29:24-35:16; *Wilkins v. State*, 847 S.W.2d 547 (Tex.Crim.App. 1992), Def. Att’y Brush Quest. Dr. McNeel Test. Trial Tr. vol. 33, 35:19-50:18.

psychiatric and psychological evidence to the same standards of admissibility required for the 'hard' sciences, Texas judges continued to admit such evidence, no matter how inaccurate and unreliable it proved to be. This tendency has contributed to the maintenance of a punitive penal system which provides jurors with very limited possibilities to exert mercy when dealing with mentally disabled capital defendants, and which facilitates the strategic use of future dangerousness predictions based on questionable scientific standards.

## CHAPTER 4. FROM PSYCHO-LEGAL THEORY TO COURTROOM

### PRACTICE

#### Introduction

This chapter turns to a detailed analysis of popular misconceptions about mental illness and criminal responsibility found in Texas capital punishment trials over the 20<sup>th</sup> century. A cursory look at late 20<sup>th</sup> century developments in mental disability law and capital punishment jurisprudence seems to suggest that the role of mental health professionals is expanding, and that the law is increasingly engaging with the most advanced discoveries in the psychological and behavioural sciences. US Supreme Court rulings such as *Woodson v. North Carolina* (1976)<sup>151</sup> and *Ake v. Oklahoma* (1985)<sup>152</sup> suggest a growth of the role of experts in establishing defendants' moral culpability in capital punishment cases. Key decisions such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993)<sup>153</sup> show an increased attention to modern standards of scientific validity and reliability in evaluating the admissibility of expert evidence. John Hinckley's acquittal by reason of insanity<sup>154</sup> gives the impression that, in the United States, the intersection of mental disabilities and crime is intensely debated, carefully scrutinised, and powerfully litigated. However, the analysis of trial transcripts of capital punishment

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<sup>151</sup> 428 U.S. 280 (1976).

<sup>152</sup> 470 U.S. 68 (1985).

<sup>153</sup> 509 U.S. 579 (1993).

<sup>154</sup> *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981).

cases involving defendants with severe mental illnesses reveals the existence of a deep mismatch between the law in the books and the law in practice.

While several US Supreme Court rulings indicate repeated attempts to incorporate the scientific discoveries and clinical expertise of the mental health professions, the daily dealings of the lower courts show a backward, stagnant, approach to mental disabilities and their bearing on defendants' moral culpability. In most of these low-profile cases, the input of experts is either missing or grounded in dubious or obsolete scientific standards, the quality of legal representation is below average, and the rulings of the higher courts are either ignored or distorted to fit local political agendas. With the exception of a few high-profile cases, such as *Rubenstein v. State* (1966)<sup>155</sup> and *Penry v. State* (2005),<sup>156</sup> if experts are called to testify, they rarely rely on the most recent advances in their field, revealing a wide gap between the pace of development of academic scholarship and its practical application in forensic contexts. Moreover, even in the few cases where highly qualified defence experts provide compelling evidence aimed at reducing the defendant's moral blameworthiness, the soundness of their scientific arguments and the accuracy of their conclusions ultimately do not seem to matter. As the following pages will show, rather than being dominated by scientific views of human psychology and behaviour, trial proceedings and sentencing verdicts are powerfully informed by a widespread common-sense view, which routinely ignores the empirical evidence provided, and defers to prejudices,

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<sup>155</sup> 407 S.W.2d 793 (Tex.Crim.App. 1966).

<sup>156</sup> 178 S.W.3d 782 (Tex.Crim.App. 2005).

myths, and stereotypes about what mental disabilities are, how they manifest themselves, and how they relate to the crime committed.

In line with the United States' traditionally democratic and populist approach to legal matters (Steiker 2016), trial courts have a clear tendency to privilege the view of 'ordinary men' over that of experts and intellectual elites (see Perlin 1999).<sup>157</sup> This tendency emerges in courts' apparent efforts to maintain these common-sense views intact; by omitting clarifying instructions for the jury, allowing expert testimonies based on evidence that has been deemed inaccurate by legal and psychiatric authorities, and/or by directly fuelling myths and stereotypes through prosecutorial argument. This far from flattering picture shows that, in order to fully understand *how* mental disability law is routinely applied, and *why* it is applied in this manner, we should not limit ourselves to the analysis of US Supreme Court decisions and high-profile cases (Perlin 1999: 13-14). Instead, we need to turn our attention to the hidden world of mental disability law, to the daily workings of the trial courts where the destinies of 'invisible' defendants charged with capital offences are ultimately written.

This chapter draws from the psycho-legal literature, Texas trial transcripts, and TCCA opinions to identify longstanding trends in the ways experts and lay people interpreted the intersection of mental illness and criminal responsibility over the 20<sup>th</sup> century. The chapter is divided into three sections. Section 1 explores the ontological and epistemological assumptions that distinguish scientific and legal views of human

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<sup>157</sup> United States v. Brawner, 471 F.2d 969, 977 n. 6 (D.C.Cir. 1972).

psychology and behaviour. Section 2 examines the false beliefs that inform lay and expert understandings of mental illnesses and intellectual disabilities in capital punishment trials. Finally, Section 3 illustrates the different kinds of witnesses that are traditionally called to testify in death penalty proceedings, paying a particular attention to different categories of forensic mental health experts, the timing of their emergence in the trial context, and the nature and scope of their diagnostic methods.

## 1. Ontological and Epistemological Clash

The reasons for the mismatch between modern scientific principles and their application in the legal arena are varied. First, while the US Supreme Court has acknowledged the importance of giving effect to mental disability evidence in guilt and sentencing deliberations, it has repeatedly stressed that psychiatry and psychology are not exact sciences, that there still is significant dispute about the nature and symptoms of various diagnoses, and that the law is not bound by the criteria followed by the mental health professions.<sup>158</sup>

Secondly, the legal and the psychiatric view of human psychology and behaviour are very different, creating an ontological and epistemological clash with a difficult, if not impossible, solution (Whitlock 1963; Sadoff 1984). Advocates of the common-sense approach to human psychology in mental disability cases propose that all juries need to know about the defendants' mental state can be inferred without the

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<sup>158</sup> *Addington v. Texas*, 441 U.S. 418, 429 (1979); *Kansas v. Hendricks*, 521 U.S. 346, 360 n 3 (1997); *Clark v. Arizona*, 548 U.S. 735, 774-775 (2006); see Morse (2011: 894).

contribution of mental health experts (Morse 1978: 562-590, 1982: 982; contra Bonnie & Slobogin 1980). Mental health professionals, on the other hand, hold clearly diverging views, highlighting the importance of expert knowledge and experience for the understanding of the psychological mechanisms underlying the criminal act and for providing suitable recommendations for rehabilitative interventions (Briggs 1923: 62).

Thirdly, science and the law start from a different notion of time (Lelling 1993: 1484-1485; see also Greenhouse 1988). Whereas science constantly looks forward, legal opinions, even the most radical and innovative, are bound by historical precedent. While psychiatrists and psychologists always seek to replace old theories and methods with new models and techniques, judges and attorneys are required to justify their decisions and support their arguments with established jurisprudence (Lelling 1993: 1485). Even when trying to keep in line with scientific developments and current concerns, the legal system needs to ensure stability and continuity, reducing uncertainty and unpredictability. The behavioural sciences, on the other hand, are not bound by the scientific beliefs of the past and would languish if constrained by what has already been said and done.

This philosophical discrepancy is partially responsible for the ongoing tension between the legal and the scientific view of human psychology that dominates the psycho-legal arena. Whereas science proceeds by paradigmatic shifts, jumps, and revolutions (see Kuhn 2012), the law is the product of gradual historical change, is mostly suspicious of the latest innovation, and deferential to the status quo. While the law has maintained intact a folk psychological view of human behaviour whose origin

dates back thousands of years, psychiatry, psychology and neurophysiology have repeatedly challenged this view, by unveiling the physiological mechanisms underlying our mental processes and proposing alternative explanations for the formation of criminal intent (Lelling 1993; Sifferd 2006).

The folk psychological view that informs mental disability law is a seemingly intuitive theory used by individuals to understand and predict their own and other people's behaviour (Sellars 1956; Fodor 1987; Carruthers & Smith 1996). As Katrina Sifferd explains,

this cognitive capacity allows humans to postulate that behaviour is causally related to mental states such as beliefs and desires, and to predict or interpret such behaviour based on attribution of mental states (2006: 2).

This folk psychological view is routinely used in the criminal law context to establish defendants' mental state at the time of the crime and their relative level of guilt. Sentencing verdicts thus depend on whether a defendant had the 'intent to kill', whether he believed that the act was wrong, or on whether the act was committed knowingly or purposefully.

This view of human psychology is based on the assumptions that humans are rational beings, whose actions and movements are led by mental entities such as 'beliefs', 'desires' and 'intentions'. There is no scientific evidence supporting these assumptions (Lelling 1993: 1475). Yet, the theory provides an apparently self-evident explanation which, until the second half of the 20<sup>th</sup> century, was hardly ever questioned. It was only with the advent of Freudian psychoanalysis, Skinnerian behaviourism, and eliminative

materialism, that the foundations of this entrenched view of human behaviour began to shake.

Sigmund Freud's psychoanalytic theory had a powerful influence on American psychiatry in the 1950s and 1960s. Freud famously argued that human subjects are dominated by unconscious instincts which are only kept under control through various mechanisms of repression developed during early childhood (Lelling 1993: 1485-1486; see also Gleitman 1992: 302-303). If one of these mechanisms of repression fails to form, and the internal conflict between natural instincts and societal expectations becomes too great, the subject experiences the eruption of irrational subconscious impulses which can take the form of deviant criminal behaviours (Freud 1957[1916]: 332-333). His conclusion with regard to criminal responsibility was that, since impulses and desires are unconscious and therefore inaccessible to the subject's rational mind, he or she should not be held accountable for the criminal actions resulting from their failed suppression.

B. F. Skinner's behaviourism provided a radically different challenge to the folk psychological view (Lelling 1993: 1486; see also Gleitman 1992: 72-73, 77-79; Sifferd 2006: 578-579). In his view, explanations of human behaviour should never rely on assumptions about internal mental states, but only on external observations of physical activities that can be directly observed (Dennett 1978: 55-6; see generally Skinner 1985). Skinner and other behaviourists,

sought to explain all of human behaviour as an elaborate causal exchange between organisms and the environment; behaviour was dictated solely by the response - reward or punishment - that the organism could expect from his surroundings (Lelling 1993: 1487; see also Sifferd 2006: 578).

By denying the existence of a conscious mind and of its related mental states, behaviourists 'dehumanized human psychology', and had their views become more widely accepted, our current way of thinking the criminal law would have been significantly modified (Lelling 1993: 1488; see also Churchland 1984: 89; see generally Skinner 1972).

Finally, eliminative materialism, a scientific-philosophical school of thought emerging in the 1950s, argues that recent discoveries in the field of neuroscience undermine the assumptions of the folk psychological view that informs the criminal law (Lelling 1993: 1492). Advocates of this school of thought propose a 'materialist' view of the human mind as a biological manifestation of the brain, and the 'elimination' of psychological theories based on the existence of mental states such as beliefs and desires (see, e.g., Churchland 1981; Churchland & Churchland 1998; contra Lelling 1993; Sifferd 2006). They picture a mechanistic view of human behaviour which challenges the common-sense notion of 'voluntary act' and 'criminal intent' by proposing an alternative explanation based on physiological processes preceding the act itself and therefore operating independently from the conscious mind (see, e.g., Libet 1985).

Despite these numerous attacks, the folk psychological view that informs the criminal law has remained largely intact. Notwithstanding the lack of scientific evidence supporting this view, judges, legal scholars (Sifferd 2006; Morse 2008: 210), attorneys,

and juries hardly, if ever, question its validity and utility for the criminal law. Neither Freud nor Skinner caused significant changes to the US legal system, although Freud's views had some impact in the 1950s, when the popularity of his ideas peaked (Denno 2005: 615-616). Similarly, while recent discoveries in the field of neuroscience have provided new and compelling challenges to common-sense explanations of behaviour, even these recent attacks have had little impact on the legal reasoning underlying the assignment of criminal culpability. Part of the explanation is that, while folk psychology has never been validated, it has also never been refuted (Morse 2008: 210). Moreover, this view of human behaviour is a necessary condition for the maintenance of the concept of responsibility upon which our legal system depends. If we did not assume that humans were rational agents guided by internal desires, 'it would be impossible to judge individuals against any kind of behavioural standard, since such standard would be undefinable' (Lelling 1993: 1473). If human action was entirely directed by unconscious impulses, external conditionings, or neurophysiological mechanisms, the concept of personal accountability would lose its explanatory force.

The law's tendency to embrace common-sense rather than scientific views of human behaviour is reflected not only in mental disability law, but also in the way lay actors interpret mental disabilities and their association with criminal behaviour in trial proceedings. As the next section will show, far from relying on scientific evidence and empirical data, such interpretations tend to be informed by old prejudices, myths, and stereotypes about how mental illnesses manifest themselves and how they influence defendants' appearances, manners, and behaviours, an issue which has had dramatic consequences for the outcomes of insanity trials over the 20<sup>th</sup> century.

## 2. False Beliefs about Mental Illness at its Intersection with Crime

### *a. The Wild Beast Standard of Insanity*

The ‘Wild Beast’ standard of insanity embodies one of the most entrenched and widely held misconceptions about how mental illnesses leading to criminal exculpation should manifest themselves (Perlin 1989: 640, 700; see also Greenawalt 1984; Roberts, Golding & Fincham 1987: 226). Developed by Justice Tracy in the 1724 case of *Rex v. Arnold*, the Wild Beast test satisfies a large portion of the American public, eminent members of the judiciary, as well as state and federal legislators. According to the Wild Beast test, in order to be found not guilty by reason of insanity, a defendant

must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment.<sup>159</sup>

The Wild Beast standard of legal insanity prompts three considerations. First, the test places insane defendants in the same category as children and animals, two groups which are traditionally excluded from criminal punishment either due to incomplete intellectual development, or to a lack of the reasoning powers that distinguish humans from the other inhabitants of the animal kingdom. By framing insane individuals as a category whose mental powers are qualitatively rather than quantitatively different from those of normal individuals, Justice Tracy depicted the mentally disabled

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<sup>159</sup> *Rex v. Arnold*, 16 St. Tr. 695 (1724) in Howell, Cobbett & Jardine (1816: 764-765); see also Meynen (2016: 13).

individual 'as different in kind' playing into an idea of abnormality that separates the mentally incapacitated from the average person (see also Loughnan 2012: 56).

This approach plays into old and still widely held assumptions about the ontological character of mental illness at its intersection with crime. According to Arlie Loughnan (2012: 49-57), through its daily practices, the legal system has framed mental illness associated with criminal conduct as 'dispositional'. By this term, she means that mental illness is viewed as a relatively permanent status or condition, which is inscribed into the character of the individual, and results in particular antisocial and deviant behaviours. This notion is useful in so far as it creates a logical connection between the criminal act and the defendant's intent. George Fletcher proposes a similar association in his analysis of what he calls 'manifest criminality', the idea that 'the criminal act manifests the actor's criminal purpose and is treated as a substantive condition of liability' (2000: 232; Loughnan 2012: 53). These ideas seem to suggest a deep-seated tendency in both criminal law and psychiatry to frame mental illness as a mix of internal disposition and action, something inscribed into the character of the individual and interpretable in behavioural terms.

The dispositional view of mental illness and crime reflects the Fundamental Attribution Error described by social psychologists, a cognitive bias that leads humans to overestimate the influence of personal dispositions, and to underestimate the impact of external circumstances, on people's behaviour (Heider 1958; Bordens & Horowitz 2002: 76). Texas district attorneys regularly take advantage of this tendency by inscribing defendants' actions into their personality make-up, often by exploiting

psychiatric diagnoses such as psychopathy and antisocial personality disorder, and/or by turning defendants' criminal acts into the totality of their persona by essentialising them as 'rapists', 'murderers', 'sadists', 'thrill killers', or 'sexual predators' (see Chapter 7: Section 2[a]).<sup>160</sup>

The dispositional nature of mental illness means that, under certain circumstances, the criminal act can be read as a symptom of mental disease (Loughnan 2012: 55). A typical example of such interpretation can be found when the legal system is faced with motiveless crimes, or with cases in which the offence itself is used as evidence that the defendant is 'becoming mad'. The latter association becomes particularly powerful when the criminal act was preceded by a gradual change in the disposition and character of the individual, an aspect which 19<sup>th</sup> century psychiatrists interpreted as a clear sign of the advent of mental disease (see, e.g., Prichard 1842: 31-32; Ray 1871[1838]: 135-136), and which has survived in the reasoning of lay and expert witnesses testifying in 20<sup>th</sup> century capital punishment proceedings.<sup>161</sup>

Second, the Wild Beast standard requires a *complete* lack of 'understanding and memory', an extremely high bar if we consider that even severely mentally disabled defendants usually maintain a part of their cognitive abilities intact. Indeed, far from resulting in beast like behaviour and a total lack of 'understanding and memory',

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<sup>160</sup> See, e.g., *Burks v. State*, 583 S.W.2d 389 (Tex.Crim.App. 1979), Dist. Att'y Whaley Quest. Dr. Holbrook Trial Tr. vol. 2, 796:11-798:15; *Penry*, 178 S.W.3d, Dist. Att'y Cl. Arg. on Punishment Trial Tr. vol. 58, 121: 13-16, 125:18-25.

<sup>161</sup> See, e.g., *Morris v. State*, 255 S.W. 744 (Tex.Crim.App. 1923), Rosa Morris Test. Trial Tr. 48-52; *Ross v. State*, 220 S.W.2d 137 (Tex.Crim.App. 1948), Bernice Test. Trial Tr. 136-138; *Dr. Boyd Test.* Trial Tr. 243-244.

mental illnesses and intellectual disabilities, even the most severe, rarely result in a total loss of the rational capacities. As explained by a defence expert witness in *Penry*,<sup>162</sup> contrary to common misconceptions,

you find people who can do some fairly sophisticated things that you wouldn't expect of a person with mental retardation... This isn't just the very bottom that people are like tree stumps or something, that they can't do anything at all. We know that there are strengths. We expect them, and it's included in the literature very strongly.<sup>163</sup>

Yet, most people commonly assume that having strengths in some areas, whether practical or intellectual, is incompatible with a diagnosis of mental illness or intellectual disability which should call for criminal exculpation (Arens, Granfield & Susman 1965: 9; Goldstein 1967: 42; Hans & Slater 1984: 111).<sup>164</sup>

Prosecutors regularly play into this misunderstanding. They routinely undermine insanity and mitigation claims by eliciting information from witnesses to the effect that the defendant does not behave irrationally in every sphere of life.<sup>165</sup> A prosecutor choosing a similar strategy may ask the expert witness:

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<sup>162</sup> 178 S.W.3d.

<sup>163</sup> Dr. Darning Test. Trial Tr. vol. 53, 205:21-206:7.

<sup>164</sup> For Texas cases showing this tendency amongst attorneys and lay witnesses see, e.g., *Penry*, 178 S.W.3d, Asst. Dist. Att'y Hon Quest. McComb Trial Tr. vol. 42, 224:4- 231:12.

<sup>165</sup> See, e.g., *Apolinar v. State*, 244 S.W. 813 (Tex.Crim.App. 1922), Dist. Att'y McAskill Quest. Cardwell Trial Tr. 11, Dist. Att'y McAskill Quest. Dr. Davis Trial Tr. 13; *Leath v. State*, 346 S.W.2d 346 (Tex.Crim.App. 1961), Dist. Att'y Bryan Quest. Debedts Trial Tr. 303-304, Dist. Att'y Bryan Quest. Campbell Trial Tr. 336-337; *Johnston v. State*, 396 S.W.2d 404 (Tex.Crim.App. 1965), Dist. Att'y Cleveland Quest. Miller Trial Tr. 215:19-220:1.

[Y]ou say so and so is insane; now, isn't it a fact that he dresses himself neatly every morning? He doesn't put his trousers on his arms and his coat on his legs, does he, doctor? When it is meal time he goes to the dining room, he doesn't go to the sitting room, does he? (Lind 1922: 232).

Psychiatrists have criticised this strategy, arguing that severely mentally ill defendants may still be able to provide food and shelter for themselves, go to work, and carry out other typical daily activities. As Dr. Bernard Glueck, a prominent forensic psychiatrist and psychoanalyst, argued in 1914

[L]egal [actors] fail to appreciate... the fact that an individual may be very seriously ill mentally and urgently require hospital treatment, without, however, showing those gross disorders of conduct which go to make up the legal evidence and diagnosis of insanity. Neither do they seem to recognize the possibility of a seriously unbalanced individual making quite a normal impression, at any rate before a jury of laymen at the time of his appearance in court (371-372).

Third, the Wild Beast test does not require the opinion of a medical expert or the use of any specialist terminology to establish mental incapacity, since even the average person knows what a child or an animal is, and hence can make the comparison based on his own observations. The idea that people without special medical expertise can rely on observations of defendants' manners, appearance, and behaviour to establish the presence of mental disorder draws from widely held epistemological assumptions in the context of criminal law doctrines and everyday legal practices. As highlighted by Dr. Britton Evans, a former Medical Superintendent of the New Jersey State Hospital in 1909,

[T]he average American citizen believes himself to be a standard authority on medical expert testimony... the testimony of medical experts furnishes the one theme which all men seem to feel fully qualified to analyze, simplify, rearrange, boil down or build up to meet individual fancy or personal prejudice (84).

According to Loughnan (2012: 59), at its intersection with criminal behaviour, mental illness is traditionally viewed as ‘readable’, meaning immediately recognisable even by a lay observer without medical expertise.<sup>166</sup> Interestingly, this idea has resisted two centuries of attacks from the rising mental health professions, which have repeatedly highlighted the hidden and elusive character of mental disease and the need for specialised expertise for its diagnosis and interpretation (see, e.g., Briggs 1923: 62).<sup>167</sup> As clinical psychologist Timothy Dering testified in *Penry*, during his years of experience dealing with intellectual disabilities, he had encountered several myths and stereotypes:

[T]hings like people with mental retardation look funny. They talk funny. They may have an odd speech pattern. It is an obvious disorder. You can kind of tell from across the street. Certainly, that’s true of people with mental retardation... Some of those folks really do look very mentally retarded. You can see it. But many, many people don’t look mentally retarded... They look like the rest of us. They don’t dress any differently. They are interested in clothes and dressing stylishly and getting the latest jeans or sneakers or whatever. And so, they will not appear mentally retarded.<sup>168</sup>

This common misconception contributes to explain why lay witnesses exert such a powerful influence on the process of legal adjudication of criminal responsibility. If mental illness is readable through the observation of external behaviour, any lay individual who has had the opportunity to observe the defendant in action, can

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<sup>166</sup> Along these lines, Nicola Lacey (2010: 117) argues that in 18<sup>th</sup> century England ‘the trial was focused not on internal questions about the defendant’s state of mind but rather on external facts of conduct’, a tendency which, as we will see, survives even in 20<sup>th</sup> century penal practices (see, e.g., Chapter 5: Section 4[a]).

<sup>167</sup> See also *Singleton v. State*, 346 S.W.2d 328 (Tex.Crim.App. 1961), Dr. Tate Test. Trial Tr. 218:23-25.

<sup>168</sup> Dr. Dering Test. Trial Tr. vol. 52, 203:14-204:6.

legitimately provide an opinion on his or her mental state and bear on the final decision regarding his or her personal culpability.

Despite psychiatrists' repeated challenges to these epistemological assumptions, the public continues to demand 'that a mentally ill defendant comport with its visual images of "craziness" in order to qualify as insane' (Perlin 1989: 724; see also Branham 1926: 175; Sandys, Trahan & Pruss 2008: 683-684). Similarly, when evidence of 'flagrant psychotic symptomatology' is missing, the judiciary has shown pervasive hostility against the insanity defence, as some studies suggest (Arens et al 1965; Arens & Susman 1966). If a defendant does not look crazy; if rather than jumping on his chair, screaming to imaginary monsters, or running around naked he sits calmly and quietly, his insanity defence is unlikely to be successful (Perlin 1989: 724). The evidence coming from the medical world suggests that this common-sense approach may be highly deceptive, especially since mentally ill and intellectually disabled people tend to mask their disabilities in an attempt to appear as normal as possible (Lewis et al 1986, 1988a; Greene 1988; Grossman & Cavanaugh 1989).

The reliance on external appearance emerges clearly in the testimony of several lay witnesses in Texas capital punishment trials. Typical examples include witnesses commenting on the defendant's peculiar facial expression, wild eyes, and staring look when arguing that, in their view, the defendant had gone mad.<sup>169</sup> For instance, in the

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<sup>169</sup> See, e.g., *McGee*, 238 S.W.2d, Eva McGee Test. Trial Tr. vol. 3, 469-470; *Houston v. State*, 287 S.W.2d 643 (Tex.Crim.App. 1956), Def. Att'y Stinson Quest. W. H. Houston Trial Tr. 166:10-12; *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1989), Annabel Lackey Test. Trial Tr. 5253:19-20.

trial of Joe Shield, a man charged with the murder of his divorced wife and in-laws, a lay witness argued that before the criminal act,

in talking of his family affairs and troubles [the defendant] had a defiant look out of his eyes... Joe's expression was similar to the look on other fellows' faces who have proven that they were kind of wild by their later acts.<sup>170</sup>

The practice of asking experts to analyse the criminal act to infer defendants' mental state at the time of the crime constitutes an additional example of the law's tendency to infer mental health from the observation of behaviour.<sup>171</sup> In the first three quarters of the 20<sup>th</sup> century, this was done through the use of long hypothetical questions.<sup>172</sup> For example, in McGee's case (see Introduction), doctors were asked hypothetical questions which lasted as long as 45 minutes and covered numerous pages of the trial transcript.<sup>173</sup> More recently, it has become common practice to simply provide a reconstruction of the defendant's actions at the time of the crime and use them to establish whether they could result from a deranged or disabled mind.

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<sup>170</sup> *Shield v. State*, 38 S.W.2d 76 (Tex.Crim.App. 1931), Leon Shield Test. Trial Tr. 122¶6-123¶1.

<sup>171</sup> See, e.g., *Maxey v. State*, 145 S.W. 952, 959 (Tex.Crim.App. 1912).

<sup>172</sup> The Hypothetical Question rule affords both parties the right to ask for an expert opinion based upon a hypothetical statement of the facts, which is reasonably consistent with the evidence presented. The rule provides that if one party gives a poor representation of the facts, the other party has the right to ask the witness a counter-hypothetical question addressing any possible lacunae or misrepresentation. Additionally, the parties can inquire into the reasons behind the expert's answers, and the court has the duty to oversee that the process is conducted fairly and reasonably; see *Leache v. State*, 3 S.W. 539, 58 Am. Rep. 638 (App. 1886).

<sup>173</sup> *McGee*, 238 S.W.2d, Def. Att'y Simpson Quest. Dr. White Trial Tr. vol. 1, 155-161¶1. Psychiatrists and courts across the United States have criticised this kind of practice for confusing rather than assisting the jury in evaluating the facts in evidence. See, e.g., Chapin (1909: 92); Reedy (1912); Briggs (1923); Menninger (1928); Bychowski & Curran (1946); *Clautice v. Murphy*, 180 Md. 558, 48 (Md. 1942).

In *Penry*, for instance, the District Attorney (hereinafter ‘DA’) used evidence that the defendant had planned ahead, improvised strategies to avoid getting caught, and deceived others to carry out the criminal act, to suggest that John Penry was not mentally retarded. The following exchange between the DA and state expert Dr. Roger Saunders clearly illustrates this strategy:

Q. With regard to the - the way the records reflect how the crime was committed, is there anything that tells you about his adaptive functioning in those records?

A. Yes.

Q. And what is that?

A. In the rape and in the rape-murder, he showed good forward planning, he was able to sequence events in his mind, he was able to anticipate outcomes and was capable of pretty sophisticated interpersonal deception. He was able to think on his feet and remain calm and come up with plausible stories during the commission of his crimes.<sup>174</sup>

Dr. Saunders’ conclusion in light of this evidence was that Penry was not mentally retarded. Evidence of premeditation and attempts to escape punishment and conceal the evidence is frequently used even in insanity trials, to argue that the defendant had a rational criminal motive and knew that the criminal act was wrong.<sup>175</sup> Testifying in *McGee*, for example, defence expert Dr. Paul White argued on cross examination

The intention of getting away from the scene of the crime is indicative, in my opinion, of a man knowing the difference between right and wrong when he has killed a man... [The defendant] exercised some volition in getting away from there... [H]e knew enough to think about it and believe that society would feel that he was wrong, and therefore, he was fleeing from the wrath of society.<sup>176</sup>

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<sup>174</sup> Dist. Att’y Price Quest. Dr. Saunders Trial Tr. vol. 44, 14:23-15:10.

<sup>175</sup> See, e.g., *Murray v. State*, 182 S.W.2d 475, 477 (Tex.Crim.App. 1944); *Johnston*, 396 S.W.2d, Dist. Att’y Cleveland Quest. Dr. Rubin Trial Tr. 194:9-16.

<sup>176</sup> *McGee*, 238 S.W.2d, Dist. Att’y Dupree Quest. Dr. White Trial Tr. vol. 1, 153¶3-154¶4.

Conversely, in *Winn v. State* (1939),<sup>177</sup> the defence argued that the crime, murder to commit robbery, was irrationally executed since the defendant, Edward Winn, did not attempt to hide from potential witnesses, and was seen moving around the city in the hours following the killing with his trousers covered in blood.<sup>178</sup> Coupled with the fact that the defendant was diagnosed with *dementia praecox*, and that he lacked a strong motive for committing the robbery since he was financially comfortable,<sup>179</sup> according to the defence Winn's lack of concern about the blood on his clothing strongly suggested that he was insane at the time of the crime.

Several medical experts have highlighted that using the facts of the crime as a test for insanity is unscientific and unreliable, and runs counter to well-established methods of identifying an individual's level of intellectual functioning and reasoning abilities.<sup>180</sup> Nevertheless, this practice is extremely effective, since it leverages the public's tendency to see the ability to premeditate as being incompatible with severe mental disease, and 'expects a type of impulse action on the part of the defendant who pleads insanity' (Perlin 1989: 725; see also Lind 1922: 233; Resnick 1986: 208; Golding & Roesch 1987: 400; Roberts, Golding & Fincham 1987: 209-210).

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<sup>177</sup> 126 S.W.2d 481 (Tex.Crim.App. 1939).

<sup>178</sup> Def. Att'y (n.n.) Quest. Dr. Duncan Trial Tr. 157:20-158:1.

<sup>179</sup> *Ibid.*, 157:1-5.

<sup>180</sup> *Penny*, 178 S.W.3d, Asst. Dist. Att'y Hon Quest. Dr. Pincus Trial Tr. vol. 51, 249:11-250:23.

*b. Organic versus Psychosocial Origins of Mental Illness*

A further misconception shared by the American judiciary and lay public is that mental illnesses caused by organic defects are a more legitimate exculpatory or mitigating evidence than those caused by emotional stressors, developmental problems, and other sociopsychological factors (White 1987: 417; see also Bonnie & Slobogin 1980: 434). The reasons for this tendency are twofold. First, the biological model of disease is seen as a legitimate source of knowledge because grounded in empirical physiological evidence, whereas sociopsychological explanations are seen as more abstract, less 'scientific', and therefore more dubious.

People tend to have a 'materialistic bias' and to question the very existence of the mental disease if they cannot directly verify its presence through some form of visual aid. The invisibility of mental illness is troubling for most observers confronted with the question of whether they should exculpate criminal behaviour; hence, their preference for 'objective' evidence, such as Computed Axial Tomography (CAT) and Magnetic Resonance Imaging (MRI), over personal accounts of symptoms coming from the defendant and mediated by the mental health expert (Perlin 1989: 678-680; see also Kuh 1961: 791; Diamond & Louisell 1965: 1340; Elliott 1987: 305). This tendency aligns with the anatomic-pathological orientation of American psychiatry which, in its quest for the 'scientific objectivity' usually attributed to other medical fields, has gradually emptied the discipline from its psychological component and directed all its efforts to the analysis of brain physiology (Ussher 2012).

Second, the biological notion of mental disease is the only one which relies exclusively on endogenous causes and is therefore more compatible with legal concepts of individual responsibility (Lelling 1993: 1489). Whereas in sociopsychological explanations the blame can be distributed to significant figures in the defendant's life, traditionally the parents, in the biological paradigm the source of the behavioural disorder is located inside the individual's body, making the assignment of moral blame to the individual more intuitive. As the cases analysed in the following chapters will show, Texas defence attorneys are acutely aware of the public's preference for biological over psychosocial explanations of criminal behaviour, and therefore tend to privilege evidence capable of showing organic defects whenever possible.<sup>181</sup> Prosecutors, on the other hand, seek to undermine such evidence and try to convince the jury that the defendant's mental illness is merely 'functional' and therefore less legitimate.<sup>182</sup> This despite the fact that there is no scientific evidence suggesting that mental illnesses originating from psychosocial stressors are less impairing than those caused by a biological condition (Perlin 1989: 681).

### *c. Mental Illness Equals Lack of Intelligence*

An additional misconception found amongst both expert and lay actors participating in death penalty proceedings is that mental illness, especially if used to claim legal insanity, is incompatible with intelligence. This misunderstanding is fuelled by the

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<sup>181</sup> See, e.g., *Rubenstein*, 407 S.W.2d, Def. Att'y Belli Quest. Dr. Towler Trial Tr. vol. 4, 967:6-971:14; *Lackey*, 819 S.W.2d, Def. Att'y Brown Quest. Dr. McBride Trial Tr. vol. 32, 5296:14-5305:13; *Perry*, 178 S.W.3d, Def. Att'y Smith Quest. Dr. Pincus Trial Tr. vol. 51, 103:19-132-19.

<sup>182</sup> See, e.g., *Lackey*, 819 S.W.2d, Dist. Att'y Griffin Quest. Dr. McBride Trial Tr. 5313:5-6, 5316:7-10.

strictly cognitive approach of the test for legal insanity used in most American courts, which frames legal insanity as a matter of rational understanding rather than of emotional distress (Coppola 2019: 1). Early 20<sup>th</sup> century psychiatrists fostered this misconception, by focusing their mental health evaluations on the defendant's intelligence above anything else.<sup>183</sup> For example, in the trial of George Duke, a man charged with the killing of his divorced wife, Dr. O. F. Bourque examined the defendant in the county jail and concluded that he knew the difference between right and wrong based on the following observations:

I asked him questions about his past life, and he would answer those questions intelligently. He could remember back when he was a little boy. We discussed what he did... we discussed generally the years he had been growing up to the present and he had an ability to remember times and dates and places and names. At no time in my examinations of him did he make any reply or carry on any conversation that indicated he was idiotic or that indicated to me that he suffered from hallucinations, he was very rational.<sup>184</sup>

In some cases, however, psychiatrists challenged this misconception, highlighting that 'it is possible for a person to be "insane" but yet be alert, aware of his surroundings, intelligent, pleasant, courteous, and able to talk on a number of subjects'.<sup>185</sup>

Empirical research inquiring into capital jurors' understanding of the legal standards to be followed in reaching their verdicts has confirmed the existence of a similar misinterpretation amongst lay observers (see, e.g., Stites & Dahlsgaard 2015:

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<sup>183</sup> See, e.g., *Morris v. State*, 255 S.W. 744 (Tex.Crim.App. 1923), Dr. Shield Test. Trial Tr. 172¶3.

<sup>184</sup> *Duke v. State*, 182 S.W.2d 808 (Tex.Crim.App. 1944), Dr. Bourque Test. Trial Tr. 63¶1.

<sup>185</sup> *Mines v. State*, 852 S.W.2d 941, 949 (Tex.Crim.App. 1994); See also *Morrow v. State*, 224 S.W.2d 481 (Tex.Crim.App. 1949), Dr. Grice Test. Trial Tr. 71¶1-2.

678-679). For instance, a study based on interviews conducted by the Capital Jury Project, has shown that jurors often misunderstand the diagnosis of mental retardation and tend to confuse it with a claim of legal insanity (Sandys, Trahan & Pruss 2008: 691-693). As a result, rather than considering mental retardation as a potentially mitigating factor at sentencing, they tend to disregard its importance if they feel that the defendant was able to distinguish right from wrong at the time of the alleged offence.

The blurring of the boundaries between mental illness and intellectual disability was a constant feature of lay testimonies provided in Texas capital punishment trials, particularly in the early 20<sup>th</sup> century. Asked whether, based on their observations of the defendant's manners, demeanour, and behaviour they believed the defendant to be insane, several witnesses mentioned intelligence as a factor they considered in answering the question, even when the insanity claim relied on a diagnosis of mental illness. In the trial of Doyle Arnold, for example, an old-time acquaintance of the defendant testified that during Arnold's childhood 'there was something about his acts and conduct which caused me to believe that he was not a normally developed child mentally... He did not act like he was bright at all to me.'<sup>186</sup> Based on this observation, the witness expressed the opinion that the defendant was insane. To counteract this statement, the state introduced the testimony of the Sheriff of Haskell County who testified that, while in jail under his custody, the defendant had read at least ten or twelve magazines, a fact which he interpreted as evidence of a sane mind.<sup>187</sup>

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<sup>186</sup> Arnold v. State, 873 S.W.2d 27 (Tex.Crim.App. 1993), Beaird Test. Trial Tr. 81¶1.

<sup>187</sup> Sarrels Test. Trial Tr. 117¶2.

The judges of the TCCA similarly conflated insanity with lack of intelligence in the trial of Woody Maxey, an African American man who claimed to suffer from psychomotor epilepsy (see Chapter 5: Section 4[e]). In upholding Maxey's death sentence, the judges argued that none of the witnesses had shown that prior to the homicide the defendant had displayed a behaviour consistent with an insane state of mind, and that 'when not suffering from an attack of epilepsy [the defendant had] shown to have possessed as much *intelligence* as the average of his race.'<sup>188</sup> As this passage suggests, at the time of Maxey's trial, racist stereotypes depicting African Americans as intellectually inferior prompted the TCCA to use a lower average of intelligence in evaluating the sanity of black defendants as compared to their white counterparts (see Chapter 5: Section 3[a-b]). In so doing, the TCCA legitimised a double standard which could lead to the disproportionate imposition of death sentences on African Americans who, if evaluated according to the level of intellectual functioning expected from white defendants, would have been deemed insane and therefore not culpable for the crime committed.

*d. Mental Illness is Easy to Fake*

The fear that defendants may fake mental illness in order to escape punishment is a recurring theme in American jurisprudence (Perlin 1987: 98, 1989: 713-720). The assumption is that mental illness is easy to fake and that medical experts, in their eagerness to exculpate the defendant or reduce his sentence, are often ill equipped to

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<sup>188</sup> *Maxey*, 145 S.W. at 958-959; see also *Mines*, 852 S.W.2d at 948.

discern the genuinely sick from the faking impostor. However, a review of American caselaw reveals that there is no evidence that faked mental illness has led to numerous spurious insanity acquittals or unwarranted life sentences. In fact, far from being a widespread phenomenon, malingering among defendants claiming insanity or a sentence reduction is statistically low<sup>189</sup> and easily exposed (Perlin 1989: 715; Davidson 1952: 159-173). Members of the judiciary and the lay public tend to distrust forensic psychiatrists' ability to determine legal insanity and unmask malingerers (Slater & Hans 1984; Homant & Kennedy 1986: 79-80). Chief Justice Rehnquist synthesised this fear of faking in his dissenting opinion in *Ford v. Wainwright* (1986), where he raised the concern that allowing death row prisoners to raise insanity claims to avoid execution would offer 'an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity.'<sup>190</sup>

Prosecutors regularly exploit the false belief that mental illness is easy to fake and hard to detect at trial. They argue that defendants' accounts are biased by their natural desire to escape punishment, and that if psychiatrists base their diagnosis and interpretation solely on defendants' versions of the facts, they are likely to be deceived (Lind 1922: 233-234). In Texas death penalty cases, it is a common prosecutorial strategy to undermine every piece of evidence presented by the defence by pointing to the risk that the defendant may be malingering or feigning mental illness.<sup>191</sup> On their

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<sup>189</sup> Rogers (1990) argues that malingering in forensic settings occurs in 3.2 to 8% of the cases.

<sup>190</sup> 477 U.S. 399, 435 (1986), Rehnquist, J., dissenting; see also *Ake v. Oklahoma*, 470 U.S. 68, 1101 (1985), Rehnquist, J., dissenting.

<sup>191</sup> See, e.g., *Burks*, 583 S.W.2d, Dist. Att'y Garrigan Cl. Arg. on Guilt or Innocence Trial Tr. vol. 2, 698:9-703:8; *Wilkens v. State*, 847 S.W.2d 547 (Tex.Crim.App. 1992), Dist. Att'y Henry Quest. Dr.

part, psychiatrists testifying for the state tend to emphasise the risk of malingering and play into prosecutors' narrative. The DSM-IV-TR seems to support this kind of inference. It defines malingering as

the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentive such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs... [Moreover, the manual proposes that] malingering should be strongly suggested if any combination of the following are present: 1) medical-legal context of the presentation, 2) marked discrepancy between the person's claimed stress or disability and the objective findings, 3) lack of cooperation during the diagnostic evaluation and in complying with the diagnostic evaluation, and 4) the presence of anti-social personality disorder (APA 2000: 739).

Testifying for the state in *Penry*, Dr. Saunders took this definition one step further, arguing that when someone is facing several years of prison, one should not only *suspect* malingering, as highlighted by the DSM-IV-TR, but actually *expect* it.<sup>192</sup>

Contrary to popular views, psychiatrists have historically agreed that: 1) simulating insanity is a difficult endeavour, 2) the skilled physician will readily identify a malingerer, and 3) insanity claims based on a faked condition are rarely, if ever, successful. In his influential treatise, Isaac Ray cited the opinion of several psychiatric authorities to argue that 'insanity is not easily feigned, and consequently that no attempt at imposition can long escape the efforts of one properly qualified to expose it' (1871[1838]: 350). Along these lines, William White, eminent psychiatrist and former president of the St. Elizabeth's Hospital in Washington DC, argued in 1923: 'in my

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Allen Test. Trial Tr. vol. 31, 79:23- 88:2, Dist. Att'y Henry Quest. Dr. McNeel Test. Trial Tr. vol. 31, 15:8-24:3.

<sup>192</sup> See *Penry*, 178 S.W.3d, Dr. Saunders Test. Trial Tr. vol. 43, 239:13-24.

personal experience I have never known a criminal to escape conviction on the plea of “insanity” where the evidence did not warrant such a verdict’ (3-4).

Forensic psychiatrists use several methods to unmask malingering in their mental health evaluations (Resnick 1984; Ziskin 1984; Cornell & Hawk 1989). Some of them have been in use for over 200 years and rely on the ability of the physician to find discrepancies between the symptoms manifested by the subject and the characteristic symptoms of the disease. In his analysis of feigned mania, a condition whose symptoms resemble those of the disease now known as schizophrenia, Ray illustrates a series of clumsy mistakes typically made by patients trying to simulate insanity. First and foremost, ‘the grand fault committed by impostors is, that in their anxiety to produce an imitation that shall deceive, they overdo the character they assume, and present nothing but a clumsy caricature’ (Ray 1871[1838]: 351). This mistake is due to the fact that, the subject determined to feign insanity lacks any specialised knowledge of the manners and manifestations of the disease, and relies for his imitation on the occasional observation of ‘some roving maniac’ and on a misconception of insanity as a synonym for ‘wildness, fury, and unlimited irregularity’ (*Ibid.*, 352)

The case of Doyle Arnold, a man charged with the murder of his wife, provides a typical example of this kind of error.<sup>193</sup> According to the Stephens County Sheriff and the Fort Worth County Jailer, while in custody, especially when he knew that he was being observed, Arnold jumped up from his bed and ran around the room, throwing

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<sup>193</sup> *Arnold*, 79 S.W.2d.

chicken bones out in the hall, barking like a dog, chuckling like a hen, crowing like a roost, and shouting ‘sho, sho, sho’ and ‘Zelma, Zelma, [his wife’s name] what have I done?’.<sup>194</sup> On appeal, the TCCA upheld the defendant’s death sentence, arguing that Arnold was probably simulating insanity.<sup>195</sup> According to the TCCA, after having barked and created disturbance from his cell, Arnold had tried to escape his detention by climbing out through the window. Coupled with his grossly exaggerated symptoms, and the fact that he acted normally while not aware of being observed, this attempted escape suggested that Arnold had feigned a mental disorder in an ungainly endeavour to escape punishment.

Second, individuals faking mental illness often pretend that they have no memory of friends, places, and life events with which they have always been familiar, especially when they think that, if believed, such amnesia may be considered as a proof of innocence or ground for exculpation. However, as Ray explains, ‘the real madman will seldom, if ever, forget them, in whatever shapes they may appear to his mind, or with whatever delusions they may be connected’ (Ray 1871[1838]: 352). On the other hand,

in simulated madness, the common error is to imagine that nothing must be remembered correctly, and that the more inconsistent and absurd the discourse, the better is the attempt at deception sustained (*Ibid.*, 353; see also Gordon 1928: 573).

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<sup>194</sup> Morrow Test. Trial Tr. 149¶3, Stanley Test. Trial Tr. 129¶4-132¶4.

<sup>195</sup> *Arnold*, 79 S.W.2d at 132-133.

Capital defendants claiming insanity or temporary insanity in Texas cases regularly rely on this misconception in their accounts of the criminal event, claiming that they have no recollection of the facts leading to, and immediately following, the offence for which they are on trial.<sup>196</sup>

Third, whereas in real mental illnesses the eruption of disease is often preceded by a series of preliminary symptoms stretching over a long period of time,

in simulated insanity... the invasion is as sudden as is most frequently the occasion that leads to it. The simulator being unaware of the progressive nature of the invasion, suddenly, in the midst of health, startles his attendants by an outbreak of the most extravagantly wild and furious conduct, while the minutest inquiries will fail to establish the previous existence of any precursory symptoms (Ray 1871[1838]: 359).

In order to unmask similar attempts, psychiatrists testifying in Texas cases traditionally look at the medical history of the defendant to identify whether he was ever diagnosed with mental disease before the commission of the crime.<sup>197</sup> If a defendant presents a history of mental illness, they look for consistency in psychiatric diagnoses and test results over time.<sup>198</sup>

Forensic mental health professionals have developed increasingly sophisticated techniques to test for malingering in their evaluations, progressively abandoning

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<sup>196</sup> See, e.g., *Miner v. State*, 178 S.W.2d 268 (Tex.Crim.App. 1944), Harold Miner Test. Trial Tr. 74¶2-75¶1; *Whitaker v. State*, 268 S.W.2d 172, 175-176 (Tex.Crim.App. 1954); *Brinkley v. State*, 277 S.W.2d 704 (Tex.Crim.App. 1954), Lonnie Brinkley Test. Trial Tr. 193; *Crain v. State*, 394 S.W.2d 165, 167 (Tex.Crim.App. 1964); *Wilkins*, 847 S.W.2d, Wilkins Test. Trial Tr. vol. 30, 75:19-80:19; *Heiselbetz v. State*, 906 S.W.2d 500, 505 (Tex.Crim.App. 1995).

<sup>197</sup> See, e.g., *Satterwhite v. State*, 858 S.W.2d 412, 426 (Tex.Crim.App. 1993).

<sup>198</sup> See, e.g., *McGee*, 238 S.W.2d, Dr. Morrow Dep. Trial Tr. vol. 1, 179¶2-181¶1; *Perry*, 178 S.W.3d, Dr. Price Test. Trial Tr. vol. 52, 44:18-45:3.

traditional clinical interviews in favour of standardised tests. Popular psychological personality tests such as the Minnesota Multiphase Personality Inventory (MMPI), for example, contain a whole section dedicated to the detection of malingering, and psychiatrists testifying in the 1990s often relied on this instrument to verify the sincerity of the defendant's statements (Walters, White & Greene 1988; Hawk & Cornell 1989). Neuropsychological tests, on the other hand, are administered as a battery of tests which alternate 'real' tests aimed at identifying organic disfunctions, with 'fake' tests, aimed at identifying whether the defendant is deliberately underperforming to appear impaired, a particularly effective method according to some defence experts.<sup>199</sup>

As the cases analysed in Chapter 7 will show, Texas prosecutors regularly challenge the reliability of similar tests in death penalty proceedings. Drawing from the folk psychological view of the law and from the stigma associated with antisocial personality disorders (hereinafter 'APD'), they argue that the observation of the defendant's behaviour when he believes that he is not being observed is more reliable than any neurological or psychological evaluation,<sup>200</sup> and that no matter how severe the symptoms and how consistent the evidence, if a defendant has been diagnosed with APD his mental illness will almost invariably be simulated.<sup>201</sup>

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<sup>199</sup> *Perry*, 178 S.W.3d, Dr. Price Test. Trial Tr. vol. 52, 43:15-44:8.

<sup>200</sup> See, e.g., *Ibid.*, Dist. Att'y Price Quest. Dr. Saunders Trial Tr. vol. 55, 31:8-32:15.

<sup>201</sup> See, e.g., *Burks*, 583 S.W.2d, Dr. Grigson Test. Trial Tr. vol. 2, 565:18-566:6; *Hawkins v. State*, 613 S.W.2d 720 (Tex.Crim.App. 1981), Dist. Att'y Curtis Quest. Dr. Grigson Trial Tr. vol. 9, 1811:10-1818:20.

### 3. Prosecutors, State Experts, and Common-sense Views

As the previous sections suggest, prosecutors regularly exploit myths and stereotypes about how mental illnesses manifest themselves and how they can be detected. By appealing to jurors' common-sense views of human behaviour, they have a significant advantage over the defence which, when equipped with the necessary resources to conduct a thorough investigation, tends to rely on empirical evidence that challenges such assumptions. Moreover, whereas the defence's narrative tends to rely on facts, figures, and 'cold numbers' to prove issues such as the defendant's unlikelihood to commit acts of violence in the future,<sup>202</sup> the state's story is constantly peppered with graphic descriptions of the defendant's past and present criminal acts, and of gruesome episodes suggesting the significant presence of violence in America, inside and outside the prison.<sup>203</sup> While relying on anecdotal evidence, the state's methods stir powerful emotional reactions which often override rational considerations based on empirical data, statistics, and scientific predictions. Descriptions of real, concrete, singular episodes make a more powerful impression on jurors' minds than depersonalised statistics and percentages; as demonstrated by the numerous death sentences imposed on defendants whose risk of future dangerousness was far from established.<sup>204</sup>

Furthermore, state experts tend to play into the jury's longing for certainty by stating a relationship of cause and effect between APD and violent behaviour, or by

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<sup>202</sup> See, e.g., *Perry*, 178 S.W.3d, Def. Att'y Tarver Quest. Dr. Cunningham Trial Tr. vol. 54, 136:18-144:3.

<sup>203</sup> See, e.g., *Ibid.*, Dist. Att'y Price Quest. Currie Trial Tr. vol. 55, 197:2-202:16.

<sup>204</sup> See, e.g., *Adams v. State*, 577 S.W.2d 717 (Tex.Crim.App. 1979).

claiming as much as a 100% accuracy in their future dangerousness predictions,<sup>205</sup> despite overwhelming evidence of psychiatry's inability to make similar predictions (Ennis & Litvack 1974; Slobogin 1984; Monahan 1988; but see Monahan 1981; Haddad 1985).<sup>206</sup> Defence experts, on the other hand, tend to take a more cautious approach when expressing opinions on the relationship between mental illness and criminal behaviour, or on the likelihood that the defendant will commit violent acts in the future.<sup>207</sup> As highlighted by many medical authorities, it is impossible and blatantly wrong to expect the human sciences to answer questions about the association between mental health and human behaviour with the level of certainty required to establish a causal relationship.<sup>208</sup>

By undermining empirical evidence which cannot reach the 'gold standard' required by the hard sciences, prosecutors exploit lay people's view of psychiatry and psychology as 'confusing', 'unseeable', and 'imprecise' (Perlin 1989: 677-678), and jurors' need for strong claims to overcome the difficult moral choice they are called to make. Despite the virtual impossibility of reaching a similar level of certainty in the medical and behavioural sciences, this prosecutorial approach has proven strikingly effective, showing that the average Texas juror shares the black and white view of morality and behaviour proposed by the state, and prefers a false certainty over a

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<sup>205</sup> See, e.g., *Cook v. State*, 821 S.W.2d 600, 602 (Tex.Crim.App. 1991); *Adams*, 577 S.W.2d, Dist. Att'y Mulder Quest. Dr. Grigson Trial Tr. vol. 5, 1409:10-1411:7; *Burks*, 583 S.W.2d, Dist. Att'y Whaley Quest. Dr. Grigson Trial Tr. vol. 2, 769:6-776:21; *Holland v. State*, 761 S.W.2d 307 (Tex.Crim.App. 1988), Dist. Att'y Latino Quest. Dr. Grigson Trial Tr. vol. 14, 2554:12-2555:3.

<sup>206</sup> See also *Barefoot v. Estelle*, 463 U.S. 880, 3408-3409 n 2-4 (1983), Blackmun, J., dissenting.

<sup>207</sup> See, e.g., *Sattiewhite v. State*, 786 S.W.2d 271 (Tex.Crim.App. 1989), Dr. Dickerson Trial Tr. vol. 11, 3168:2-25.

<sup>208</sup> E.g., *Perry*, 178 S.W.3d, Asst. Dist. Att'y Hon Quest. Dr. Pincus Trial Tr. vol. 51, 188:14-207:9.

truthful doubt which takes into account the complexity of the world and of our human interactions.

Another common prosecutorial strategy is to attack individually each symptom cited by the expert to support his finding of insanity or diminished culpability due to mental illness.<sup>209</sup> This method can be particularly damaging for psychiatrists' credibility, since

mental disorder is... not demonstrable in any examination of the patient at any one time, nor in any single act committed by him, but in a broad view of his conduct over a certain period of time or in the circumstances and setting, say, of his criminal act (Lind 1922: 232).

When the prosecutor singles out a symptom and takes it out of context, he forces the psychiatrist to admit that, taken alone, the symptom is not necessarily a manifestation of mental disorder, a statement that is likely to undermine the value of the testimony and of the diminished culpability claim in the eyes of the jury.

Finally, while prosecutors typically ask psychiatrists detailed questions about how they would diagnose and classify defendants' symptoms and behaviour, they tend to neglect what should be the central concern of the forensic evaluation: whether and how defendants' emotional, intellectual, and behavioural difficulties diminish their moral culpability. After all, does it really matter whether a defendant who committed rape suffered from mild or moderate mental retardation if he did not understand that the rape was wrong? Equally, does it change our legal conclusion whether a defendant

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<sup>209</sup> See, e.g., *McGee*, 238 S.W.2d, Dist. Att'y Dupree Quest. Dr. White Trial Tr. vol. 1, 141¶5-142¶4.

who committed murder while labouring under the delusional belief that the victim was attempting to take his life, suffered from paranoid schizophrenia or paranoia schizoaffective type disorder? (see also Morse 2008: 215).

The practice of leaving the mechanism connecting the mental disability with the moral blameworthiness out of the discussion is traditionally justified by arguing that it would infringe upon the authority of the jury. However, for prosecutors it also serves the strategic function of focusing on labels and categories whose meanings and contours are subject to interpretation, despite psychiatrists' repeated efforts towards diagnostic standardisation. This subjectivity in turn leads to diagnostic inconsistencies across time and between different evaluators, an aspect that can easily be exploited to undermine defence experts' testimony and the presence of a mental disability altogether.<sup>210</sup>

Having examined the common-sense assumptions that influence lay and expert perceptions of mental illness at its intersection with criminal behaviour, the next sections will describe the different kinds of witnesses who are traditionally called to testify on defendants' mental state in American capital punishment trials.

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<sup>210</sup> See, e.g., *Penry*, 178 S.W.3d, Dr. Gripon Test. Trial Tr. vol. 46, 22:18-24:5, 46:4-17.

#### 4. The Trial Witnesses

Defence attorneys and prosecutors trying to establish the defendant's level of moral culpability at the time of the crime tend to rely on three groups of witnesses: family and friends, lay experts, and professional experts (Sundby 1997: 1116-1119). Family and friends are individuals with a close relationship with the defendant and an intimate knowledge of his or her character and upbringing. While their testimonies usually involve detailed accounts of the defendant's childhood,<sup>211</sup> in some cases it is limited to descriptions of the defendant's non-violent character and/or to appeals to the jury to spare the defendant's life.<sup>212</sup> The advantage of this kind of testimony is that it provides close first-hand accounts of any transformation in the defendant's character and behaviour that may have occurred over the years, and any life-changing events that may have affected his or her mental state. Its disadvantage is that jurors distrust this witness category because of their intimate relationship with the defendant and their potential personal bias in favour of the defence (Sundby 1997: 1163).

Lay experts are persons who have some knowledge of the defendant through personal observations and/or interactions, but who have no personal relationship with the defendant. They offer expertise to the jury in the sense that they can provide insights about the defendant's manners and demeanour that the jury would otherwise not know, but their expertise is based on personal knowledge and experience rather than on

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<sup>211</sup> See, e.g., *McGee*, 238 S.W.2d, Holcomb Test. Trial Tr. vol. 2, 262¶6-270¶2.

<sup>212</sup> See, e.g., *Colburn v. State*, 966 S.W.2d 511 (Tex.Crim.App. 1998), Henry Test. Trial Tr. vol. 27, 110:1-112:19.

specialised training and mental health evaluations. The typical lay expert called to testify in capital punishment trials is either a police officer involved in the defendant's arrest and interrogation, or a prison guard who worked in a facility where the defendant had been previously detained. The advantage of this kind of testimony is that jurors trust lay experts above any other witness category, because they perceive them as being free from personal prejudices stemming from emotional attachments or financial interests (Sundby 1997: 1145).<sup>213</sup>

Finally, professional experts are individuals with specialised training that can claim a level of expertise that goes beyond the knowledge of the average juror. They are hired by the defence or the prosecution to examine the defendant's personality, biology, and background in exchange for a pre-established fee. Their knowledge of the defendant is acquired for the purposes of solving legal issues and is based on a mental health evaluation aimed at identifying possible explanations for defendants' criminal behaviour. The disadvantage of this kind of testimony is that jurors tend to be sceptical of expert opinions for three main reasons (Sundby 1997: 1125-1144). First, jurors see experts as 'hired guns' providing biased opinions informed by financial considerations (*Ibid.*, 1126-1130).<sup>214</sup> Second, they describe experts' opinions as being out of touch with reality and difficult to believe (*Ibid.*, 1132-1133). Finally, jurors perceive defence and state experts' conflicting testimony at trial as proof of their lack of credibility. As the next sections will show, while there are many kinds of professional experts, when trying

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<sup>213</sup> See, e.g., *Winn v. State*, 126 S.W.2d 481 (Tex.Crim.App. 1939), *Bailey Test.* Trial Tr. 120: 24-121:9; *Ross*, 220 S.W.2d, *Rightmare Test.* Trial Tr. 307¶4-308¶4.

<sup>214</sup> This perception is regularly exploited by cross-examiners; see *Busch* (1949: 636); *Gross* (1991: 1168).

to establish the defendant's mental health, Texas defence attorneys and prosecutors have historically relied on five groups of professionals: general physicians, psychiatrists, psychologists, neurologists and, more recently, social workers.

*a. Forensic Mental Health Experts*

1910s-1940s General Physicians

During the first three decades of the 20<sup>th</sup> century, it was fairly common to find general physicians without particular expertise in the diagnosis and treatment of mental disease testifying in Texas capital punishment trials.<sup>215</sup> At the time, psychiatry was still establishing itself as an independent professional category with its own boards, associations, and university degrees. Hence, while the big cities of the North East could already rely on a pool of specially trained experts, most rural areas in Texas still lacked this kind of professional capacity and had to rely on the opinion of medical doctors without specialised training.

In fact, until the 1960s, when psychiatrists and psychologists started testifying on a more regular basis, attorneys relied mostly, if not exclusively, on lay witnesses for their insanity evaluations. Lay witnesses tended to limit their testimony to conclusive statements regarding defendants' ability to distinguish right from wrong at the time of

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<sup>215</sup> See, e.g., *Burgess v. State*, 181 S.W. 465 (Tex.Crim.App. 1916), *Dr. Johnson Test. Trial Tr.* 71¶1-2; *Alexander v. State*, 8 S.W.2d 176 (Tex.Crim.App. 1928), *Carothers Test. Trial Tr.* 17¶1-21¶1; *Shield*, 38 S.W.2d, *Dr. Osterhost Test. Trial Tr.* 180¶6-181¶1; *Jordan v. State*, 94 S.W.2d 741 (Tex.Crim.App. 1936), *Dr. Prentice Hyder Test. Trial Tr.* 27; *Wimm*, 126 S.W.2d, *Dr. Bush Test. Trial Tr.* 128:25-129:23.

the alleged offence, providing limited explanations as to how they reached a similar conclusion.<sup>216</sup> When such explanations were provided, they typically included observations of weird appearance, character, and behaviour, such as ‘inhuman’ strength,<sup>217</sup> not talking or engaging with others,<sup>218</sup> being lazy at work,<sup>219</sup> looking moody, melancholic, and immersed in deep thought,<sup>220</sup> staring into empty space,<sup>221</sup> having a blank and wild look,<sup>222</sup> not playing with other children<sup>223</sup> and running away from home as a child,<sup>224</sup> staying up all night walking around,<sup>225</sup> wearing weird outfits,<sup>226</sup> suddenly changing subject in the middle of a conversation,<sup>227</sup> and laughing without reason.<sup>228</sup>

Physicians’ testimonies in court suggest that defendants were asked a series of questions to identify their level of intelligence, test their sense of reality, and observe their emotional responses to the psychiatrist’s narration of the circumstances of the

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<sup>216</sup> See also *Stanton v. State*, 158 S.W. 994 (Tex.Crim.App. 1913), Mack Test. Trial Tr. 12¶1; *Burgess*, 181 S.W., Carlton Test. Trial Tr. 62¶1; *Duke*, 182 S.W.2d, Dr. Bourque Test. Trial Tr. 62¶3-63¶1; *Jones v. State*, 243 S.W.2d 848 (Tex.Crim.App. 1951), Courtney Test. Trial Tr. 108¶3, 110¶2; *Kizzee v. State*, 312 S.W.2d 661 (Tex.Crim.App. 1958), Corn Test. Trial Tr. 303-304.

<sup>217</sup> *Duke*, 182 S.W.2d, Riley Test. Trial Tr. 35¶3.

<sup>218</sup> *McKenny v. State*, 288 S.W. 465 (Tex.Crim.App. 1926), Fay Test. Trial Tr. 21¶3.

<sup>219</sup> *Arnold*, 79 S.W.2d, Lancaster Test. Trial Tr. 64¶2.

<sup>220</sup> *Harris v. State*, 172 S.W. 975 (Tex.Crim.App. 1915), Chas Harris Test. Trial Tr. 112:140-15.

<sup>221</sup> *Lackey*, 819 S.W.2d, Annabel Lackey Test. Trial Tr. 5253:19-20; *Jones*, 243 S.W.2d, Fudge Test. Trial Tr. 87.

<sup>222</sup> *Burgess*, 181 S.W., Carlton Test. Trial Tr. 57.

<sup>223</sup> *Arnold*, 79 S.W.2d, Lancaster Test. Trial Tr. 55¶6.

<sup>224</sup> *McGee*, 238 S.W.2d, Dr. Stephens Test. Trial Tr. vol. 1, 165¶1.

<sup>225</sup> *Shield*, 38 S.W.2d, Hill Test. Trial Tr. 116¶6.

<sup>226</sup> *Ibid.*, Leon Shield Test. Trial Tr. 119¶2.

<sup>227</sup> *Harris*, 172 S.W., Reese Test. Trial Tr. 115:9-28.

<sup>228</sup> *Bradley v. State*, 353 S.W.2d 864 (Tex.Crim.App. 1962), Dunson Test. Trial Tr. 115:24-116:10.

case.<sup>229</sup> Moreover, they tried to identify the defendant's temperament and uncover whether he or his family members used to indulge in 'bad habits', such as excessive drinking or masturbation.<sup>230</sup> Furthermore, assuming that insanity was inherited through the transmission of defective germ plasms, psychiatrists tried to establish whether there was a history of insanity running down the family.<sup>231</sup> Given the popularity of heredity theories at the time, a finding of a similar pattern across generations, was often used to reinforce an otherwise shaky insanity claim.

However, while a finding of hereditary insanity could prove useful, a potentially more effective way to convince jurors of the legitimacy of the insanity claim was to demonstrate that the defendant had been, and still was, affected by delusions and hallucinations.<sup>232</sup> Defence psychiatrists trusted this kind of evidence because it could be submitted to traditional standards of examination. It was a palpable proof of the presence of mental disease, not a metaphysical speculation. Yet, the outcomes of several cases suggest that even strong evidence of delusions and hallucinations could fail to convince the most sceptical audiences.<sup>233</sup> The reason for this was that such evidence relied on the defendant's subjective sensations and impressions, an aspect that defence

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<sup>229</sup> See, e.g., *Morrow*, 224 S.W.2d, Dr. Grice Test. Trial Tr. 66¶2-3, Dr. Crain Test. Trial Tr. 99¶3-100¶3; *Jones*, 243 S.W.2d, Dr. Plasek Test. Trial Tr. 111¶2-112¶1, Dr. Hawkins Test. Trial Tr. 125¶3-126¶2.

<sup>230</sup> See, e.g., *Miner*, 178 S.W.2d at 269, Dr. Swope Test. Trial Tr. 91¶1; *Morris*, 255 S.W., Def. Att'y Dunlap Quest. Dr. Shield Trial Tr. 174¶3-176¶1.

<sup>231</sup> *Shield*, 38 S.W.2d, Dr. Gray Test. Trial Tr. 222: ¶2-5.

<sup>232</sup> See, e.g., *Lindsey v. State*, 260 S.W. 862, 862, 864 (Tex.Crim.App. 1924); *Alexander*, 8 S.W.2d, Carothers Test. Trial Tr. 17¶1. For later cases see *Hawkins*, 613 S.W.2d, Dr. Wall Test. Trial Tr. vol. 9, 14-25; *Satterwhite*, 858 S.W.2d at 426; *Robison v. State*, 720 S.W.2d 808, 488 (Tex.Crim.App. 1994).

<sup>233</sup> See, e.g., *Morris*, 255 S.W., Rosa Lee Morris Test. Trial Tr. 51¶2-52¶1; *Ross*, 220 S.W.2d, Dr. Boyd Test. Trial Tr. 243¶1-245¶1, Dr. Johnson Test. Trial Tr. 275¶5-277¶4; *McGee*, 238 S.W.2d, Dr. White Test. Trial Tr. vol. 2, 132¶3; for later cases see *Burks*, 583 S.W.2d, Debra Ann Burks Test. Trial Tr. vol. 1, 412:8-413:8; *Colburn*, 966 S.W.2d, Dr. Quijano Test. Trial Tr. vol. 25, 248:7-249:2.

psychiatrists considered important proof, but that legal actors and the general public regarded with suspicion. Additionally, juries often considered these accounts unreliable since they were based exclusively on defendants' personal narratives and on psychiatrists' expertise.

Another aspect that was often adduced as legal evidence of insanity was a sudden or gradual change of character. In the trial of Edward Winn, for example, the defendant's mother cited as evidence of insanity her son's transformation from a socially adjusted boy with an interest in music, to a withdrawn teenager, a lone wolf, a misfit, who had no interest in social activities and in school, spent most of the time alone in his room, was always depressed, and stood up all night reading the Bible out loud.<sup>234</sup> Psychiatrists testifying in this case attributed this kind of personality changes during adolescence with the onset of *dementia praecox*. In this and similar cases, psychiatrists relied on the common-sense belief that if a person behaves irrationally or out of character there must be something wrong with them.<sup>235</sup>

Besides talking to the defendant, early 20<sup>th</sup> century physicians conducted a medical examination to assess his or her general physical health. In an effort to draw a clear line between insanity and criminality, and to give their testimony an aura of objectivity, expert witnesses tried to define mental disease according to observable physical criteria. However, doctors often disagreed as to the correct diagnosis in

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<sup>234</sup> *Winn*, 126 S.W.2d, Weaver Test. Trial Tr. 77:25-79:4, 80:2-82:18. See also *Colburn*, 966 S.W.2d, Fitzsimmons Test. Trial Tr. vol. 25, 171:13-184:20.

<sup>235</sup> See also *Ross*, 220 S.W.2d, Dr. Stout Test. Trial Tr. 131¶2-132¶1.

individual cases, and the physical descriptions they needed to corroborate their opinions were often difficult to find. Lacking more sophisticated techniques, physicians based their evaluation on a routine physical examination, which involved simply looking at the defendant's eyes and pupils, taking his blood pressure and heart rate, and testing his knee reflexes.<sup>236</sup> In some cases, a change in appetite, sleeplessness, and/or headaches were seen as sufficient signs of the presence of mental disease,<sup>237</sup> especially when they followed an accident involving a head injury.<sup>238</sup>

In several cases doctors refrained from conducting a physical examination altogether. In such instances, doctors either based their opinions on the observation of defendants' manners and behaviours alone,<sup>239</sup> like any other lay witness, or on the hypothetical questions formulated by the attorneys.<sup>240</sup> Such testimonies generally drew from: 1) observations of the defendant's acts and appearance around the time of the crime, during the examination, and in court<sup>241</sup>; 2) testimony adduced at trial; and 3) simple conversations with the defendant whose nature and content remains largely unknown.<sup>242</sup> The reasons for the mystery surrounding doctors' diagnostic methods is

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<sup>236</sup> See, e.g., *Arnold*, 79 S.W.2d, Dr. Nies Test. Trial Tr. 175; *Covin v. State*, 93 S.W.2d 428 (Tex.Crim.App. 1936), Dr. Rowe Test. Trial Tr. 132:7-11; *Morgan v. State*, 117 S.W.2d 76 (Tex.Crim.App. 1938), Dr. Swope Test. Trial Tr. 104¶2.

<sup>237</sup> *Jones*, 243 S.W.2d, Dr. Plasek Test. Trial Tr. 112¶1.

<sup>238</sup> *McGee*, 238 S.W.2d, Dr. David Test. Trial Tr. vol. 1, 206¶5-208¶1.

<sup>239</sup> *Jones*, 243 S.W.2d, Dr. Plasek Test. Trial Tr. 111¶3.

<sup>240</sup> *Shield*, 38 S.W.2d, Dr. Allen Test. Trial Tr. 147¶5-172¶1, Dr. Osterhost Test. Trial Tr. 173¶6-179¶1, Dr. Gray Test. Trial Tr. 203¶5-225¶1, Dr. Snyder Test. Trial Tr. 228¶3-234¶1.

<sup>241</sup> Texas prosecutors regularly play into jurors' dislike of defendants' apparent coldness during the proceedings to argue for a death sentence, see, e.g., *Covin*, 93 S.W.2d, Cavanaugh Test. Trial Tr. 20:7-15; *Burks*, 583 S.W.2d, Dr. Grigson Test. Trial Tr. vol. 2, 771:19-20.

<sup>242</sup> See, e.g., *Burks*, 583 S.W.2d, Dr. Grigson Test. Trial Tr. vol. 2, 770:10-771:12; *Lindsey*, 260 S.W. at 862, 863.

that attorneys often failed to ask doctors how the examination was effectively conducted and how they had reached their conclusions. Doctors, on the other hand, were often vague and reticent when such questions were effectively asked, possibly because they traditionally failed to take notes and keep a record of the examination, despite the fact that the life of the defendant was at stake.<sup>243</sup>

### 1940s-2000s Psychiatrists and Neurologists

Psychiatrists specialised in ‘mental and nervous disease’ only started testifying on a regular basis in Texas death penalty proceedings from the 1940s and 1950s. The Second World War appears to have played a crucial role in this regard, prompting a paradigmatic shift in psychiatrists and lay people’s perception of the nature and causes of mental disease, and fuelling the professionalisation of medical doctors dedicated to its diagnosis and treatment (Hale 1995: 187-190). Before World War II mental illness was seen as an inherited genetic defect, or as something resulting from dissipated and immoral habits such as sexual promiscuity (in the case of syphilis) and abuse of intoxicating drinks (in the case of *delirium tremens*). However, the war experience demonstrated that perfectly healthy American soldiers could have their mental health compromised by the traumatic experience of violence, fear, and grief that accompanied combat (*Ibid.*, 190-192).<sup>244</sup> This prompted an increasing need for mental health experts whose knowledge of the nature and causes of mental disease extended beyond that of the average physician.

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<sup>243</sup> Edwards v. State, 114 S.W.2d 572 (Tex.Crim.App. 1938), Dr. Holt Test. Trial Tr. 17¶1-18¶2.

<sup>244</sup> See also *McGee*, 238 S.W.2d, Dr. Morrow Test. Trial Tr. vol. 1, 189.

As psychiatrists refined and standardised the diagnostic methods of the profession (the DSM-I was published in 1952; see Chapter 1: Section 1), forensic mental health evaluations in capital punishment trials became increasingly consistent. It also became more common practice amongst attorneys to ask how the forensic mental health evaluation was conducted, so the records contain more information about the data and process through which experts reached their psycho-legal conclusions. The typical ‘mental status examination’, would take place in the county jail where the defendant was held while awaiting trial, and last between 30 minutes and 2 hours depending on the physician. It consisted of a general observation of the defendant’s external appearance, manners, and behaviour, along with a psychiatric interview aimed at establishing the defendant’s thought processes, speech patterns, emotions, personal history, memory, and intellectual abilities.<sup>245</sup> While there is some variation in the way different psychiatrists would conduct the evaluation, ask questions, and reach conclusions, most forensic psychiatrists followed a similar structure, and focused on similar areas, to the ones delineated above.

However, the fact that an increasing number of psychiatrists were involved in capital punishment cases did not signify that they were always asked to conduct a mental status examination. The old practice of asking doctors to reach a conclusion as to the mental state of the defendant based on a hypothetical question alone<sup>246</sup> was slow to disappear and could still be found in cases tried in the mid-1980s.<sup>247</sup> The persistence

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<sup>245</sup> *Adams*, 577 S.W.2d, Dr. Grigson Test. Trial Tr. vol. 5, 3913:8- 3916:16.

<sup>246</sup> See, e.g., *Shield*, 38 S.W.2d, Dr. Allen Test. Trial Tr. 147¶5-172¶1, Dr. Osterhost Test. Trial Tr. 173¶6-179¶1, Dr. Gray Test. Trial Tr. 203¶5-225¶1, Dr. Snyder Test. Trial Tr. 228¶3-234¶1.

<sup>247</sup> See, e.g., *Holland*, 761 S.W.2d, Dist. Att’y Latino Quest. Dr. Grigson Trial Tr. vol. 14, 2546:3-2552:3.

of this approach suggests that, when asked to establish criminal guilt, Texas district attorneys often preferred abstract theoretical reasonings around a hypothetical criminal subject over a forensic psychiatric evaluation. The reason for this is that hypothetical questions help attorneys maintain control over the information provided to the expert, and to keep the evaluation focused on their reconstruction of the facts of the crime, and of defendants' alleged behaviour immediately before and after the crime. While mediated by the interpretation of a mental health expert, in psychiatric evaluations the defendant is entitled to a conversation theoretically aimed at providing a more human portrait of the 'murderer' or 'rapist' described by the prosecution. By expanding the timeframe of analysis from the facts of the present criminal transaction to the past history of the defendant, and by examining the defendant's psychological experience rather than his external appearance and behaviour alone, the psychiatric evaluation gives the defendant the opportunity to have his voice heard, and his history and personal experience acknowledged, even if only within the limited scope of the evaluation itself.

Over the course of the 20<sup>th</sup> century, the medical disciplines became increasingly specialised and the level of expertise required in criminal trials expanded. Fields such as neurology and neuropsychology, which existed since the late 19<sup>th</sup> century, started exerting an increasing influence on capital punishment proceedings, especially when the defendant was suspected to suffer from epilepsy and/or organic brain damage. The neurological examination typically involved the administration of a series of tests of the subject's sensory and motor responses to assess whether there were any lesions in the central or peripheral nervous system. It specifically evaluated the subject's mental status,

cognitive functions, cranial nerves, coordination, motor strength, reflexes and sensation. Its function was to help the neurologist identifying the location of the pathology and develop a diagnosis. It traditionally included a medical history, a physical examination and, when the symptoms warranted it, the administration of additional diagnostic tests such as the electroencephalogram (EEG)<sup>248</sup> and/or neuroimaging tests such as CAT scans and MRIs.<sup>249</sup>

However, the possible presence of epilepsy or brain damage did not guarantee that a neurologist would be called to the witness stand. In Texas, for example, until the early 2000s it was quite uncommon to have a neurologist testify, unless the case was particularly high profile, and/or the defendant had the financial means to hire a specialist in neurological diseases. In fact, it was not unusual to find psychologists and psychiatrists themselves order an EEG to test for the presence of epilepsy and use the aid of an electroencephalographer to interpret the results.<sup>250</sup>

#### 1950s-2000s Clinical Psychologists

While by the 1950s forensic psychiatrists were routinely performing mental status examinations, clinical psychologists only became standard witnesses in Texas capital punishment trials from the late 1950s and early 1960s. In previous decades, clinical psychologists were only called to testify in cases where the defendant was suspected of

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<sup>248</sup> See *Rubenstein*, 407 S.W.2d, Def. Att’y Belli Quest. Dr. Towler Trial Tr. vol. 4, 967:6-971:14.

<sup>249</sup> See *Penry*, 178 S.W.3d, Dr. Pincus Test. Trial Tr. vol. 52, 121:9-133:13.

<sup>250</sup> See *Rubenstein*, 407 S.W.2d, Dr. Shafer Test. Trial Tr. vol. 4, 857:19-23.

feeble-mindedness, since they were the only professionals qualified to administer intelligence tests.<sup>251</sup> Beginning in the 1940s, clinical psychologists expanded their role and expertise by developing a series of standardised personality tests aimed at aiding psychiatrists in the diagnosis of mental disease. As psychiatry turned to more quantitative methods to improve diagnostic consistency across different evaluators, psychologists' expertise in clinical testing became increasingly valuable. As a result, from the 1960s attorneys started regularly hiring clinical psychologists to establish whether the defendant's personality make-up made him less capable of controlling his behaviour and therefore more likely to commit criminal acts.<sup>252</sup>

Psychiatrists and neurologists traditionally held a medical degree and spent four years of 'residency' in a hospital specialising in their respective fields. Clinical psychologists, on the other hand, typically completed a doctoral degree during which they were trained to administer psychological tests. Called to testify in capital punishment trials, clinical psychologists could spend between two hours and several weeks on a case, administering tests, evaluating the results, and reaching a diagnosis. In the 1950s and 1960s, they relied primarily on projective techniques such as the Rorschach Ink Blot test, the Word Association test, the Thematic Apperception test, the Bender Gestalt test, and the Draw a Man test.<sup>253</sup> The tests used a series of stimuli -

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<sup>251</sup> See *Snow v. State*, 291 S.W. 558 (Tex.Crim.App. 1927), Shepard Test. Trial Tr. 187-189.

<sup>252</sup> See, e.g., *Freeman v. State*, 317 S.W.2d 726 (Tex.Crim.App. 1958), Dr. Tracktir Test. Trial Tr. vol. 1, 134:17-135:22; *Leath*, 346 S.W.2d, Dr. Holbrook Test. Trial Tr. 241; *Rubenstein*, 407 S.W.2d, Def. Att'y Belli Quest. Dr. Shafer Trial Tr. vol. 4, 872:16-873:2; *Burks*, 583 S.W.2d, Dr. Lewis Test. Trial Tr. vol. 1, 368:23-371:6.

<sup>253</sup> See, e.g., *Moon v. State*, 331 S.W.2d 312 (Tex.Crim.App. 1959), Dr. Wagner Test. Trial Tr. 210:23-211:10; *Freeman*, 317 S.W.2d, Dr. Tracktir Test. Trial Tr. vol. 1, 132:2-9; *Johnston*, 396 S.W.2d, Dr. Pope Report Trial Tr. 166:19-168:16; *Rubenstein*, 407 S.W.2d, Dr. Shafer Test. Trial Tr. vol. 4, 867:11-914:11;

single words, incomplete stories and sentences, inkblots, images, drawings, and puppets - to elicit projective responses in the patient. Different groups of stimuli prompted different kinds of responses, which psychologists then used to infer particular psychological and behavioural patterns. Psychologists saw the responses as the expression of unconscious phantasy material and interpreted them qualitatively, paying attention to both form and content (Vernon 1964: 150).

In response to their growing popularity, methods based on the subjective experience and authority of the physician came increasingly under scrutiny, and standardisation and objectivity gradually became the new 'gold standard' (Vernon 1964: 174; see, e.g., Jensen 1958; Eysenck 1960). As a result, clinical psychologists started developing personality scales and psychometric tests based on statistical methods. Psychologists using these techniques shared the same commitment to the objective methods of the physical and natural sciences. While often inspired by conflicting theories, these professionals all tried to carefully record and measure the characteristics of the individual personality to reach high standards of scientific objectivity. From the 1970s onwards, clinical psychologists routinely relied on the MMPI to assess the defendant's personality and behaviour in Texas criminal courts.<sup>254</sup>

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*Burks*, 583 S.W.2d, Dr. Grigson Test. Trial Tr. 600:14-603:17; *Hawkins*, 613 S.W.2d, Dr. Wall Test. Trial Tr. vol. 9, 1748:1-1783:17; *Lackey*, 819 S.W.2d, Dr. McBride Test. Trial Tr. 5296:14-5305:13.

<sup>254</sup> See, e.g., *Wilkins*, 847 S.W.2d, Dr. Allen Test. Trial Tr. vol. 31, 79:23-81:7; *Satterwhite*, 858 S.W.2d, Dr. Erwin Test. Trial Tr. vol. 10, 2737:19-2738:8.

While several psychologists enthusiastically embraced psychometric tests, others were sceptical about their ability to reliably measure individual dispositions. Since their first formulation in the 1920s, psychologists made constant efforts to perfect the design of the questionnaires and to identify methods to limit biases and false responses. Nonetheless, critical reviews constantly suggested that test results had to be treated with caution, due to their low median validity coefficients and to variations in test results across different investigations (Vernon 1964: 201; see, e.g., Ellis 1946; Ellis & Conrad 1948).

Sociological criminologists criticised personality theories and psychological tests as well, albeit from a different perspective. They highlighted that clinical psychologists tended to equate criminality with a character disorder, and to minimise the criminogenic influence of childhood abuse, delinquent peers, and deprived neighbourhoods (see, e.g., Cressey 1954; Nye 1958; Cloward & Ohlin 1960; Burgess & Akers 1966; Suttles 1968; Hirschi 1969; Sampson & Groves 1989). Personality theorists, they argued, isolated defendants from the context in which they were born, associating deviant and aggressive behaviours to personality disorders rather than to socio-economic and cultural circumstances. This approach inevitably pictured defendants as individuals with a clearly discernible defective personality who are, and will always be, unable to participate in conventional society.

## 1960s-2000s Social Workers

The sociological critique of personality tests prompted the expansion of the role of social workers, professionals who made it their primary mission to integrate psychiatric and psychological accounts with detailed information about social background. While psychiatrists and psychologists focused their attention on individual biology and on the internal workings of the psyche, social workers turned their attention to the social context in which the individual developed, highlighting the impact of family relationships and community networks on personality and behaviour (see generally Andrews 1991, 2007, 2012; Guin, Noble & Merrill 2003; Schroeder 2003).

By means of a ‘biopsychosocial assessment’, social workers investigated defendants’ family relationships, traumatic experiences, illnesses and hospitalisations, convictions and incarcerations with the aim of reconstructing the different forces which collectively shaped who they became and how they behaved.<sup>255</sup> The biopsychosocial assessment, otherwise known as family background study, relied on a variety of sources such as: interviews with family members, friends, neighbours, and acquaintances; clinical observations; school, hospital, court, and prison records; information from other mental health professionals who examined the defendant throughout his life; visits to the community in which the defendant grew up and/or currently lived; and literature that could help make sense of the data (see O’Brien 2008: 689). Once this voluminous set of information was collected, the social worker looked for consistency across

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<sup>255</sup> See, e.g., *Freeman*, 317 S.W.2d, Siborin Test. Trial Tr. vol. 2, 398:22-399:24; *Penry*, 178 S.W.3d, Vogelsang Test. Trial Tr. vol. 49, 288: 14-21.

different sources and created a visual timeline of the defendant's life history to be presented in court. The strength of the biopsychosocial assessment was that it relied on a variety of sources in order to provide as truthful and complete picture as possible of the defendant's life. Moreover, it complemented the work of other mental health professionals, who tended to emphasise endogenous causes of mental disease and social maladjustment, and to leave the social context largely unexplored.

## Conclusion

The legal changes that transformed the structure of capital punishment proceedings in the mid-1970s, introducing the bifurcated system that separated evidence relevant to the verdict from that relevant to mitigation or aggravation, allowed for a wider range of mitigating evidence to be presented at the punishment phase. This led to an increase in the number of cases in which the defence presented evidence of family conflicts and childhood abuse,<sup>256</sup> especially as social workers began to exert their influence on the mental health professions and on psychiatry's diagnostic categories (social workers contributed to the drafting of some diagnostic categories found in the DSM-IV in the 1990s). However, while legal changes and professional developments over the course of the 20<sup>th</sup> century generally led to a growth in the number of experts, to more sophisticated mental health evaluations, and to more detailed testimonies in capital punishment proceedings, in the 1980s and 1990s successful insanity claims or life

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<sup>256</sup> See, e.g., *Freeman*, 317 S.W.2d, Dr. Crow Test. Trial Tr. vol. 2, 359:10-361:7; *Moon*, 331 S.W.2d, Dr. Wagner Test. Trial Tr. vol. 2, 187:21-194:22; *Johnston*, 396 S.W.2d, Dr. Rubin Test. Trial Tr. 175:7-176:7; *Wilkens*, 847 S.W.2d, Wilkens Jr. Test. Trial Tr. vol. 30, 10:19-21:6; *Penry*, 178 S.W.3d, Patterson Test. Trial Tr. vol. 50, 10:10-21:24.

sentences based on evidence of mental illness were still relatively rare (Perlin 1989: 707, 2013: 1).

The reason for defence attorneys' failure to successfully argue for a finding of not guilty by reason of insanity or for a life sentence based on mitigating evidence of mental illness can be found not only in the legal considerations discussed in Chapter 3, but also in the modality through which defence experts tend to present their evidence in court. Despite impressive scientific and legal developments, this modality has remained largely the same over the course of the 20<sup>th</sup> century. With few exceptions, defence attorneys tend to ask formulaic questions and mental health experts to provide customised answers. The discussion tends to focus exclusively on symptoms, diagnoses, tests, and measurement techniques, and to leave the association of the psychiatric condition with the relevant mental state largely unexplored.<sup>257</sup> Contrary to recommendations coming from legal scholars specialised in forensic psychiatry and psychology (Morse 2008: 214-17), mental health experts tend to use professional jargon and fail to translate their findings into the language, reasoning, and folk psychological view of the law. They typically provide superficial, unclear, and incoherent explanations of defendants' mental states and to offer information which is irrelevant for the legal question they are asked to answer. Despite their claim to the contrary, they rarely conduct interviews with family members, friends and acquaintances to triangulate the information given to them by the defendant during the mental status examination (with the obvious exception of social workers). Finally, when asked to make

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<sup>257</sup> See, e.g., *Snow*, 291 S.W., Shepard Test. Trial Tr. 188-194. For exceptions see *Penry*, 178 S.W.3d, Dr. Pincus Test. Trial Tr. vol. 51, 232: 4-233:24.

predictions of future violence, they typically base them on subjective rather than actuarial methods and claim a level of certainty that has been discredited in the empirical literature (see Chapter 3: Section 3[b]).

As the cases discussed in this thesis will reveal, defendants claiming insanity or mitigation due to mental illness in Texas capital punishment trials face an almost insurmountable challenge. No matter how powerful the evidence, how sophisticated the argument, how qualified the experts: jurors will almost invariably revert to preconceived notions about how mental illness works and how it influences behaviour. When Texas juries rely on similar preconceptions in capital punishment cases the verdict is usually a death sentence, no matter how mentally disabled the defendant may be. As discussed in Chapter 3, in the case of the insanity defence, the problem is exacerbated by the narrowness of the right and wrong standard, which places a high bar for the establishment of legal exculpation. When the claim is sentencing mitigation, the difficulty is intensified by the failure of the Texas legislature in 1976 to include a special issue question allowing the jury to give effect to the mitigating evidence presented in their sentencing decision.

Following a death sentence, defendants with severe mental disabilities face an additional challenge: convincing the TCCA on direct appeal that their conviction and/or sentence was unjust. This has historically proven to be an almost herculean endeavour and one with limited hope of success. The TCCA has historically been reluctant to reverse a death sentence and remand the case to the county court for a

retrial.<sup>258</sup> This dynamic occurs despite overwhelming evidence of ineffective assistance of counsel, improper jury instructions, irregularities in jury selection, false or misleading testimony, false scientific evidence, and several other procedural issues.<sup>259</sup> Even more striking, however, is the reluctance of the TCCA to ever consider overwhelming evidence of mental illness as sufficient cause for a reversal. Its complete deference to the will of the jury, even in cases which, by its own admission, warranted a different outcome,<sup>260</sup> appears to be profoundly unjust and in need of reconsideration. By focusing on due process, in itself a valuable goal, appeal courts in the United States have lost sight of the fairness of the outcomes. This approach has allowed the system - in this instance embodied in the TCCA - to hide behind the maintenance of due process to justify unfair decisions which disproportionately affect the most vulnerable groups in the criminal justice system. In this context, the illusion of procedural fairness has become a means to maintain traditional power balances, and to perpetuate the political oppression of particular socio-demographic categories (e.g., African Americans, the poor, the mentally ill and intellectually disabled) traditionally disadvantaged by the legal process.<sup>261</sup> The next chapter will turn to a detailed analysis of the ways in which some of these patterns of political oppression have been perpetuated through the discourse of forensic psychiatrists and legal actors in the first half of the 20<sup>th</sup> century, and reveal how apparently neutral descriptions of mentally ill criminal offenders can help maintain traditional social and racial hierarchies intact.

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<sup>258</sup> *Murray*, 182 S.W.2d at 477-479.

<sup>259</sup> See, e.g., *Snow*, 291 S.W. at 560-561; *Hawkins*, 613 S.W.2d at 727-730.

<sup>260</sup> See *Apolinar*, 244 S.W. at 815-816; *McGee*, 238 S.W.2d at 709.

<sup>261</sup> See, e.g., *Holland*, 761 S.W.2d at 322; see also Haney (1980: 381-382).

## **PART II. EMPIRICAL CHAPTERS**

## **CHAPTER 5. BIOLOGY, HEREDITY, AND THE DOCTRINE OF CIVILISATION (1909-1952)**

### Introduction

The developments analysed in this chapter stem from the mid-19<sup>th</sup> century crisis of the Christian notion of the soul and of the Enlightenment concept of rational mind, with their emphasis on reason, autonomy, free will, and personal responsibility. Over the 19<sup>th</sup> century, a series of scientific transformations gradually eroded the religious and philosophical foundations that informed legal notions of criminal responsibility in Western thought. Developments in the new disciplines of phrenology, neurology, and physiology questioned Enlightenment philosophers' ontological assumptions, proposing an alternative view of man seen as a biological mechanism regulated by natural laws and responding to particular physiological stimuli.

These developments fostered a deterministic and mechanistic view of human nature, which described human behaviour as the result, not of a moral choice or a commitment to religious values, but of biological and environmental forces operating beyond the subject's control. Rather than emphasising man's rationality and personal accountability, the new biomedical sciences stressed his affinity with the animal world and his vulnerability to the pressures of lower instincts and drives. Instead of seeing the human mind and behaviour as the unitary expression of individual consciousness, physicians reframed them as the outcome of an internal struggle between conflicting

anatomical units, each one with their own independent purpose and function (Burnham 1988: 19-21; see also Curti 1980: 3-13; see generally Danziger 1979; Smith 1981). Through this fragmentation, the mind had lost control over the body's operations,

the functional units of the human machine each had an independent existence and purpose of their own... neither function was under the control of the organism, whether animal, or man with a soul (Burnham 1988: 21).

As this chapter will show, in the late 19<sup>th</sup> and early 20<sup>th</sup> century this mechanistic view of human nature gave birth to a new notion of 'biological man', which exerted a powerful influence on the ways in which lay and expert witnesses framed mental disease and criminal behaviour in Texas criminal courts.

As the following sections will elucidate, despite their emphasis on science and objectivity, early 20<sup>th</sup> century explanations of mental disease and criminality reveal the existence of an underlying tension. On the one hand, psychiatrists developed scientific explanations of the biological and environmental mechanisms connecting mental diseases and intellectual defects with criminal behaviours. On the other hand, they provided morally charged descriptions of the personality and lifestyle associated with these medical conditions, which reveal a far from detached approach. Such descriptions drew from Darwinian evolutionism, which framed mental illness and criminality in terms of savagery and regression to a primitive stage of racial evolution, and from a 'culture of character' (Susman 2012: xxii) which, inspired by a puritan-capitalist ethic of hard work, austerity, and moral rectitude, impelled citizens to develop moral qualities that would move them towards ideal models of male and female virtue.

Besides highlighting the tension between scientific and moralising explanations of mental disease and crime, the following analysis will unveil the existence of a clear mismatch between the scientific theories developed in the psychiatric literature and the daily practice of expert witnesses called to testify in Texas courtrooms. This mismatch was partially due to lack of funding for legal aid (ABA 2013b: xxix-xxxi), poor legal representation (ABA 2013b: xxx; Bright 1994, 2009; The Spangenberg Group 1993),<sup>262</sup> and low levels of professionalism amongst experts called to testify in Texas capital punishment proceedings (see Ewing 1982). However, it was also due to psychiatry's methodological limitations when confronted with individual cases, and to the difficulty of reconciling psychiatric explanations of criminal behaviour with the legal questions that experts were required to answer in insanity trials. In particular, defence psychiatrists' concern with the physiological causes of mental disease rather than with defendants' behaviour at the time of the alleged offence, coupled with their emphasis on irresistible impulses rather than on cognitive deficits, undermined their ability to use the instruments of their discipline effectively, and to convince juries of defendants' inability to conform their behaviour to legal requirements.

The chapter is divided into 4 sections. Section 1 analyses the professional developments associated with the early 20<sup>th</sup> century biological paradigm. Section 2 examines biological explanations of insanity and criminality and the physiological mechanisms connecting the two. Section 3 turns to the moral framework within which early 20<sup>th</sup> century psychiatrists operated and to the ways in which cultural values and

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<sup>262</sup> See also *Burdine v. Johnson*, 262 F.3d 336 (5<sup>th</sup> Cir. 2001).

beliefs affected their framing of criminal insanity. Finally, Section 4 turns to the analysis of biological explanations of mental disease and crime in Texas capital punishment proceedings, focusing on the ways in which psychiatrists and lay witnesses used evidence of heredity, brain damage, syphilis, feeble-mindedness and epilepsy to explain defendants' peculiar characters and behaviours, and to support or undermine their insanity claims.

## 1. Professional Developments

Until the 1880s and 1890s medical and psychiatric explanations of physical and mental disease followed similar paths. However, at the close of the 19<sup>th</sup> century, discoveries in the field of pathogenesis and bacteriology prompted a scientific turn in American medicine, making old psychiatric theories seem obsolete. Medicine identified with the new scientific and technological rhetoric and was increasingly framed in biological terms. Psychiatrists, on the other hand, due to their repeated failures in treating mental disease, were gradually relegated to a caregiving function, isolated behind the asylum walls, more worried about managing chronically sick populations than about conducting scientific inquiries into the aetiology of mental disease (Rafter 1997a: 169).

In the eyes of the new scientific physician, institutional psychiatry was a remnant of a pre-modern age, based on enigmatic metaphysical speculations lacking theoretical rigour and scientific grounding (Grob 1983: 31). Psychiatrists were increasingly aware of the gap separating them from the new scientific medicine. Concerned about the risk of being marginalised as representatives of a backward and underdeveloped discipline,

they became more receptive to the innovations stemming from the biological sciences. Over the following decades, they dedicated significant efforts to scientific research, radically transforming the theories and methods of their discipline to adapt to the new intellectual environment.

While some psychiatrists highlighted the lack of scientifically grounded aetiological explanations (Wechsler 1930: 24-26 see Grob 1983: 179), the majority were firmly convinced that a new era of scientific progress and technological advancement was about to radically transform their field. Biological explanations of insanity and criminality were extremely popular, not because of their theoretical or empirical rigour, but because they served specific interests and purposes. They enhanced psychiatrists' professional status amongst the various branches of medicine, justified their claims for authority and expertise over mental disease, and supported their approach to criminal responsibility (Smith 1981: 34). Additionally, the reframing of insanity as a physical disease, distanced psychiatrists from non-experts, giving them exclusive authority over a specific area of intervention.

## 2. Biological Explanations of Mental Illness and Criminality

Encouraged by developments in the fields of neurology and physiology, early 20<sup>th</sup> century psychiatrists turned their attention to human biology as a possible source of criminal behaviour and devoted increasing efforts to the investigation of the mechanisms through which the workings of the body could influence human character, morality, and conduct. Victor Vaughan (1914: 690), former Dean of the School of

Medicine at the University of Michigan, fully endorsed psychiatrists' physiological approach to human behaviour when, in front of the American Prison Association, he read the following statement by French scholar Gabriel De Tarde:

The moral sense has an organic base (which does not necessarily mean to say a cerebral place) and consequently its disappearance or its deadening can only be explained by means of a gap or a lesion, by an atrophy or an injury to the brain, or by an imperfect nutrition of its cells; by some misfortune in other words (1922 [1912]: 177).

The majority of early 20<sup>th</sup> century psychiatrists agreed on the role of organic pathology in the aetiology of mental disease and criminal behaviour. However, their opinions varied as to the exact physical location of the disease, and the mechanism through which it could prompt criminal conduct. Charles Burr (1925: 536), a former Professor of Mental Disease at the University of Pennsylvania, for example, joined several other colleagues in focusing on the role of the brain, highlighting that there was

[A] widespread, popular belief, that much badness [was] caused by 'pressure' within the skull, the idea being that since the skull is a rigid body surrounding the brain, any injury to the bones, or any disease of the brain, so decreases the volume of the cranial cavity that the brain is squeezed and therefore functions abnormally.

On the other hand, Alfred Gordon (1921: 609), an alienist from Philadelphia, took a holistic and unspecified approach, arguing that mentally imbalanced criminals often presented many 'stigmata of physical degeneration, [along with] disturbed functions of the viscera, of tissues, of organs.' Similarly, Edgar Doll (1921: 366), a New Jersey clinical psychologist, believed that delinquents' mental instability stemmed either from an organic infection affecting 'the teeth, tonsils, or gastro-intestinal tract', or from a 'disturbance of the glands of internal secretion' upsetting the equilibrium of the

endocrine system (see also Bandler 1920: 2). These scholars started from an interrelated view of human biology, which argued that ‘a malfunction in any vital organ could ultimately affect the brain and lead to insanity’ (Grob 1983: 33). In this holistic rationale, the human organs were all interconnected; a disease in any single part could ultimately affect the overall functioning of the whole.

While psychiatrists’ opinions varied as to the exact location of disease, most of them agreed that the brain was the primary organ that regulated mental processes, and that lesions to one or more layers of the cortex could degenerate an individual’s mental state and prompt anti-social tendencies (Southard 1910: 119; Orton 1913: 669; Southard & Canavan 1917; Langdon 1917; Gurd 1920: 201-202; Rawlings 1920: 265). For instance, speaking at the annual meeting of the American Medico-Psychological Association, Dr. Michael Osnato (1919: 419) referred to the work of German psychiatrist Aloysius Alzheimer (1910) to argue that *dementia praecox* was ‘an organic disease of the brain’ caused by ‘lesions in the second and third layers of the cortex’, and that such lesions were directly correlated with the mental, affective, and behavioural abnormalities typically found in criminal offenders affected by this medical condition (Osnato 1919: 420). As we will see, until the discovery of the Binet-Simon test (1905), the Wasserman reaction (1906), and the electroencephalogram (1924) physiological explanations of mental disease and crime relied heavily on the post-mortem analysis of organic brain matter, an aspect which would prove problematic for psychiatrists asked to give opinions about living defendants in criminal proceedings.

*a. The Theory of Reflex Action*

Psychiatrists arguing that criminality stemmed from brain pathologies drew from the 19<sup>th</sup> century theory of reflex action, which framed insanity as lack of inhibition and unchecked expression of impulses, which could easily translate into motiveless and horrendous crimes (Smith 1981: 57; see, e.g., Gordon 1921). The theory of reflex action proposed that the brain controlled and inhibited the natural tendency of the lower reflexes to translate urges and sensations into action (Smith 1981: 46-49). A lesion that undermined the brain's inhibitory faculty over the lower reflexes could therefore prompt automatic movements outside the reach of individual consciousness, as happened in many cases of criminal insanity. The theory of reflex action drew from English biologist Charles Darwin's analogy between the human and the animal world to argue that man's behaviour was ultimately regulated by animalistic impulses that operated beyond the subject's control. Darwin (1985[1859], 1981[1871]) argued that all species, including humans, descended from a common ancestor and had evolved over millions of years into their present form through a process of natural selection, in which the struggle for survival and adaptation had contributed to eliminate unfavourable genetic traits while maintaining the desirable ones (1985 [1859]: 455). By stressing that all species descended from 'one primordial form', Darwin had broken down the traditional division between men and animals, furthering a secularised view of human nature which framed men as biological machines regulated by the same physical laws that governed the animal kingdom.

Physiological theories of reflex action based on the Darwinian analogy between men and animals challenged one of the fundamental grounds of legal doctrines of criminal responsibility. By arguing that movements and actions could be the result of unconscious reflexes rather than of conscious thought processes, they undermined legal notions of the human mind as a rational instrument guiding behaviour. However, as the next sections will show, when transposed into the trial context explanations of criminality stemming from reflex action theory supported the idea that the accused had committed the crime under an irresistible impulse rather than due to a cognitive deficit, falling short of the legal standard required to prove insanity and lack of guilt in Texas criminal courts.

#### *b. Heredity*

As the somatic approach gathered momentum, in the 1880s and 1890s an increasing number of psychiatrists turned their attention to genetic explanations, arguing that if insanity had an organic basis, it followed that it could be biologically transmitted across generations as much as any other physical pathology (Smith 1981: 54). Similarly, a growing number of psychiatrists inspired by Jean-Baptiste Lamarck's theory of soft inheritance, which proposed that organisms could transmit acquired characteristics and learned abilities to their offspring (1914 [1809]: 113), argued that children could inherit not only their parents' mental diseases, but also their bad habits and deviant behaviours. In this view, 'when a particular mental trait turned into habit, it became embodied in the structure of the nervous system; [and] this acquired structure was passed down to future generations' (Smith 1981: 54). Criminologists eager to find scientific support to

their claims that criminality was an inborn characteristic embraced the Lamarckian theory of soft inheritance with enthusiasm. While inspired by a deterministic view of human biology, these theorists conceded that there was scope for moral change through education and training during the juvenile years (see, e.g., Brown 1921; Dodge 1922; Conklin 1917).

In the early decades of the 20<sup>th</sup> century, however, the majority of psychiatrists embraced a more fixed view of human personality and behaviour (Rafter 2008: 128; see also Burnham 1988: 32). Stimulated by August Weissman's (1891) refutation of Lamarck's theory and by Gregor Mendel's (1906 [1865]) recently rediscovered heredity laws, they believed that biological characteristics were genetically transmitted without modification from the environment and that the improvement of social conditions was unable to stop the spreading of mental disease and moral degeneracy (Rafter 2008: 128). In the view of Weissman and Mendel's followers, once a particular trait had been acquired, there was no hope for moral recovery. The only solution to the spreading of moral degeneracy across generations was eugenic sterilisation. A strong supporter of Mendelian heredity theory, Dr. Drähms emblematically expressed this view, when he argued

[T]he burden with which the congenital offender comes already laden, and from which he draws his inspirational forces, is purely congenital. It is the product of entailed inheritance from ancestral germ plasms even inoculating that new life with the very germs of theft and murder already stirring in the flood of its progenitors ages back (cited in Hunter 1914: 519).

Along these lines, Dr. Burr (1925: 534-535) argued that criminal behaviours were not the results of some external, precipitating stress factor, but an inborn personality

characteristic stemming from an ‘inherent defect in protoplasm’, which could neither be cured nor corrected. As we will see, rather than embracing the deterministic views proposed by eugenicists, experts testifying in Texas courtrooms argued that criminal behaviours stemmed from the interaction of genetically inherited brain pathologies, vicious habits, and stressful life events.

### 3. Cultural Influences and Moral Framework

#### *a. American Psychiatry and the Doctrine of Civilisation*

Despite their claims to scientific objectivity, cultural values and standards of behaviour had a powerful influence on the ways in which 19<sup>th</sup> and early 20<sup>th</sup> century psychiatrists framed insanity and criminality. Inspired by Darwin’s evolutionary theories, psychiatrists saw civilisation as the most advanced stage of human development, the culmination of a long transition from a primitive condition of savagery and brutality, to a civilised status of intellectual refinement, dignity, and self-mastery (Darwin 1981 [1859]: 34, 386, 404-405, 1985 [1871]: 435; see also Spencer 1881 [1857]: 234-237). In this view, while all human races would eventually reach this stage of evolution, only whites had thus far completed the necessary steps to free themselves from the savagery and violent barbarity of the more archaic stages (Darwin 1985 [1871]: 459). Accordingly, non-whites were yet far from reaching a similar stage of biological and cultural advancement: civilisation was a quintessentially white, and more specifically male Anglo-Saxon, quality (Darwin 1981 [1859]: 178, 199, 404-405; Bederman 2008: 98; Cuddy & Roche 2003: 17-22, 32-40).

Forensic psychiatrists influenced by these views described insanity and criminality as fundamental attributes of ‘uncivilised’ men and women. In this view, mental illness and criminal behaviours were pathological manifestations of the ‘eruption of the inner savage’, of a loss of control over the unconscious impulses present in every individual, even the most virtuous types (Wiener 1994: 27). Indulgence in sensual pleasures and failure to conform to the virtuous habits of civilisation degenerated individuals’ mental and moral condition, transporting them ‘from a higher plane to a lower plane of living and acting’ (Chapin 1909: 77). Like their 19<sup>th</sup> century predecessors, most early 20<sup>th</sup> century psychiatrists still believed that insanity and criminality resulted from ‘a violation of those physical, mental, and moral laws which, properly understood and obeyed, result not only in the highest development of the race, but in the highest type of civilization’ (Grob 1983: 37). These physical, mental, and moral laws reflected a well-defined view of how individuals should live up to the ideals of appropriateness, dignity, and civility which were thought to distinguish Western culture from the ‘barbaric’ populations of the old European colonies, and from the African black slaves now freed from their subjugation.

#### *b. ‘Race Science’ and Eugenics*

Late 19<sup>th</sup> and early 20<sup>th</sup> century discourse on civilisation led many American psychiatrists to believe that mental disease was partially dependent on race. This belief built upon an old medical tradition, which emphasised the existence of clear anatomical differences between blacks and whites. By the end of the 19<sup>th</sup> century, the old American view that racial hierarchies reflected a divine order had been eclipsed by the conviction

that the racial power structure ‘reflected a natural ordering of myriad human groups measurable through the techniques of scientific empiricism’ (López 2006: 996; see, e.g., Darwin 1981 [1859]: 34, 199, 404-405). In this framework, the races’ position in the hierarchical ladder reflected ‘natural biological divisions’ and the innate abilities, temperaments, and destinies of their members. Accordingly, a system which adapted its social, medical, and legal practices to accommodate these differences was neither racist nor discriminatory: it simply acknowledged a scientific fact.

In the 1910s and 1920s, most members of the legal and medical profession were firmly convinced that traditional racial hierarchies were rooted in innate biological differences. By then, 19<sup>th</sup> century biological race theories had evolved into eugenics, an extreme expression of naturalistic racism which reasserted the hierarchical organisation of the world’s ‘races along a continuum of intelligence, capacity, and worth’, while advocating a strict separation between members of different racial groups to maintain Anglo-Saxon Americans’ racial purity and intellectual superiority (López 2006: 997). In this view, racial mixing would inevitably lead to biological and moral degeneration. Hence, white Anglo-Saxon Americans needed to be protected from the genetic contamination of racially inferior and mentally defective individuals, via the enforcement of strict immigration, segregation, and sterilisation laws (López 2006: 997; see, e.g., Battaglini & Millar 1914; Shartel 1925; Hunter 1914).

c. *The Culture of Character and the Puritan Work Ethic*

In the first three decades of the 20<sup>th</sup> century, eugenic theories of racial superiority intersected with a culture of character and a puritan work ethic which turned the behavioural characteristics of the white protestant middle classes into a gold standard of moral rectitude. Over the 19<sup>th</sup> century, a puritan ethic of sobriety and simplicity had created the foundations for the emergence of a new class ideology and of a vibrant capitalist spirit, which rejected the values and lifestyles of the old feudal aristocracy while celebrating those of the productive and virtuous middle classes (Weber 2012 [1905]: 170-172). The puritan ethic celebrated industriousness, austerity, and self-discipline as moral virtues leading to spiritual salvation (*Ibid.*, 158). As Max Weber explains, for the puritans,

not leisure and enjoyment, but only activity serves to increase the glory of God, according to the definite manifestations of his will. Waste of time is thus the first and in principle the deadliest of sins... Loss of time through sociability, idle talk, luxury, even more sleep than is necessary for health, six to at most eight hours, is worthy of absolute moral condemnation (*Ibid.*, 157).

Early 20<sup>th</sup> century psychiatrists inspired by the puritan work ethic condemned and criminalised men and women engaging in ‘idle’ and ‘self-indulgent’ habits and behaviours. Men were most likely to be condemned for their alcohol abuse and sexual promiscuity, which was believed to reduce their industriousness, degrade them to a lower socio-economic condition, and prompt them to use criminal means to satisfy their needs (Kinberg 1914: 573-574; see also Armstrong-Jones 1918: 139). In this view, by failing to fulfil their moral duty to create wealth and serve God’s will, alcoholic and

sexually indulgent men had lost any hope for salvation, in this world as well as in the afterlife.

The social reform movements of the Progressive Era (1890-1920) endorsed the puritan-capitalist framework while rethinking it according to the economic and social developments of their time. Inspired by early 20<sup>th</sup> century Taylorism, progressive reformers aimed at improving the efficiency and productivity of the nation by modernising and applying scientific criteria to the management of every area of society and government, through the employment of experts selected on purely meritocratic grounds (Rafter 2008: 135). A number of psychiatrists enthusiastically endorsed the progressive project, recasting hard work, efficiency, and productivity as essential means to achieve not only spiritual salvation but also mental health and social adjustment. In their view, mentally ill and intellectually disabled men were ‘social misfits’, individuals incapable of contributing to the economic progress of American society through constant effort and self-control, and therefore most likely to engage in criminal behaviour. For example, Dr. Stanley Abbot (1911: 16) argued in front of the New York Psychiatric Society that men affected by *dementia praecox* displayed

goodness and meekness rather than strength and determination... deficient ethical control; unsteadiness of occupation; inefficiency; especially loss of directive energy and initiative, without obvious cause (such as illness).

Similarly, Dr. Burr (1925: 534) associated men’s habitual criminality with lack of industriousness, and argued that the inability to pursue a goal with constancy and persistence reflected criminals’ lower impulses, their tendency to search for immediate pleasures, and their incapacity to postpone gratification (see also Fernald 1912: 525).

Psychiatrists operating in this context described mentally diseased criminals by relying on stereotyped personality and behavioural descriptions associated with social categories that were deemed to be unfit to function productively within the mechanisms of early 20<sup>th</sup> century capitalism. ‘Socially problematic’ groups such as immigrant workers from Eastern and Southern Europe and African Americans were described not only as insane and mentally defective, but also as weak, idle, self-indulgent, sexually promiscuous and highly fertile, all characteristics in sharp contrast with the traits and behaviours cherished by the white protestant middle classes (Rafter 2008: 135; see, e.g., O’Malley 1914: 313-317; Bevis 1921: 70; Erickson 1928: 618-621).<sup>263</sup>

In the South, where the highest proportion of African Americans lived, the association of blackness, madness, and crime had been in vogue since the abolition of slavery in 1865. Shocked by the transformation of race relations brought about by the Civil War, mid-19<sup>th</sup> century American psychiatrists started arguing that emancipation increased blacks’ likelihood to develop mental diseases and engage in antisocial behaviours (see Chapter 1: Section 6). In their view, while slave discipline had thus far restrained blacks’ ‘childish’, ‘emotional’, and ‘instinctive’ nature, their newly acquired freedom allowed them to indulge in ‘unhealthy passions and appetites’, that could easily degenerate their mental health condition (Roberts 1883: 254; Buchanan 1886: 67-70; O’Malley 1914: 317-318; Bevis 1921: 69-70). Psychiatrists writing in the 1910s and 1920s powerfully embraced these racist arguments, suggesting that, deprived of the supervision of the white slave owner, African Americans had turned into ‘irresponsible’,

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<sup>263</sup> For a discussion of middle-class perceptions of ‘urban slum dwellers’ in Victorian England see Zedner (1991: 265-266); Stedman Jones (1971).

'lazy', and 'unreliable' workers, more likely to engage in criminal behaviours to cope with the difficulties associated with their new social status and the requirements of 'modern civilization' (Bevis 1921: 69-70).

In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, the racist stereotypes typically applied to African Americans were extended to Southern and Eastern European immigrants of Catholic faith. At the time, the mass immigration of these ethnic groups towards the urban centres of the North-East were prompting growing concerns amongst white middle class Americans, who feared that through their 'childish', 'beastlike', and 'promiscuous' behaviours, Catholic immigrants would create a host of sanitary and political problems which would drain the nation's already scarce resources (Rafter 1997a: 118-119, 127-128).

American psychiatrists regularly fuelled these fears, by arguing that foreign immigrants could be distinguished by their inferior physical characteristics, lower intelligence, and higher propensity to contract mental diseases and engage in criminal behaviour (Grob 1983: 40; see, e.g., Channing 1883: 76-83; Henderson 1893: 13-14; Drähms 1900: 31). For example, Dr. Milton H. Erickson proposed in 1928 that the immigration of foreign nationals of 'defective mentality' had led to a staggering increase in the incidence of crime (620; see also Vaughan 1914: 690). 'The foreign-born individual of subnormal or deficient intelligence', Erickson argued,

appears to be responsible for an overwhelmingly increased incidence of crime as determined by population ratios. This increased incidence reaches the proportion of 327% of the fair quota for the low-grade morons (1928: 624).

To contain this tendency, he proposed, states needed to develop stricter immigration policies, which could limit the entrance of these ‘low-grade’ foreigners and decrease the incidence of crime over the following years (*Ibid.*, 621).

As these examples suggest, eugenic theories of racial superiority and cultural stereotypes linking particular ethnic groups with lower intelligence, idleness, and criminality had a powerful influence on early 20<sup>th</sup> century psychiatric thought. However, when asked to testify in Texas criminal courts, mental health experts typically refrained from making explicit connections between defendants’ race, their genetic endowment, and propensity for mental disease and/or criminality. Similarly, attorneys and judges tended to avoid strong racial references in their arguments and opinions, the sole exception being the occasional use of different metrics in the evaluation of ‘normal intelligence’ amongst African Americans and whites.<sup>264</sup> Instead of indicating a lack of concern for racial matters in forensic mental health assessments, these omissions may reflect the deeply entrenched nature of the racist stereotypes influencing defendants’ mental status evaluations, and/or courts’ deliberate attempt to silence racial issues and give a false impression of neutrality and impartiality in trial proceedings.

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<sup>264</sup> See, e.g., *Maxey v. State*, 145 S.W. 952 (Tex.Crim.App. 1912), Chapter 4: Section 2(c).

## 4. Biology, Insanity, and Texas Capital Punishment Trials

### *a. Heredity*

Most early 20<sup>th</sup> century psychiatrists testifying in Texas capital punishment trials firmly believed that mental diseases and criminal behaviour were transmitted across generations. However, rather than embracing popular Mendelian theories and eugenic arguments, they emphasised the role of the environment in precipitating individuals' weak mental condition. When facing stressful life events, they argued, subjects who had inherited a mental disease or intellectual disability from their ancestors were more likely to break down, lose control over their reasoning faculties, and engage in criminal conduct. As state expert Dr. C. W. Gray argued at the trial of Joe Shield, a man with a history of insanity in the family who was accused of murdering his divorced wife,

[I]f there is mental unsoundness in the parents or down the line in the family, it predisposes the offspring to mental unbalance. Unbalance of mind is brought about in a great many instances by chronic worry and excessive grief; some forms of insanity where they have weak nervous system or in a weakened condition to start with... sudden shocks have a predisposing effect on the mind towards insanity... I have heard of people going suddenly insane at the grave of some loved one... [They] do not have any control over their will and do not know anything about right or wrong.<sup>265</sup>

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<sup>265</sup> Shield v. State, 38 S.W.2d 76 (Tex.Crim.App. 1931), Dr. Gray Test. Trial Tr. 222¶2-224¶1.

Evidence that a parent, sibling, or relative suffered from some form of mental illness was extremely helpful for the defence, particularly when the defendant's insanity claim was weak.<sup>266</sup> By emphasising a family history of insanity, defence attorneys could potentially divert the jury's attention from the mental status of the defendant to that of a mentally disordered family member, playing on the determinist idea that if a close relative suffered from a severe mental condition, it followed that their client suffered from some form of mental disease as well.

However, defence attorneys often failed to elicit a connection between the mental disorder suffered by the defendant's family member and the one allegedly suffered by the defendant himself, making heredity claims, based on family history alone, unconvincing.<sup>267</sup> This omission may have been due to a combination of poor investigation, due to lack of expertise and/or financial constraints; difficulties in retrieving hospital records and conducting interviews with witnesses who could testify on the mental condition of the defendant's family members; and a lack of substantial evidence supporting the legitimacy of the defendant's insanity claim in the first place.

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<sup>266</sup> See, e.g., *McKenny v. State*, 288 S.W. 465 (Tex.Crim.App. 1926). The defendant in this case based his insanity claim exclusively on family members' testimony to the effect that a number of relatives, including the defendant's cousin and one of his sisters, were insane; see *Mose McKenny Test. Trial Tr.* 19, *Julia McKenny Test. Trial Tr.* 19-20. See also *Gutierrez v. State*, 175 S.W.2d 968 (Tex.Crim.App. 1943), *Nicola Test. Trial Tr.* 42-43, *Rev. Flores Test. Trial Tr.* 44-45; *Shield*, 38 S.W.2d; *Duke v. State*, 182 S.W.2d 808 (Tex.Crim.App. 1944).

<sup>267</sup> The evidence in *Shield*, 38 S.W.2d strongly suggests that the defendant's father, Charlie Shield, suffered from some form of mental illness; see *Gordon Test. Trial Tr.* 89¶2-92¶3, *Thompson Test. Trial Tr.* 60¶2-61¶2, *Leon Shield Test. Trial Tr.* 117¶2-121¶1. However, while a few lay witnesses stated that the defendant resembled his father physically, none of them argued that he had acquired the behaviours and peculiarities that made them believe that his father was insane; see *Leon Shield Test. Trial Tr.* 121¶2, *Ethel Shield Test. Trial Tr.* 126¶2.

For example, George Duke, a white man charged with killing the woman with whom he lived, based his insanity claim almost exclusively on testimonies to the effect that his mother, uncle, niece, and brother had all been committed to insane asylums,<sup>268</sup> and that, on the night of the alleged offence, he was under the influence of ‘intoxicating liquor’.<sup>269</sup> The defence’s case rested on the idea that Duke had inherited his mother’s bad genes, which had weakened his mental faculties predisposing him to the development of insanity. On the night of the crime, the abuse of intoxicating liquor further weakened Duke’s reasoning powers, prompting a loss of control and unrestrained violence towards the victim. The defence failed to introduce any medical evidence suggesting that Duke was insane at the time of the killing and made no attempt to show that there was a connection between the kind of mental disease suffered by his family members and the one allegedly suffered by the defendant himself. As a result, the jury concluded that Duke was fully responsible for the crime committed and sentenced him to death.

Early 20<sup>th</sup> century psychiatrists consistently argued that a combination of ‘bad heredity’, environmental pressures, and ‘wicked habits’ could lead to a loss of control over the ‘lower impulses’ and to the development of insanity (see, e.g., Chapin 1909: 76-77; Bowers 1917: 84; Conklin 1917; see generally Burnham 1988: 57).<sup>270</sup> The trial of Lloyd Ross, a Harvard-educated surgeon charged with the murder of his friend and

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<sup>268</sup> *Duke*, 182 S.W.2d, Miles Test. Trial Tr. 52¶2-53¶1.

<sup>269</sup> *Duke*, 182 S.W.2d at 808.

<sup>270</sup> For Texas court experts advocating this approach see *Shield*, 38 S.W.2d, Dr. Allen Test. Trial Tr. 150¶3-152¶2; *Pappas v. State*, 78 S.W.2d 619 (Tex.Crim.App. 1935), Dr. Greenwood Test. Trial Tr. 62; *Ross v. State*, 220 S.W.2d 137 (Tex.Crim.App. 1948), Dr. Johnson Test. Trial Tr. 263¶2.

investment advisor Willard York, his wife Gertrude, and two of their children, provides an illustrative example of this line of reasoning.<sup>271</sup> At trial, the defence tried to demonstrate that, as a result of a combination of bad heredity and traumatic events, the defendant's mental faculties had gradually degenerated, causing him to succumb under the pressures of unrestrained impulses.

In support of the defendant's insanity claim, the defence introduced several lay witnesses, including nurses, doctors and acquaintances, who had known him for several years. They all agreed that Dr. Ross had undergone a radical transformation over the months preceding the killings, particularly following a financial breakdown he experienced as a result of bad investments, made by Willard York on his behalf.<sup>272</sup> From being a respectable, kind, courteous and professional man, the surgeon started dressing sloppily, being withdrawn, forgetful, and absent minded. He looked nervous, became severely depressed, and lost interest in everything and everyone. His work suffered as a result, to the point that several nurses and doctors who worked with him on a daily basis commented on it.<sup>273</sup> The witnesses all agreed that the murders were completely out of character and concluded that the man must have gone insane to commit a similar action.<sup>274</sup> The fact that the man previously was a 'perfect gentleman', honourable, and full of virtues, made his crime even more difficult to interpret as an act of rational choice.

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<sup>271</sup> *Ross*, 220 S.W.2d.

<sup>272</sup> Lewis Test. Trial Tr. 93¶2-94¶1, Dr. Maxwell Test. Trial Tr. 153¶4-155¶1.

<sup>273</sup> Sister Bernice Test. Trial Tr. 137¶3.

<sup>274</sup> Dr. Scott Test. Trial Tr. 123¶1, Dr. Cooper Test. Trial Tr. 144¶1, Dr. Maxwell Test. Trial Tr. 156¶2.

The defence psychiatrists, Anna Boyd and W. J. Johnson, agreed with the lay witnesses that Dr. Ross was insane at the time of the crime. In their view, the defendant had a schizoid personality and suffered from paranoid delusions. While he had suffered from this condition from an early age, the disease had accumulated over time, and manifested itself as he collapsed under the pressures of life.<sup>275</sup> As a result of his paranoid condition, Ross felt that everyone was against him: his colleagues, his wife, even the psychiatrists interviewing him.<sup>276</sup> He became obsessed with his health and hygiene, refusing to have water in his ear for fear of infections, repeatedly washing his hands, and changing his socks several times a day.<sup>277</sup> Finally, he expressed delusionary thoughts that all the events leading up to the murders, including the murders themselves, were part of God's 'infinite plan.'<sup>278</sup>

On top of this, two physicians testified that Dr. Ross suffered from rheumatic brain fever, a disease which could cause him to experience brain haemorrhages, with devastating effects on his mental faculties.<sup>279</sup> The disease, they argued, had degenerated in the months preceding the murder, causing the defendant to suffer an eye haemorrhage which suggested the possibility of internal brain bleeding. According to the defence psychiatrists, while Dr. Ross had always had paranoid tendencies, it was

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<sup>275</sup> Dr. Johnson Test. Trial Tr. 263¶2.

<sup>276</sup> Dr. Boyd Test. Trial Tr. 243¶1, Dr. Johnson Test. Trial Tr. 264¶1.

<sup>277</sup> Dr. Johnson Test. Trial Tr. 277¶5-278¶1.

<sup>278</sup> Dr. Boyd Test. Trial Tr. 243¶2-244¶2, Dr. Johnson Test. Trial Tr. 275¶5-276¶3.

<sup>279</sup> Dr. Helfer Test. Trial Tr. 222¶2-223¶1, Dr. Scott Test. Trial Tr. 116¶3, 118¶2.

the fears associated with the worsening of his physical condition, coupled with his financial breakdown, that precipitated his mental health.<sup>280</sup>

Finally, the evidence showed that the defendant's mother had died in an insane asylum suffering from a form of paranoia.<sup>281</sup> A number of witnesses argued that the defendant closely resembled his mother. They described Mrs. Ross as 'gentle and retiring... a quiet and reserved woman',<sup>282</sup> who had become mentally 'unstable, moody, depressed, and child-like in her manner' due to her mental condition.<sup>283</sup> In his youth, the defendant shared his mother's reserved character and disposition, as well as her moodiness, depression, and paranoid tendencies.

According to the defence's theory, Dr. Ross' congenital mental weakness, combined with his medical condition and the emotional strain resulting from his financial loss, gradually undermined his brain's ability to keep the lower instincts under control, eventually resulting in an explosion of unrestrained violence with devastating consequences. As one of the physicians who diagnosed the defendant's rheumatic brain fever explained at trial,

the piling up of emotional stresses and strains one upon the top of the other... might cause a so-called blow-up in the mental capacity of the individual, and he might become dangerous and do unheard of things.<sup>284</sup>

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<sup>280</sup> Dr. Johnson Test. Trial Tr. 267¶4-5, 278¶5-6.

<sup>281</sup> Dr. Bennett Test. Trial Tr. 125¶3-126¶1.

<sup>282</sup> Tuzuh Stahl Test. Trial Tr. 200¶4.

<sup>283</sup> Renna Ross Test. Trial Tr. 218¶2.

<sup>284</sup> Dr. Scott Test. Trial Tr. 122¶1; see also *McCune v. State*, 240 S.W.2d 305 (Tex.Crim.App. 1951), Dr. Thomas Test. Trial Tr. 115¶1-2.

On appeal, the TCCA upheld Dr. Ross' conviction and death sentence. In response to the defendant's claim that the evidence supporting his insanity plea was so overwhelming as to invalidate the jury's verdict, the TCCA highlighted that

[m]uch of the evidence in the case presents conclusions of witnesses, based on the idea which the witness had that circumstances had developed in the appellant an irresistible impulse which drove Dr. Ross to the murder of Willard York, and with him his wife, Gertrude York... [however] the one controlling question in this case is whether or not the accused was so mentally deranged at the time of the commission of the alleged offense as to make him incapable of knowing the right from the wrong in her particular transaction, and that it was a thing he ought not to do.<sup>285</sup>

This, according to the TCCA, the defence had failed to conclusively show.<sup>286</sup> Additionally, the circumstances surrounding the murder showed that the defendant had a clear motive for wanting to inflict suffering on Willard York and his family, whereas his actions following the killings suggested that he understood that his act was wrong. According to the TCCA,

following the shooting [appellant] returned to San Antonio, went to the police station and surrendered himself to be imprisoned for his crime. It would be singular that a man should do this in the absence of any realization of wrong doing.<sup>287</sup>

The court's reasoning in *Ross* illustrates the difficulty of reconciling psychiatry and the law's ontological and epistemological assumptions when trying to establish criminal guilt. Texas courts, like most other judicial bodies, endorse a folk-psychological, behavioural, approach to insanity and criminal responsibility, which relies on the

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<sup>285</sup> *Ross*, 220 S.W.2d at 139.

<sup>286</sup> *Ibid.*, 141.

<sup>287</sup> *Ibid.*

observation of external behaviours to infer mental states, rather than on scientific explanations highlighting the influence of unconscious impulses on the individual will. As a result, psychiatric evidence that the defendant suffered from a mental illness at the time of the crime may prove useless for the purpose of the insanity defence, if the defendant's behaviour before and after the commission of the alleged offence suggests the presence of premeditation and/or cover up. Moreover, psychiatric opinions based on reflex action and heredity theories, such as the ones introduced in Dr. Ross' case, tend to suggest that the defendant acted under an irresistible impulse while maintaining his cognitive abilities intact, falling short of the legal standard of insanity required to prove lack of guilt.

#### *b. Brain Damage*

As discussed in Section 2, the early 20<sup>th</sup> century psychiatric literature was filled with speculative explanations of the biological mechanisms connecting various organic defects, mental diseases, and criminal behaviours. Conversely, such explanations rarely, if ever, appeared in the discourse of experts called to testify in Texas capital punishment trials. The reason for this mismatch is that, until a series of technical innovations enhanced psychiatrists' diagnostic abilities - particularly with regard to syphilis, feeble-mindedness, and epilepsy - somatic explanations of brain pathologies relied exclusively on the observation of external symptoms and on post-mortem examinations.

Psychiatrists valued post-mortem examinations since they allowed them to identify brain lesions and other organic abnormalities that differentiated insane individuals from the ‘normal’ population (see, e.g., Southard 1910; Gurd 1920). However, due to their inapplicability to living persons, this method was of limited utility for psychiatrists hired to conduct mental health evaluations and testify in criminal proceedings. As a result, experts typically based their mental health assessments on a simple 20-30 minutes conversation aimed at assessing the defendant’s cognitive abilities, and on the hypothetical questions formulated by the defence and the prosecution. Their opinions drew from information that was equally available to lay observers, such as the defendant’s family, medical, and criminal history; his manners, speech, and conduct; his ability to carry on a conversation intelligently and meaningfully; and any marked changes in his personality and conduct following the alleged brain damage.<sup>288</sup> Partially due to this epistemological limitation, most insanity trials in the first half of the 20<sup>th</sup> century relied almost exclusively on lay witness testimonies, even when defendants’ insanity claims were based on organic explanations of mental disease, such as brain damage following traumatic accidents.<sup>289</sup> An analysis of such testimonies suggests that the lay public believed that insanity was closely associated with organic brain defects, and that traumatic head injuries could lead to a sudden change in the individual’s

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<sup>288</sup> See, e.g., *Morris v. State*, 255 S.W. 744 (Tex.Crim.App. 1923), Dr. Shields Test. Trial Tr. 172-173; *Pappas*, 78 S.W.2d, Dr. York Test. Trial Tr. 58-59; Dr. Appleby Test. Trial Tr. 60-61; *Morrow v. State*, 224 S.W.2d 481 (Tex.Crim.App. 1949), Dr. Grice Test. Trial Tr. 66¶2-3, Dr. Crain Test. Trial Tr. 99¶3-100¶3; *Jones v. State*, 243 S.W.2d 848 (Tex.Crim.App. 1951), Dr. Plasek Test. Trial Tr. 111¶2-112¶1, Dr. Hawkins Test. Trial Tr. 125¶3-126¶2.

<sup>289</sup> See, e.g., *Stanton v. State*, 158 S.W. 994 (Tex.Crim.App. 1913), Mack Test. Trial Tr. 12; *Morris*, 255 S.W., Rosa Lee Morris Test. Trial Tr. 51; *Apolinar v. State*, 244 S.W. 813 (Tex.Crim.App. 1922), Susana Apolinar Test. Trial Tr. 23, Ricardo Apolinar Test. Trial Tr. 27, Heard Test. Trial Tr. 28, Vasquez Test. Trial Tr. 28; *Morrow*, 224 S.W.2d, Ragan Test. Trial Tr. 56¶5-57¶6; *Jones*, 243 S.W.2d, Gray Test. Trial Tr. 103¶2. For a later case relying on similar evidence to support an insanity claim see *Bradley v. State*, 353 S.W.2d 864 (Tex.Crim.App. 1962), Dunson Test. Trial Tr. 110:22-23, Nelson Test. Trial Tr. 137:22-138:7.

character and behaviour, prompting the subject to engage in criminal conduct. Traumatic head injuries were, in the mind of many lay witnesses, a useful rationalisation for defendants' change of character and criminal actions.

Following a traumatic head injury, lay witnesses argued, defendants started manifesting a variety of behavioural symptoms. They experienced severe headaches, insomnia, lapses of memory, and difficulties communicating.<sup>290</sup> They became melancholic, childish, laughed without reason, talked to themselves, and had persecutory delusions.<sup>291</sup> However, taken in isolation, evidence that the defendant suffered a head injury and behaved oddly following the accident, was typically insufficient to convince the jury that the defendant should be exculpated for his crime, especially if the offence was cruel and/or showed evidence of premeditation.<sup>292</sup>

The trial of Ewell Morris, an African American cotton picker sentenced to death for the murder of a neighbouring white landowner, serves as a compelling case study for this point.<sup>293</sup> In court, several lay witnesses reported that, two years before the alleged offence, the defendant had suffered a head injury by falling off the sidewalk and hitting his head on the paved street.<sup>294</sup> While Morris recovered shortly after the fall, a few family members testified that they had noticed a marked change in the defendant's

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<sup>290</sup> *Stanton*, 158 S.W., Mack Test. Trial Tr. 12, Grabtree Test. Trial Tr. 13; *Morrow*, 224 S.W.2d, Griffith Test. Trial Tr. 42¶3.

<sup>291</sup> *Morris*, 255 S.W., Mildred Morris Test. Trial Tr. 67-68; *Morrow*, 224 S.W.2d, Sutton Test. Trial Tr. 79¶3-80¶6, Mr. Murrell Test. Trial Tr. 86¶6-87, Mrs. Murrell Test. Trial Tr. 93; *Bradley*, 353 S.W.2d, Dunson Test. Trial Tr. 111:25-112:4, Nelson Test. Trial Tr. 135:4-11.

<sup>292</sup> See, e.g., *Jones*, 243 S.W.2d at 849.

<sup>293</sup> *Morris*, 255 S.W.

<sup>294</sup> *Rosa Morris Test. Trial Tr. 51.*

character and behaviour following the accident. Amongst other things, they reported that Morris started obsessively washing his hands, pulling his fingernails, not speaking and not answering people's questions, speaking and laughing to himself without reason, not sleeping at night, and spitting food and throwing it on the floor.<sup>295</sup> Most importantly, they argued that in the year prior to the murder, Morris started fearing sleeping alone at night because he believed that the victim, Oliver Marshall, was spying on him at all times with the intent of killing him.<sup>296</sup>

According to the witnesses, it was the traumatic head injury suffered a few years prior to the alleged offence that had caused Morris' mind to degenerate, undermining his ability to distinguish right from wrong at the time of the crime. However, in the absence of medical experts corroborating this hypothesis, the defence's theory lost its explanatory force. The lay witnesses testifying in Morris' case lacked the necessary authority and expertise to explain how the traumatic brain injury may have undermined Morris' ability to reason, make moral judgments, and control his behaviour, making an insanity claim based on their opinions alone less powerful. Moreover, the evidence showed that Morris had threatened to kill the victim on numerous occasions before effectively carrying out the murder, and that he had tried to hide at the house of some relatives on the night following the crime.<sup>297</sup> These facts likely led the jury to infer that the murder was premeditated, and that Morris had

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<sup>295</sup> *Ibid.*, 48-53, see also Mildred Morris Test. Trial Tr. 67-68, Maxwell Morris Test. Trial Tr. 79-80, Buelah Johnson Test. Trial Tr. 89-91.

<sup>296</sup> Rosa Morris Test. Trial Tr. 51-52, 57, Mildred Morris Test. Trial Tr. 69.

<sup>297</sup> Hicks Test. Trial Tr. 112-114¶1, Osby Test. Trial Tr. 114¶3-116¶1.

sufficient mental capacity to distinguish right from wrong at the time of the crime, regardless of the symptoms observed by his family.

Finally, since the case involved a black defendant killing a white victim, and since (white) Texas jurors tend to impose harsher sentences in similar cases (Johnson 1941; Garfinkle 1949; Koeninger 1969; Ralph et al 1992; Brock et al 1999), the jury's decision to impose the death penalty was presumably informed, not only by lucid considerations regarding Morris' mental health, but also by racist stereotypes which prompted them to explain his criminal act as an expression of his 'uncivilised nature' rather than of a mental disorder. In this context, the fact that most defence witnesses were black members of the defendant's family, and most state witnesses were local white landowners and police officers, constituted an additional advantage for the prosecution, which could bet on jurors' likelihood to hold the opinion of the state witnesses in higher regard.

In extreme cases, the defendant was the only (or almost only) witness introduced to support his own insanity claim.<sup>298</sup> In such instances, the defendant's testimony was turned into a psychiatric session, a stream of consciousness in which the defendant gave a detailed account of his life experiences, and of the events leading to, and following, the criminal act itself. In the absence of a medical evaluation, jurors were turned into

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<sup>298</sup> *Pappas*, 78 S.W.2d, Pappas Test. Trial Tr. 26-49; *Edwards v. State*, 114 S.W.2d 572 (Tex.Crim.App. 1938), Edwards Test. Trial Tr. 11-19; *McCune*, 240 S.W.2d, Billie McCune Test. Trial Tr. 49-86; *Miner v. State*, 178 S.W.2d 268 (Tex.Crim.App. 1944), Miner Test. Trial Tr. 37-63, 67-78; *Jordan v. State*, 94 S.W.2d 741 (Tex.Crim.App. 1936), Jordan Test. Trial Tr. 16-27; see also *Stanton*, 158 S.W., Stanton Test. Trial Tr. 22¶1. For a later case in which the defendant's testimony, and performance as his own defence attorney, played a crucial role in jurors' decision-making see *Hawkins v. State*, 613 S.W.2d 720 (Tex.Crim.App. 1981), Hawkins Test. Trial Tr. vol. 9, 1678-1730.

listening ears with the responsibility of judging, based on their own common-sense views, whether or not the defendant's manners, appearance, speech, and account of the event suggested that he was mentally deranged at the time of the crime.

The trial of James Pappas, a mentally unstable Greek citizen with limited knowledge of the English language, provides an illustrative example.<sup>299</sup> Charged with the murder with malice of Bess Burt, a woman he loved but who refused his advances, James Pappas signed a written confession that he was incapable of reading, in which he admitted to the killing for romantic reasons.<sup>300</sup> Due to his mental condition and linguistic difficulties, Pappas was incapable of collaborating with counsel in his own defence, and to provide a list of witnesses who could testify in support of his insanity claim.<sup>301</sup> As a result, Pappas' defence relied exclusively on the defendant's own testimony at trial.<sup>302</sup>

In their motion for a new trial, the defendant's attorneys argued that

the wild, fantastic, unbelievable story told by the defendant on the trial of this case and which your council heard for the first time from the witness stand in this court is evidence tending to show the mental unbalance of the defendant.<sup>303</sup>

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<sup>299</sup> *Pappas*, 78 S.W.2d.

<sup>300</sup> Pappas Conf. Trial Tr. 64-67.

<sup>301</sup> Def. Att'ys Francis and Van Dobson Hr'g On Mot. for New Trial 3-4§2.

<sup>302</sup> Pappas Test. Trial Tr. 26-49.

<sup>303</sup> Def. Att'ys Francis and Van Dobson Hr'g On Mot. for New Trial 5§3.

A reading of Pappas' testimony at trial corroborates this conclusion, suggesting that the defendant was extremely confused and had no understanding of his defence strategy. On the one hand, he provided information in support of his insanity claim, testifying that he had been confined in 'the crazy hospital' on numerous occasions.<sup>304</sup> On the other hand, in a convoluted, implausible, and incoherent account of the facts, he tried to convince the jury that he was innocent, that he signed the confession although he could not read in English,<sup>305</sup> and that the real perpetrator was an imaginary woman who had killed the victim out of jealousy because she was madly in love with him.<sup>306</sup> An extract of the DA's cross examination clearly illustrates the difficulty of eliciting any meaningful information from the defendant:

Q. Now, when you got in the car the next morning, you had the pistol with you?

A. How do you know I had it?

Q. I am asking you.

A. Do you want me to tell yes or no?

Q. I want you to tell the God's truth?

A. I said a while ago, I said what I had to say.

Q. Did you have the pistol when you got in?

A. Now, I said I told you already, and told the jury and you too. I don't know what I am going to say. You make me like crazy.

Q. I asked you if you had the pistol when you got in the car. The answer is 'yes' or 'no'.

A. I don't remember...

Q. When you got out of the automobile on Jenkins street, when it was raining, did you not have the pistol then with you?

A. I don't know what you are going to tell me; I don't know what I have. I told you what I was going to say... you make me so dizzy; anything you ask I am going to say 'yes'... when I got out of the car down there on Jenkins Street, I did not have the pistol with me then.<sup>307</sup>

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<sup>304</sup> Pappas Test. Trial Tr. 48-49.

<sup>305</sup> *Ibid.*, 29.

<sup>306</sup> *Ibid.*, 33-39.

<sup>307</sup> *Ibid.*, 40-41.

In light of this testimony, the defence attorneys asked the TCCA to grant a new hearing based on newly discovered evidence in support of the defendant's insanity claim. Pappas corroborated his attorneys' statements, arguing that he had only started opening up regarding his mental condition following his conviction.<sup>308</sup> According to Pappas' account, his mental condition had degenerated following a head injury suffered during his youth. The injury had allegedly caused him to suffer from severe headaches and lapses of memory, during which he lost his reasoning abilities, 'imagined things humanly impossible', and 'acted in a wild and crazy manner.'<sup>309</sup>

To corroborate the defendant's story, the attorneys presented a series of affidavits written by his friends and acquaintances, who argued that the defendant's mother was insane and was known in their village in Greece as the 'Crazy Batziamarkos',<sup>310</sup> that they had always considered the defendant 'a crazy galoot, in other words "nuts"', that the defendant 'would fly off the handle and was just like a wild man when he got mad',<sup>311</sup> 'did not seem to have any control of himself where women were concerned', 'was unable to carry on a sensible conversation', and 'seemed to have the mind of a child.'<sup>312</sup>

The TCCA ruled that, given Pappas' lack of cooperation in the investigations, the defence attorneys had used 'reasonable diligence to obtain testimony touching

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<sup>308</sup> Pappas On Mot. for Cont. 19.

<sup>309</sup> *Ibid.*, 19-20.

<sup>310</sup> Zgouridos Aff. Hr'g On Mot. for New Trial 26.

<sup>311</sup> Henckel Aff. Hr'g On Mot. for New Trial 13.

<sup>312</sup> Agurastos and Agurastos Aff. Hr'g On Mot. for New Trial 23-24.

appellant's mental condition' and that the newly discovered evidence was 'certainly material, and calculated, we think, to change the result on another trial.'<sup>313</sup> Recognising that Pappas was probably not a responsible person, the judges reversed the judgment of the trial court and remanded the case for a new hearing.

As this example suggests, in extreme cases of mental derangement, the availability of a direct line of communication between the defendant and the court, can help unveil mental disorders which would otherwise be filtered, sanitised, and tainted by the language of mental health experts with a partisan interest in securing a conviction (despite Pappas' bewildering testimony, state experts in this case testified that the defendant was of sane mind).

### *c. Syphilis*

Defendants claiming that they suffered from particular brain pathologies and intellectual defects, such as syphilis, feeble-mindedness, and epilepsy, were more likely to rely on expert opinions to support their insanity claims. A possible explanation is that such conditions presented clear and specific physical and behavioural symptoms which psychiatrists and psychologists could more confidently identify, even in living individuals. This was particularly true following the development of a series of diagnostic instruments which, by allowing experts to objectively assess the presence of

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<sup>313</sup> *Pappas*, 78 S.W.2d at 620-621.

such pathologies pre-mortem, legitimised expert testimonies in trial proceedings dealing with similar disabilities.

Syphilis, a venereal disease associated with ‘mucous patches, skin eruptions, and glandular enlargement’,<sup>314</sup> constitutes a case in point. Between 1905 and 1913, psychiatrists concluded that syphilis was caused by a bacterium, the *treponema pallidum*, which could lead to a gradual mental degeneration, general paralysis, and to the patient’s eventual death.<sup>315</sup> In 1906 they developed the Wasserman reaction, a diagnostic test based on the analysis of a sample of blood or spinal fluid, with an estimated 95% accuracy (Grob 1983: 132; Lunbeck 1996: 50; see also “Syphilis and Insanity” 1919: 935). In 1909, they discovered a drug – Salvarsan – which proved effective in the treatment of some syphilitic patients. Finally, in 1913, Hideyo Noguchi and J. W. Moore published a study that, based on post-mortem examinations, conclusively demonstrated that syphilis caused brain lesions, which in turn led to general paralysis and insanity.

The impact of these discoveries cannot be overstated. In the 1910s, 20s and 30s, psychiatric authorities estimated that general paralysis caused between 10 and 25% of insanity cases found in mental health hospitals across the United States, making it a central public health concern (Lunbeck 1996: 48; Grob 1983: 188).<sup>316</sup> By showing a link between a recognised organic pathology, such as syphilis, and general paralysis,

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<sup>314</sup> *Covin v. State*, 93 S.W.2d 428 (Tex.Crim.App. 1936), Dr. Leake Test. Trial Tr. 37:11-12.

<sup>315</sup> See, e.g., *Jordan*, 94 S.W.2d, Dr. Prentice Hyder Test. Trial Tr. 28¶2-5.

<sup>316</sup> See also *Covin*, 93 S.W.2d, Dr. Rowe Test. Trial Tr. 128¶4.

psychiatrists could finally claim a scientific status for their discipline and a legitimate place amongst the medical professions. Finally, the discovery of a diagnostic test which could identify the presence of the disease while the patient was still alive, allowed psychiatrists to overcome the methodological barriers that had limited their pre-mortem evaluations to the external observation of behavioural symptoms. By relying on the analysis of biological matter, the Wasserman reaction dramatically legitimised psychiatrists' diagnoses, giving them an aura of scientific objectivity that traditional psychiatric interviews could hardly achieve (Lunbeck 1996: 50).

Discoveries in the field of syphilology opened new horizons to psychiatrists called to testify in insanity trials. For the first time in history, psychiatrists had the instruments to gather scientific proof of the presence or absence of a physical pathology associated with severe brain dysfunctions and complete mental incapacitation. The physical nature of this kind of evidence legitimised psychiatrists' claims and, in their view, shielded them from insinuations that they had been deceived by defendants malingering mental illness.

The case of *Covin v. State* (1936)<sup>317</sup> is illustrative of this point. The defendant, Donald Covin, was found guilty of murdering a woman he was romantically interested in and sentenced to death. In his motion for a new trial based on newly discovered evidence, the defendant's counsel presented an affidavit from a physician, Guy Witt, who had examined Covin following his conviction and concluded that he suffered from

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<sup>317</sup> 93 S.W.2d 428 (Tex.Crim.App. 1936).

an advanced stage of syphilis which had led to severe mental deterioration.<sup>318</sup> While psychiatrists confronted with other types of insanity claims would typically limit their evaluation to a brief conversation, Dr. Witt conducted a physical and neurological examination which allowed him to identify a series of anomalies typically associated with this disease. According to the doctor, the defendant presented physical symptoms such as differences in pupils' size and abnormal reactions to light; muscle tremors; absence of reflexes in both arms as well as in the abdomen; sluggish knee and ankle jerks; motor incoordination; and above normal intracranial pressure as measured by a spinal puncture.<sup>319</sup> Moreover, he displayed 'marked evidence of a change of personality, emotional defect, [and] lack of judgment', coupled with 'delusions of grandeur.'<sup>320</sup>

Despite this overwhelming physiological, neurological, and behavioural evidence, the state challenged the reliability of Dr. Witt's evaluation on the grounds that it closely matched the description of the disease provided at an earlier hearing by one of the state experts, while the defendant was in the courtroom.<sup>321</sup> Covin, the DA concluded, had probably faked the symptoms listed by the state expert to convince Dr. Witt to testify on his behalf and support his insanity claim.<sup>322</sup> However, many of the symptoms described by the defence expert were physical in nature and therefore

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<sup>318</sup> Dr. Witt Aff. Ex. C First Am. Mot. for New Trial 40¶5-41¶1.

<sup>319</sup> *Ibid.*, 38¶3-39¶1.

<sup>320</sup> *Ibid.*, 39¶2.

<sup>321</sup> Dr. Rowe Test. Trial Tr. 129¶2-5.

<sup>322</sup> Dist. Att'y Williams State's Answer to Am. Mot. for New Trial 49§4.

impossible to intentionally replicate, as argued by Dr. Witt himself in a second affidavit in which he defended the results of his evaluation.<sup>323</sup>

As this example demonstrates, the biological nature of syphilis allowed psychiatrists to base their diagnoses on physiological and neurological symptoms which could, at least in theory, resist the typical challenges levelled by prosecutors in insanity trials. Nevertheless, in the instant case, the TCCA upheld Covin's death sentence, arguing that given the resemblance between the defendant's conduct during Dr. Witt's examination and the description of the behaviour associated with the disease by the state psychiatrist, it was reasonable to infer that the defendant simulated insanity while he was being examined by the newly discovered witness.<sup>324</sup> As this example demonstrates, the belief that defendants tend to fake mental illness, and deceive physicians during their evaluations, powerfully influences Texas courts' reasonings and judgments, despite experts' claims to the contrary and regardless of the physiological nature of the evidence provided.

### Syphilis, Immorality, and Crime

Due to its sexually transmitted nature, syphilis was historically associated with sinfulness and moral deprivation, a stigmatising disease which led to social exclusion and public shaming. In light of their new discoveries, a number of psychiatrists objected to the old

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<sup>323</sup> Dr. Witt Aff. Resp. to State's Answer to Am. Mot. for New Trial 51¶4.

<sup>324</sup> *Covin*, 93 S.W.2d at 429.

view of syphilis as a ‘carnal scourge’, resulting from sexual indulgences and wicked habits, and recast the disease in more dispassionate scientific terms (Lunbeck 1996: 50).

The historical association between syphilis and sinfulness survived these critiques. Several early 20<sup>th</sup> century authors continued to discuss syphilis in morally charged terms, associating the condition with particular demographic categories whose alleged sexual habits made them particularly prone to contract the disease. For example, in 1914, Mary O’Malley, a former physician at the Government Hospital for the Insane in Washington DC, conducted research into the differential impact of syphilis on white and African American women, and concluded that syphilis disproportionately affected the latter group (317-318). The reason for such differential impact, she argued, could be found in African Americans’ ‘animal appetites’ and ‘promiscuous’ behaviour. Freed from the control of the white ‘masters’, they acted instinctively and disorderly, indulging in various forms of ‘vices’ and excesses, with devastating consequences for their physical and mental health (*Ibid.*, 317). African American women were particularly responsible for the proliferation of syphilis amongst members of their race. They engaged in pre-marital sex, had ‘illegitimate children’, and contributed with their ‘sensual conduct’ to the spreading of venereal diseases. Their behaviour deviated from puritan, white, middle-class standards of femininity and was therefore forcefully condemned. In the words of O’Malley

The colored women withdraw from all the social laws of white women; many of them do not consider it necessary to enter wedlock, and the number of illegitimate children born to unmarried colored women is very great. Some of them have seven or eight children, although not married... It must necessarily follow from the above facts that venereal disease would be common among them (*Ibid.*, 318).

Thirty years later, psychiatrists would frame the problem in less crude and judgmental terms. However, the idea that the inherent viciousness of certain social groups made them more prone to contract the disease still lurked beneath the surface. For example, a 1943 article by Dr. W. G. Smillie analysed the serologic blood tests obtained from two million individuals selected for army service between 1940 and 1942 and concluded that syphilis disproportionately affected African Americans across the United States. While refraining from the racist comments made by O'Malley, Smillie (1943) argued that, at the time, syphilis only affected African Americans and the lowest classes of white society, 'the ignorant, the careless, the criminal, and the social outcast' (366). Syphilis, he proposed, was the disease of the corrupt and the deviant, a social malady that affected the undesirable categories of the American population (but see Fullilove 1943; Sampson 1943).

Discourse around syphilis in Texas capital punishment trials echoed the underlying tension between scientific approach and moral judgment found in the psychiatric literature. For instance, in the trial of Donald Covin defence counsel repeatedly asked both the defence and the state experts if syphilis could be 'innocently acquired', showing a concern that the jury could be negatively influenced by the belief that the defendant had contracted the disease due to 'immoral conduct' and sexual promiscuity.<sup>325</sup> In response to these questions, the doctors stated that syphilis could be contracted 'through innocent means',<sup>326</sup> either because inherited or because of some other form of transmission not including sexual intercourse, for instance through kissing

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<sup>325</sup> *Covin*, 93 S.W.2d, Dr. Leake Test. Trial Tr. 43:3-17.

<sup>326</sup> *Ibid.*, 43:3.

or ‘some break in the flesh.’<sup>327</sup> However, only 15% of syphilis was ‘innocently acquired’ according to one of the experts, with the remaining 85% resulting from promiscuous sexual relations.<sup>328</sup>

The trial of Harold Miner<sup>329</sup> provides another example of the cultural association between syphilis and immorality that continued to dominate psycho-legal discourse in the first half of the 20<sup>th</sup> century. Miner, a 47-year-old white man, was on trial for the murder of his divorced wife, Marjorie Miner. According to his testimony, the man had an unhappy childhood due to ‘domestic disturbances’ in the home.<sup>330</sup> His father left the family when Miner was seven years old without providing financial support, forcing his mother to send him and his sister to live with foster parents.<sup>331</sup> Miner contracted syphilis in France during his service in World War I, and married the victim, a woman seventeen years younger than him, a few years later in Iowa.<sup>332</sup> His life was defined by his struggle with the disease, which made him restless, sleepless, and depressed; continuous moves and changes of occupation; and excessive alcohol consumption, both alone and in the company of his wife. This alcohol abuse led to regular conflicts between the two, particularly due to his wife’s infidelity and his obsessive jealousy, eventually leading to their separation and divorce.<sup>333</sup> In the defendant’s words, ‘when Marjorie wasn’t drinking she was a fine little person, a very

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<sup>327</sup> Dr. Pierson Test. Trial Tr. 78:18; see also Dr. Veazey Test. Trial Tr. 87:13-15.

<sup>328</sup> Dr. Leake Test. Trial Tr. 43:8-10.

<sup>329</sup> *Miner*, 178 S.W.2d.

<sup>330</sup> *Ibid.*, 268.

<sup>331</sup> Harold Miner Test. Trial Tr. 38¶1.

<sup>332</sup> *Ibid.*, 39¶3, 44¶3.

<sup>333</sup> *Ibid.*, 46¶2, 47¶4-48¶6, 53¶2-3.

lovable person. Unfortunately, under the influence of drink she was very like myself, we both had very nasty ungovernable tempers.<sup>334</sup>

After several failed attempts at persuading his wife to reconcile their differences, Miner threatened to kill her if she didn't move back with him.<sup>335</sup> He sought her out, and when the victim tried to escape, the defendant fell striking his head.<sup>336</sup> According to his version of the facts, his mind went blank for a few hours, during which he forgot about the whole event until the following morning, when he read about the shooting in the newspaper, realised what he had done, and decided to give himself up to the police.<sup>337</sup> The jury did not find the defendant's account of the facts and insanity claim convincing, convicted him for 'murder with malice aforethought', and sentenced him to death. On appeal, the TCCA confirmed the defendant's death sentence.

The opinion of S. D. Swope, a physician and surgeon who testified for the defence, evidences a censorious attitude towards the defendant and his lifestyle, and a lack of compassion for his diseased condition, seen more as a consequence of his 'over-indulgent behaviour' than of some misfortune.<sup>338</sup> He argued that Miner was a psychopathic personality whose upbringing, lack of education, and low intellectual endowment made him unfit to live according to 'modern civilized requirements.'<sup>339</sup> On

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<sup>334</sup> *Ibid.*, 48¶6.

<sup>335</sup> *Ibid.*, 73¶2.

<sup>336</sup> *Ibid.* 74¶1.

<sup>337</sup> *Ibid.* 74¶2-75¶1.

<sup>338</sup> Dr. Swope Test. Trial Tr. 91¶1.

<sup>339</sup> *Ibid.*, 90¶5.

top of this, the defendant suffered from syphilis and indulged in excessive alcohol consumption, which, combined, led to a gradual mental and moral degeneration.

According to the doctor,

In this state one loses all moral sense of propriety and social relation. He carries on his work for the sole purpose of providing for his personal *indulgence*, and develops into a psychopathic personality which has little regard for law and order and the right of his fellow man. A man thus *depraved* commits the various interdicted crimes and social irregularities without a clear appreciation of any social fault. A mind of this character easily breaks under the stress or strain of emotional association and loses all of his reasoning power and inhibitive sense, where other men with better mental endowment, education and social environment would retain a normal mental state of the appreciation of the rights of others and the necessity for living an upright life. I think the defendant is a psychopathic personality, a man poorly fitted with reasoning power *whose mind has been injured by syphilis and alcohol* to such an extent that his personal acts are not those of a well-balanced sane person.<sup>340</sup>

In light of his examination and of the hypothetical questions provided by the defence attorney, the doctor concluded that at the time of the killing Miner ‘was not in a normal state of mind’ and that he did not know right from wrong.<sup>341</sup>

The language in which Dr. Swope framed his testimony suggests that far from endorsing the detached approach advocated by psychiatric authorities, his opinion was a mix of scientific discourse and moral judgment. On the one hand, his testimony contained a scientific explanation of the association of *dementia paralytica* with criminal behaviour, which proposed that, while individuals with this condition could normally distinguish right from wrong, if put under extreme pressure - either due to emotional

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<sup>340</sup> *Ibid.*, 91¶1-2. See also *Miner*, 178 S.W.2d at 269.

<sup>341</sup> *Ibid.*, 93¶3-94¶2.

upheavals or to the excessive use of alcohol - they were likely to temporarily lose control over their actions, explode in an open manifestation of violence, and potentially forget about the whole event.<sup>342</sup>

On the other hand, Dr. Swope's testimony contains a moral condemnation of the defendant's habits and lifestyle, which deviated from the white protestant standards of morality and masculinity of the Progressive Era (1890-1920). By associating syphilis and drunkenness with insanity and criminality, Dr Swope echoed the concerns of rural protestants, social progressives, and other members of the American 'Temperance Movement' who, worried about the 'moral corruption' brought about by excessive alcohol consumption, in the 1910s and 1920s had advocated and obtained the passage of prohibition laws banning the production and sale of alcoholic beverages across the United States (see Burnham 1988: 170-183; Rafter 2008: 138-139; for Texas see Wuthnow 2014: 58-62).

Inspired by this 'dry crusade', several psychiatrists of the time argued that alcohol was a 'brain poison' that led to a gradual mental and moral degeneration which was then transmitted across generations (Armstrong-Jones 1918: 136). Alcoholic intoxication, they proposed, removed men's moral inhibitions, undermining their capacity of self-restraint and tempting them to all sorts of indulgences, usually of a sexual nature (*Ibid.*). By recasting Miner's criminal act as the result of his alcoholic and sexual habits rather than of the physical and emotional distress associated with his

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<sup>342</sup> *Ibid.*, 91¶2. See also *Jordan*, 94 S.W.2d, Dr. Prentice Hyder Test. Trial Tr. 30¶6-31¶1, Dr. D. C. Hyder Test. Trial Tr. 35¶3.

disease, Dr. Swope endorsed this condemning view, inadvertently lending credence to the idea that the defendant was morally responsible for the crime committed, as well as for his medical condition.

*d. Feeble-mindedness*

Advancements in the field of intelligence testing prompted the development of another explanation of criminal behaviour that would come to dominate early 20<sup>th</sup> century psychological thought: ‘feeble-mindedness theory’. The historical roots of this theory can be found in the late 19<sup>th</sup> century work of American criminal anthropologists who, inspired by the writings of Cesare Lombroso (1893, 1897) and his European followers, started observing the bodies of convicted criminals to identify the stigmata of moral degeneracy which would help them distinguish the ‘born criminal’ from the occasional offender (Rafter 1997a: 112, 118-119; see, e.g., Boies 1893; MacDonald 1893; Talbot 1898; Lydston 1904; Parsons 1909). Drawing from the Darwinian doctrine of civilisation, American criminal anthropologists framed repeat offenders as biologically inferior subjects, belonging to a more primitive stage of human evolution, which could be identified by their apelike features and various physical and psychical anomalies.

While American criminal anthropologists echoed many of Lombroso’s arguments, they differed from the Italian criminologist in two major respects. Firstly, neither Lombroso nor his European followers had dedicated particular attention to heredity theories or eugenic solutions, whereas their American counterparts ‘reformulated born criminal theory in hereditarian terms, merging it with the doctrine

of eugenics' (Rafter 1997a: 11). Secondly, while European criminal anthropologists had concentrated their attention on the criminal body, their American followers expanded their research horizons to include a closer analysis of the criminal's brain (*Ibid.*, 12, 120). In their view, criminals were not only biologically and morally primitive, as argued by Lombroso, they were also intellectually backward.

This idea, a natural precursor of feeble-mindedness theory, was based on the assumption that the vast majority of criminals were characterised by a low intellectual endowment and that this mental defect could be genetically transmitted across generations (see, e.g., Richmond 1931: 544-545; contra Bronner 1914: 561-562).<sup>343</sup>In the 1910s and 1920s, these heredity theories intersected with eugenic arguments, encouraging 24 American states to pass involuntary sterilisation laws aimed at 'preventing the reproduction of the genetically "defective" members of society', i.e. epileptic, insane, and feeble-minded individuals detained in state institutions and deemed to represent a threat for the health and security of the national stock (Cuddy & Roche 2003: 13; see Carrington 1909; Hunter 1914: 514-515, 521, 525; Laughlin 1914: Bulletin 10A; see generally Rosen 1982; Connelly 2018).<sup>344</sup>

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<sup>343</sup> Determined to identify the culprits for the spreading of mental defectiveness and moral degeneracy, a number of early 20<sup>th</sup> century psychiatrists argued that feeble-mindedness was particularly common amongst women of 'poor morals' who, through their unrestrained sexual conduct, were rapidly disseminating their defective genes amongst the American population (Rafter 1997a: 159-161; see Bullard 1908: 242; Bruce 1909: 45; Fernald 1909: 20; Emerick 1914: 21; Dodge 1922: 632). For studies identifying a similar trend in Victorian England see Zedner (1991: 266, 273-278); Simmons (1978: 394).

<sup>344</sup> The US Supreme Court upheld the constitutionality of these laws in *Buck v. Bell*, 274 U.S. 200 (1927). For a list of enacted or proposed sterilisation statutes see Laughlin (1922); for a critique of sterilisation laws due to the lack of scientific evidence supporting such measures see Hunter (1914: 521).

The first author to popularise feeble-mindedness theory in the United States was British psychologist and criminologist Charles Goring (Goring et al 1972 [1913]). While refusing the old Lombrosian theory of criminal stigmata, Goring promoted a theory of constitutional inferiority which saw the average criminal as less intelligent than the average citizen, and therefore less fit to cope with the difficulties of modern life (Rafter 2008:126). Inspired by Goring's findings, American psychologists started analysing large samples of prisoners to unveil whether they displayed lower intellectual abilities than the healthy population. As study after study seemed to corroborate this hypothesis (see, e.g., Goddard 1912; Spaulding & Healy 1914: 837; Goring, Pearson & Driver 1972[1913]; Richmond 1931: 537; contra Stevens 1915: 191-195; Curti 1926: 247-251),<sup>345</sup> the theory of the mentally defective delinquent became the leading explanation of criminal behaviour in the United States, particularly between 1915 and 1925 (Rafter 2008: 128-133).

The creation of objective instruments for the measurement of intelligence legitimised psychologists' professional authority in this area, raising the status of their discipline amongst the mental health professions. The most influential advancement in the field of intelligence testing came in 1905, when French psychologist Alfred Binet and his assistant Theodore Simon developed a standardised paper-and-pencil test that would soon become the chief method to assess intelligence levels amongst juveniles detained in American criminal justice institutions: the Binet-Simon test (*Ibid.*, 140). The assessment measured children's level of intellectual development by comparing it with

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<sup>345</sup> The work of Charles Davenport at the Eugenics Record Office at Cold Spring Harbour, New York, and the research conducted at the Human Betterment Foundation in Pasadena, California, is particularly relevant in this regard; see Cuddy & Roche (2003: 12-14); Edward (1995).

the average level of intelligence for children in a similar age category. If a child's abilities corresponded to those of a younger age group, he was classified as mentally defective, the severity of the defectiveness depending on the age of intellectual development reached.

The psychological literature of the time is replete with explanations of the mechanism through which intellectual disabilities could weaken men's moral sense and capacity for self-control. Drawing from the Darwinian association of low intelligence with savagery, idleness, childishness, femininity, and criminality (*Ibid.*, 125), psychologists argued that feebleminded men lacked the reasoning power and strength of character to restrain their animalistic impulses. For example, Dr. Gordon (1921: 610) argued that the conscience of the feebleminded was too weak to win

in the struggle against passions... The moral sentiments are not powerful enough, the voice of duty is not loud enough to be overcome by impulse... The want of judgment, of will, the weakness of character renders the moral personality of the feeble-minded unstable, not resistant, and thus they become an easy prey of their passions.

In Gordon's view, intelligence shaped every aspect of human personality, including moral standards and behaviours. Under normal conditions the intellect controlled and inhibited the individuals' impulses and desires. However, when the intellect was defective, the impulses dominated, prompting the individual to act upon his desires without regard for the consequences of his acts (*Ibid.*, see also Fernald 1912: 525). Echoing this view, Paul Bowers, a former Medical Superintendent of the Indiana Hospital for Insane Criminals, proposed that due to their lack of reason, morality, and self-control, feebleminded men

commit all manner of sexual crimes without any feeling of restraint or shame. They masturbate openly and excessively; the imbecile father impregnates his own daughter; he may commit sodomy with his own son; or, imbeciles may attempt intercourse with their mothers and sexual satisfaction with animals is frequently attempted. The great majority of cases of injury (sexual) to animals must be attributed to imbeciles (Bowers 1917: 83).

In the discourse of evolutionists, intelligence became the distinctive feature of civilised man, a proxy for the virtuous, self-controlled, and productive white middle-class citizen. Contrastingly, the primitive feebleminded was an ambitionless, temperamental, and perverted subject, whose idleness, weak character, and vulgarity inclined him to commit cruel and obscene criminal acts, often of a sexual and incestuous nature. Influenced by the puritan work ethic of their time, psychologists and psychiatrists condemned feebleminded men for failing to contribute to the public good due to their low intelligence, poor morals, and lack of ambition, and for spreading criminal deviance in American society.

Analysis of lay witness testimonies in Texas capital punishment proceedings reveals that non-experts tended to use a defendant's ability to work, hold a job, and conduct business transactions as evidence that he could distinguish right from wrong and was therefore legally sane.<sup>346</sup> This pattern suggests that the lay public shared psychiatrists' puritan work ethic, which framed ideal models of masculinity in terms of intelligence, strength of character, and professional ambition, and associated insanity

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<sup>346</sup> See, e.g., *Maxey*, 145 S.W. at 957; *Apolinar*, 244 S.W., Christopher Test. Trial Tr. 16-17, Cardwell Test. Trial Tr. 11, Dr. Springer Test. Trial Tr. 30; *McKenny*, 288 S.W., Fay Test. Trial Tr. 20-21; *Jones*, 243 S.W.2d, Cash Test. Trial Tr. 79-83; *Leath v. State*, 346 S.W.2d 346 (Tex.Crim.App. 1961), *Debedts Test. Trial Tr. 303-304*, *Campbell Test. Trial Tr. 336-337*; *Welch v. State*, 373 S.W.2d 497 (Tex.Crim.App. 1963), *Payne Test. Trial Tr. 458:4-461:7*; *Johnston v. State*, 396 S.W.2d 404 (Tex.Crim.App. 1965), *Miller Test. Trial Tr. 220*.

and criminality with personalities, habits, and behaviours which deviated from this ideal.<sup>347</sup>

While most early 20<sup>th</sup> century insanity trials relied on lay witness testimonies, the discovery of a method for the objective assessment of individuals' intelligence prompted a growing number of psychologists and psychiatrists to testify in cases where the defendant claimed to suffer from some form of intellectual impairment, particularly from the 1950s.<sup>348</sup> Intelligence tests distanced experts from old subjective methods, based on 'general impressions' and family pedigree studies (Goddard 1912), giving them a seemingly scientific instrument that was more likely to hold up against the pressures of cross examination. However, the use of more refined diagnostic instruments did not necessarily translate into more sophisticated explanations of the mechanisms connecting the intellectual disability with the crime committed, with most psychologists limiting themselves to a description of the diagnostic instrument used and of the label applied to the defendant. As mentioned in Chapter 4, partially due to attorney's failure to elicit such responses, it is unusual to find doctors who go beyond mere descriptions to explain the mechanism through which mental illnesses and intellectual disabilities affect the cognitive and emotional capacities necessary to behave lawfully.<sup>349</sup>

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<sup>347</sup> This approach emerges even in more recent cases, see, e.g., *Penry v. State*, 178 S.W.3d 782 (Tex.Crim.App. 2005), *McCombe Test. Trial Tr.* vol. 42, 226:8-227:25.

<sup>348</sup> See, e.g., *Snow v. State*, 291 S.W. 558 (Tex.Crim.App. 1927), *Shepard Test. Trial Tr.* 186-196; *McCune*, 240 S.W.2d, Dr. Thomas Test. Trial Tr. 113-115; *Moon v. State*, 331 S.W.2d 312 (Tex.Crim.App. 1959), Dr. Wagner Test. Trial Tr. 186:25-187:7, 210:1-22; *Welch*, 373 S.W.2d, Dr. Wells Test. Trial Tr. 395:5-398:3.

<sup>349</sup> See, e.g., *Snow*, 291 S.W., *Shepard Test. Trial Tr.* 188¶4-192¶2; *Welch*, 373 S.W.2d, Dr. Wells Test. Trial Tr. 397:12-398:15, 411:9-430:14; for exceptions see, e.g., *McCune*, 240 S.W.2d, Dr. Thomas Test. Trial Tr. 115¶1-2; *Penry*, 178 S.W.3d, Dr. Pincus Test. Trial Tr. vol. 51, 232:4-233:24.

In the trial of F. M. Snow, a man charged with the killings of his wife, mother-in-law, and step-son, defence expert Jean Shepard, a psychologist and social worker, administered the standard revision of the Binet-Simon test and concluded that the defendant had the ‘mentality’ of a nine-year-old, and could be classified as a *moron*.<sup>350</sup> The expert explained to the court and the jury how he identified the defendant’s age level

I gave him what is known as the standard revision of the Binet-Simon test. I began at the six years level. The first question was to give the number of fingers on the right hand and on his left hand. The next one was I exhibited a certain picture and asked him what they were, and he got that on the seven-year level... The next is give a difference between a fly and a butterfly... The next question is what is the thing for you to do, when you have broken something that belongs to someone else, when you are on your way to school and notice that you are in danger of being late.<sup>351</sup>

Despite its scientific appeal, the psychologist’s testimony failed to convince the jury that the defendant’s intellectual disability undermined his capacity to distinguish right from wrong at the time of the crime. This was partially due to the facts of the crime itself, which suggested that Snow had premeditated the killings and dedicated significant efforts to cover up his misdeeds,<sup>352</sup> but also to the superficial nature of the expert’s testimony itself. Firstly, the psychologist’s questions were clearly tailored for children, making their reliability in assessing the level of intelligence of an adult subject somewhat dubious. Secondly, while illustrative, the information provided by the psychologist said nothing about why the jury should consider the defendant’s mental defectiveness

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<sup>350</sup> *Snow*, 291 S.W., Shepard Test. Trial Tr. 188¶4; see also Dr. Bozeman Test. Trial Tr. 197¶2.

<sup>351</sup> Shepard Test. Trial Tr. 189¶2.

<sup>352</sup> *Ibid.*, 193¶4; see also *Snow*, 291 S.W. at 560-562.

relevant for the establishment of criminal guilt in the context of the alleged offence, an aspect that severely limited the effectiveness of the defendant's insanity claim.

A possible reason for this omission is that, since both psycho-legal authorities and the lay public assumed a strong association between intelligence and morality, neither the attorneys nor the mental health experts felt that such explanations were necessary. As mentioned in Chapter 4, several lay witnesses at insanity trials tended to use evidence of intelligence, or of the lack thereof, to argue that the defendant was sane or insane at the time of the alleged offence.<sup>353</sup> Moreover, the language of several legal and psychological tests aimed at assessing criminal responsibility used intelligence as a proxy for morality and mental health (see Fernald 1912: 545). As discussed in Chapter 3, the legal test of insanity based on the *M'Naghten* rules is grounded in a rationalistic notion of criminal responsibility. It is the product of the Enlightenment, an age which valued intelligence over any other quality, and tended to dismiss the power of inner feelings, emotions, and impulses over the will.

By associating criminality with low intelligence, and by using intelligence tests to measure morality, early 20<sup>th</sup> century psychologists aligned with this view. In so doing, they undermined alternative arguments that highlighted how, in the presence of certain mental pathologies, unconscious 'irresistible impulses' could overcome the rational will of traditionally intelligent and principled individuals. A possible explanation is that while psychologists had the instruments to measure intelligence, they still lacked an

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<sup>353</sup> See, e.g., *Arnold v. State*, 79 S.W.2d 130 (Tex.Crim.App. 1935), *Beard Test. Trial Tr.* 81¶1, *Sarrels Test. Trial Tr.* 117¶2.

appropriate method to grasp morality and the subject's ability to 'resist temptation' and were therefore limited to the use of a strictly cognitive approach (*Ibid.*). Moreover, intelligence testing fit nicely with the legal doctrine of criminal insanity embraced by most American courts, providing, for the first time, a linguistic and technical framework which could *potentially* prove effective in courts of law.

### *e. Epilepsy*

In 1924, German neurologist Hans Berger created another diagnostic instrument which would enhance experts' authority in criminal proceedings: the electroencephalogram (EEG). The EEG was an instrument which, by measuring the brain waves of living individuals, allowed physicians to identify neurological diseases based on the observation of the electrical activity of the brain, rather than on external symptoms. Given the association of epilepsy with abnormal brain waves, the EEG was, and still is, most commonly used for the diagnosis of this pathology. As a result, in post-1924 criminal proceedings, when the defendant's symptoms suggested that he suffered from epilepsy, psychiatrists and neurologists typically requested an EEG, and used the results to support their opinions.<sup>354</sup>

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<sup>354</sup> See, e.g., *Rubenstein v. State*, 407 S.W.2d 793 (Tex.Crim.App. 1966), *Def. Att'y Belli Op. Arg.* Trial Tr. vol. 3, 589:1-20, *Dr. Schafer Test.* Trial Tr. vol. 4, 857:19-859:3, *Dr. Towler Test.* Trial Tr. vol. 5, 966:23-971:18, 999:24-1040:4, *Dr. Guttmacher Test.* Trial Tr. vol. 5, 1120:12-1122:22; *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1989), *Dr. Coons Test.* Trial Tr. vol. 33, 5410:10-5413:22; *Perry*, 178 S.W.3d, *Dr. Pincus Test.* Trial Tr. vol. 52, 103:24-115:21.

Epilepsy is a neurological condition associated with sudden, recurrent, seizures accompanied by a temporary loss of consciousness. Early 20<sup>th</sup> century psychiatrists argued that epilepsy caused a loss of control over the lower functions, which, freed from the inhibitory faculty of the brain, inclined the individual towards violent reactions and anti-social behaviours. Bowers (1917: 80), for example, argued that epileptics were more prone to commit criminal acts because they lacked self-control, had an impetuous temperament, and indulged in sensual pleasures. Epileptics, he explained, are

most mercurial and volatile in their temperaments; the merest trifles are sufficient to stir them to serious outbreaks of temper and violence.... [Their] modes of behaviour are practically regulated by their appetites; they love power and notoriety, and they shrewdly use immoral and illegal methods to secure these; they are extreme sensualists and are prone to commit sexual crimes, such as rape, incest and sodomy (*Ibid.*).

Like syphilitics, alcoholics, and feebleminded individuals, Bowers argued, epileptics lived at a lower level of civilisation, in which reason and morality were lost, and the will surrendered to animalistic impulses and sexual perversions (see also Healy 1912: 850). What made epileptics particularly dangerous was the phenomenon of ‘epileptic automatism’. A derivative of reflex action theory, the principle of epileptic automatism argued that, following a seizure, epileptic individuals could experience a black out during which they might commit anti-social acts. Once recovered from the black out, they had no memory of their actions, or if they did have a memory, these were ‘usually of an indistinct hypnogogic character that closely corresponds to the dream-state’ (Bowers 1917: 80). Dr. Harold Hulbert (1947: 494), for instance, used the EEG to study the brain waves of a number of epileptics, and concluded that the subjects often experienced a ‘dreamy state of consciousness’ or total unconsciousness before and/or after suffering a serious seizure. During this dreamy or unconscious state, epileptics

became more irritable and their behaviour less controllable. In the words of Dr. Hulbert

[S]ome epileptics... become mortally enraged over trifles or over wrongs that non epileptics bear without sudden assault. Epileptics are the most touchy and explosive of our citizens. Yet between attacks they may be 'sticky sweet', proudly wearing a lapel pin of their Sunday School (1947: 494).

The theory of epileptic automatism provided a powerful scientific rationale to psychiatrists arguing that patients committing criminal acts in a 'post-epileptic automatic state' should be judged not guilty in criminal trials, even if their behaviour seemed perfectly normal between seizures.

Studies conducted in the 1940s and 1950s seemed to corroborate the hypothesis that epileptics were more prone to violence than healthy individuals. One study, for example, claimed that a disproportionate number of prisoners convicted for murder without motive had abnormal encephalograms, and that "murderers" as a group contain[ed] a higher proportion of epileptics compared to the normal population' (Gunn & Bonn 1971: 337; see also Hill & Pond 1952; Stafford-Clark & Taylor 1949). While some authors argue that this evidence corroborates theories about the association of epilepsy and violence, most scholars now agree that directed aggression during or following an epileptic seizure are extremely rare, and emphasise the 'near impossibility of committing murder or manslaughter during random and unsustained psychomotor automatisms' (Delgado-Escueta et al 2002: 555; see also Knox 1968; King & Marsan 1977; but see Pincus 1981).

Empirical research conducted in the 1980s suggests that acts of aggression that require a series of consecutive and continuous movements organised towards a purpose, are the antithesis of epileptic automatism. Delgado-Escueta and colleagues (1981, 2002), for example, documented 33 epileptic attacks experienced by 19 patients with a history of aggressive behaviour through closed circuit television and electroencephalography. The study showed that only 7 out of 19 patients directed aggressive acts towards objects or persons and only one of these aggressive acts could have resulted in serious harm to another person. Moreover, the automatic acts performed by the subjects in Delgado-Escueta's study were 'stereotyped, simple, unsustained, and never supported by consecutive series of purposeful movement'. They were typically 'performed with the fist or the hands... and no attempts were made to conceal the acts' (2002: 555).

These findings resonate with district attorneys and jurors' common-sense views.<sup>355</sup> Offenders with a history of epileptic seizures who engaged in organised and purposeful acts of aggression typically have a difficult time convincing juries that their acts were the result of an unconscious state of epileptic automatism. The history of Texas insanity trials shows that in the small number of cases in which defendants based their insanity claim on a theory of epileptic automatism, but the evidence suggested that the criminal act was planned, motivated, and purposeful, juries tended to be sceptical of the defence's theory and to find the defendant responsible for the act

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<sup>355</sup> E.g., *Rubenstein*, 407 S.W.2d, Dist. Att'y Wade Quest. Dr. Towler Trial Tr. vol. 5, 1043:25-1044:25; *Lackey*, 819 S.W.2d, Dist. Att'y Griffin Quest. Dr. Downing Trial Tr. vol. 32, 5378:12-5381:11, Dist. Att'y Griffin Quest. Dr. Coons vol. 33, 5414:2-5416:19.

committed.<sup>356</sup> This holds true even for cases in which the defence could rely on the testimony of several experts and on the use of the EEG.<sup>357</sup>

In *Maxey v. State* (1912),<sup>358</sup> for example, the evidence shows that the defendant, Woody Maxey, a 27-year-old African American man, had suffered from recurrent epileptic seizures for at least 15 years. Several lay witnesses who had known Maxey for his whole life testified that they had seen him having epileptic fits on numerous occasions, and that during and shortly after these fits, the defendant appeared unconscious and incapable of lucid reasoning and speech. During these ‘fits’, the witnesses argued, Maxey ‘just fell and commenced trembling... rolled his eyes back like a man dying’<sup>359</sup> and ‘frothed at the mouth.’<sup>360</sup> After recovering from the seizures, they added, ‘he didn’t have a good mind’,<sup>361</sup> ‘he talked kind of crazy’,<sup>362</sup> ‘he just didn’t look natural, didn’t act natural like he always did.’<sup>363</sup>

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<sup>356</sup> See, e.g., *Houston v. State*, 287 S.W.2d 643 (Tex.Crim.App. 1956); *Rubenstein*, 407 S.W.2d; *Lackey*, 819 S.W.2d.

<sup>357</sup> See, e.g., *Rubenstein*, 407 S.W.2d, Def. Att’y Belli Op. Arg. Trial Tr. vol. 3, 589:1-20, Dr. Schafer Test. Trial Tr. vol. 4, 857:19-859:3, Dr. Towler Test. Trial Tr. vol. 5, 966:23-971:18, 999:24-1040:4, Dr. Guttmacher Test. Trial Tr. vol. 5, 1120:12-1122:22.

<sup>358</sup> 145 S.W. 952 (Tex.Crim.App. 1912).

<sup>359</sup> Taylor Thomas Test. Trial Tr. 39.

<sup>360</sup> Mahala Childs Test. Trial Tr. 47¶2.

<sup>361</sup> Taylor Childs Test. Trial Tr. 42.

<sup>362</sup> Mattie Johnson Test. Trial Tr. 45¶1.

<sup>363</sup> Callahan Test. Trial Tr. 54¶1.

Maxey was accused of killing a restaurant clerk following an altercation in which the victim had struck the defendant on the face.<sup>364</sup> On the morning following the alleged offence, the defendant's cousin, Cordie Morphin, found the coat that Maxey was wearing on the night of the killing. She saw that the coat 'had lots of dust and dirt on it and had white looking stuff... like the froth of the white of an egg' and decided to clean it, probably to eliminate incriminating evidence against the defendant, since the coat was covered with blood stains as well.<sup>365</sup> The defence used her testimony to suggest that the white froth on Maxey's coat demonstrated that he had an epileptic seizure on the night of the killing and committed the criminal act in an unconscious state of epileptic automatism.

However, the facts of the crime reveal that on the night of the killing, the defendant engaged in a series of consecutive, organised, and purposeful actions aimed at taking the life of the victim, which contrast sharply with the kind of aggressive behaviour typically associated with epileptic automatism. The evidence shows that on the night of the murder, after having attended church, Maxey went to a restaurant and ordered some fish.<sup>366</sup> As he entered the premises, the restaurant clerk asked the defendant to take his hat off. Maxey refused, highlighting that there were two or three white men in the restaurant who were wearing their hats. The clerk reacted by cursing the defendant and striking him with a pistol. The defendant went to a near police station and asked the police to arrest the clerk who had violently assaulted him. The officer

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<sup>364</sup> *Maxey*, 145 S.W. at 953-954.

<sup>365</sup> Morphin Test. Trial Tr. 67¶1.

<sup>366</sup> *Maxey*, 145 S.W. at 953-954; See also County Att'y Freeman Hyp. Quest. Dr. Porter Trial Tr. 78-79.

said he would take the man to court the following morning, but Maxey did not believe him. He left the police station, went to see an acquaintance, and asked him for a gun without specifying what he needed it for. He then visited another acquaintance and gave him half a dollar for four bullets, saying that he needed them for hunting. Once he had secured the gun and the bullets, the defendant returned to the restaurant in which the altercation had taken place and shot the clerk who had attacked him, killing him instantly.

It seems highly improbable that Maxey could have committed this series of purposeful acts in a state of epileptic automatism. According to the defence, the blow on the face suffered by Maxey as a result of the clerk's assault, precipitated his condition prompting an epileptic seizure. Such seizure in turn elicited an uncontrolled, aggressive, reaction in the defendant, who carried out the alleged offence without realising the gravity and moral wrongfulness of the act. The defence's theory relied primarily on the testimony of one physician, D. W. Porter, who testified that Maxey suffered from hereditary epilepsy, that 'anger, sudden surprise, disappointment, depression' were some of the exciting causes leading to an epileptic attack, and that 'a slight attack without having convulsions might be productive of malice, evil for badness, sometimes contemplation of self-destruction, murder, [and] theft.'<sup>367</sup>

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<sup>367</sup> Dr. Porter Test. Trial Tr. 73.

Asked what effect a blow over the head would have on a hypothetical individual who had suffered from epileptic attacks for 15-20 years, the doctor argued that it would precipitate his condition rendering him insane for at least 5 hours up to three days.<sup>368</sup> Echoing the opinion of other early 20<sup>th</sup> century physicians, the doctor concluded that it was the interaction between the defendant's inherited congenital defect and exciting environmental pressures that caused his mental faculties to degenerate and lose control over his violent impulses.<sup>369</sup> However, as highlighted by the TCCA, multiple testimonies had unveiled that, after recovering from a seizure, the defendant

was intelligent, capable of knowing right from wrong, and engaged in the manual occupations men usually engage in, and of mental capacity sufficient to enable him to perform the duties incident to his work.<sup>370</sup>

In light of this evidence, the TCCA upheld Maxey's death sentence, arguing that unless the crime was committed shortly after the epileptic seizure, the defendant's intellectual faculties were unlikely to be affected to the point of making him incapable of knowing right from wrong. According to the TCCA, the record showed that

no one who came in contact with appellant on the night of the homicide, either before, at the time of, or subsequent to, the homicide, testifies to any fact that would render him not responsible for his act.<sup>371</sup>

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<sup>368</sup> *Ibid.*, 74¶1.

<sup>369</sup> *Ibid.*, 76-77.

<sup>370</sup> *Maxey*, 145 S.W. at 957.

<sup>371</sup> *Ibid.*, 958.

Hence, while the TCCA recognised the legitimacy of the association between epilepsy and insanity at a general level, it found no grounds to conclude that such association existed in the instant case.<sup>372</sup> As highlighted in Chapter 4, given courts' reluctance to exculpate criminals whose behaviour suggests premeditation this conclusion does not come as a surprise.

## Conclusion

As this chapter has shown, despite its claims to scientific objectivity, the early 20<sup>th</sup> century biological paradigm was deeply immersed in the values of its time. Far from being detached from their social context, psychiatrists and psychologists drew from the white Protestant cultural paradigm to associate insanity and criminality with the personality types, habits, and lifestyles which deviated from ideal models of masculinity and femininity, and which were commonly associated with America's 'social outcasts'.

Moreover, the analysis of Texas capital punishment proceedings has revealed the existence of an ontological and epistemological conflict with a difficult solution. On the one hand, starting from a mechanistic view of human nature, early 20<sup>th</sup> century psychiatrists emphasised the role of organic defects, 'bad habits', and stressful circumstances in undermining the individual's ability to control his impulses and conform his behaviour to the law. On the other hand, assuming a rational individual with autonomous free will, and starting from a folk psychological view of human

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<sup>372</sup> *Ibid.*, 959.

behaviour, lay actors relied on the observation of the defendant's actions to infer his mental state.

The cases analysed in this chapter all ended with the defendant's conviction and death sentence. While the strength of the evidence presented varied, the selected cases shared a common theme: the behaviour of the defendant before, during, and/or after the commission of the crime suggested that the defendant had planned the act and/or knew that it was illegal. Irrespective of how mentally diseased the defendant was at the time of the crime, if his acts seemed purposeful and directed, if he had thought about the crime some time prior to the offence, or if he tried to hide after the crime or consigned himself to the police, he would most likely be found to be legally sane and sentenced to death.

Finally, the chapter has shown that psychiatric and psychological knowledge underwent a deep transformation when transposed into the trial context. While the academic literature provided innumerable theoretical speculations on the causes of mental disease and on the mechanisms connecting it to criminal behaviour, expert witness testimonies typically limited themselves to descriptive accounts of their diagnostic methods and classification systems, failing to provide any meaningful explanation of the ways in which the defendant's mental condition may have rendered him not responsible for the act committed. As explained in Chapter 4, the reason for this difference may lie in attorneys' failure to elicit such information effectively. However, as argued in this chapter, it may also be due to the ontological and

epistemological clash between psychiatric theory and legal questions, along with the diagnostic limitations encountered by experts when dealing with living individuals.

**CHAPTER 6. FREUDIAN PSYCHOANALYSIS, CHILDHOOD  
DEVELOPMENT, AND CRIMINAL PSYCHOPATHY (1952-1972)**

Introduction

The transformations in the field of forensic psychiatry investigated in this chapter stem from the crisis of the somatic model of disease which, from the 1920s onwards, led to the gradual emergence of a new child-centred ideology which stressed the role of early environmental influences and psychological development over genetic inheritance and brain pathology (see Hale 1995: 4-5). While somatic explanations of insanity and criminality had emphasised the role of heredity, parents' immoral character, and the transmission of bad habits in the family unit, the new child-centred ideology stressed the negative impact of emotional conflicts, parental abuse and neglect, and childhood trauma. This transformation, coupled with a series of cultural changes that radically transformed Americans' moral standards of behaviour, parenting models, and notions of personal fulfilment, prompted the emergence of a new notion of 'psychological man', with his own feelings, desires, and aspirations, whose behaviour was as much influenced by his personality and experiences as by his organic pathologies and genetic endowment (see Rieff 1979: 329-357). As this chapter will show, the first American psychiatrists and psychologists to theorise an association between early environmental influences, individual psychology, and behaviour were deeply inspired by the work of Sigmund Freud, whose ideas had a powerful impact in the United States, particularly in the 1950s and 1960s. In particular, Freud's theory of the Oedipus Complex, coupled with

his revolutionary ideas on sexuality and parental education, would radically change forensic psychiatrists' understandings of the underlying dynamics leading to antisocial behaviours, and prompt heated discussions around the potentially pathological effects of harsh parental discipline and sexual repression on children's future personality and behaviour.

The chapter is divided into two main sections. Section 1 discusses the diffusion of Freudian ideas in the United States (a), the new notion of the self that emerged from psychoanalysis' challenge of the traditional model of disease (b), and the theoretical relationship between psychoanalytic theory and the legal insanity defence (c). Furthermore, it analyses Freud's theory of the Oedipus complex and his views on parental discipline (d), along with the impact of these ideas on expert discourse in Texas capital punishment proceedings (e).

Section 1 presents three core arguments. Firstly, it proposes that, in the 1950s and 1960s, American forensic psychiatrists were powerfully influenced by psychoanalytic ideas and that these ideas helped partially bridge the traditional gap separating mechanistic and teleological explanations of human behaviour in criminal proceedings. Secondly, it proposes that, while psychoanalytic explanations helped cast a new light on the deeper meaning of defendants' criminal behaviours, they were typically unsuited to support a defence of legal insanity, especially when defendants' behaviour before and/or after the commission of the offence suggested a culpable state of mind. Finally, Section 1 suggests that while in the 1920s and 1930s Freud's critique of parental and sexual education had fostered tolerant and permissive tendencies which

encouraged parents to indulge children's emotional needs and sexual explorations, in the conservative climate of the Cold War years the alleged rise in juvenile delinquency<sup>373</sup> prompted an authoritarian reaction which advocated a return to strict parental discipline to control 'troubled' youth, an argument which was regularly exploited by prosecutors trying to undermine the exculpatory potential of evidence of parental abuse and neglect in Texas capital punishment proceedings.

Section 2 turns to a detailed analysis of the ways in which psychoanalytic theory and the cultural changes that accompanied its diffusion affected psychiatrists' framing of criminal psychopathy in the two decades following the Second World War. Firstly, it discusses how the family centred society of the 1950s, with its emphasis on lifelong commitment and responsibility, prompted the framing of male criminal psychopaths as emotionally immature and socially maladjusted subjects, who regressed to an infantile stage of development and failed to fulfil the duties required by a respectable adult life (a).

Secondly, it argues that psychoanalysts and others' challenges to the traditional code of sexual morality, coupled with the sex-crime panic that struck the United States in the late 1930s and early 1950s, prompted psychiatrists and criminal justice officials to characterise male criminal psychopaths as 'sexual perverts' and 'latent homosexuals', dominated by uncontrollable sexual impulses and ready to attack their victims at every available opportunity (b). Finally, Section 2 highlights how the 1960s challenge to the

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<sup>373</sup> According to social historian Andrew Hartman (2008: 56), following the war, in the United States 'rates of juvenile delinquency were thought to have reached unprecedented highs, despite the fact that juvenile crime did not actually increase according to most statistical accounts'.

traditional family values of the 1950s, coupled with the emergence of a new culture of mass media that celebrated persuasive abilities and notoriety, contributed to the depiction of male criminal psychopaths as narcissistic and egocentric attention cravers, who would engage in antisocial behaviours to achieve popularity and other personal gains (c). In all these instances, the male criminal psychopath came to embody the personality characteristics which American society perceived as most threatening for the hegemonic masculinity of the time, and therefore in need for social and, if necessary, penal neutralisation.

## 1. The Rise of Psychoanalysis and of the Child Centred Ideology

### *a. The Diffusion of Freudian Ideas in the United States*

At the turn of the 20<sup>th</sup> century, a number of American psychiatrists started displaying growing dissatisfaction with the traditional somatic model of disease (Hale 1995: 4-5). Somatic psychiatrists, critics argued, had failed to provide any conclusive empirical proof of the association of inherited defects and brain lesions with particular mental health conditions and/or behaviours (*Ibid.*, 158). Furthermore, somaticists had paid very limited attention to the emotional roots of mental disease, or to the role of family relationships in shaping the mental life of their patients in the early formative years. For critics, psychoanalysis provided an appealing psychological alternative to somaticists' failures. Rather than concentrating on heredity, organic pathologies, and symptomatology, as biological criminologists had done, psychoanalysis emphasised the role of unconscious feelings, sexuality, and early childhood experiences, opening up

new exciting venues of investigation into the psychological meaning of ‘neuroses’ and antisocial behaviours.

Americans’ first official encounter with Freud occurred in 1909, when the President of Clark University, G. Stanley Hall, invited the Viennese psychoanalyst to discuss his ideas in a series of lectures (*Ibid.*, 5). Disappointed with the somatic approach, the public of intellectuals in attendance received Freud’s theories with great interest and contributed to their slow but steady dissemination in the hospitals and medical schools of the big cities of the East Coast (*Ibid.*, 160). These developments reinforced psychoanalysis’ medical image in the eyes of traditional psychiatrists and contributed to its rapid diffusion during the Second World War (*Ibid.*, 187). As the war unfolded, psychoanalysts were increasingly recruited to take up key positions in the military psychiatric services; first to help identify subjects unfit to serve due to neuropsychiatric problems, and later to treat soldiers who experienced mental breakdowns as a result of prolonged combat stress and life-threatening experiences (Grob 1991: 190-191; Hale 1995: 190). Since many soldiers experiencing these nervous breakdowns had never manifested neuropsychiatric symptoms before, the experience of the Second World War lent credence to theories emphasising the importance of environmental stress over hereditary defects and organic pathologies (Grob 1991: 191, 1990: 41-69; Hale 1995: 207).

Following the discovery of the Holocaust, hereditary and somatic approaches associated with eugenic programs and biological theories of racial superiority lost the widespread acceptance they enjoyed in the 1920s and 1930s, paving the way for

psychoanalysis' rapid diffusion and popularisation in the 1950s and 1960s (Hale 1995: 209). As the war came to an end, psychoanalysis dominated medical and public discourse, psychoanalysts filled powerful positions within prestigious academic psychiatric departments and funding bodies, and the vast majority of psychiatric training programs included psychoanalysis in their curriculum (Denno 2005: 619-620). Thanks to this overwhelming influence, psychoanalysts were able to frame the content of central scientific publications such as the DSM-I (APA: 1952), which listed the diagnostic guidelines to be followed in psychiatric evaluations.

*b. The Birth of Psychological Man*

The strength and appeal of Freud's ideas lied in their ability to synthesise two distinct intellectual streams. The first one was scientific and started from the Darwinian conceptualisation of man as a biological machine regulated by inner instincts and bodily urges (Zaretsky 2005: 332). Building on the 19<sup>th</sup> century theory of reflex action, Freud framed instincts as internal mediators between physiological processes and psychological reactions, while picturing the psyche as a reflexive instrument which mirrored the functioning of the nervous system. However, rather than reducing reflexes to a physical reaction to external stimuli, as 19<sup>th</sup> century theorists had done, he connected the body's physiological processes to the emotional and psychical component of the mind, an aspect that satisfied the medical establishment on the one hand, and psychiatrists disappointed with traditional somatic approaches on the other (Burnham 1988: 53, 33; see Freud 1953[1905]; Watson 1919: 195; see generally Bernard 1925; Liddell 1960).

The second approach was humanistic and drew from the family tragedies described by William Shakespeare, Johann Wolfgang von Goethe, and Fyodor Dostoyevsky (among others) to stress the moral struggle experienced by human subjects as a result of their conflicts with parental figures (Zaretsky 2005: 332-333). This literary genre contributed to the diffusion of a common-sense understanding of human psychology, which stressed the importance of inner feelings and healthy family relationships for the individual's psychological well-being and moral upbringing.<sup>374</sup> Freud created a unique synthesis of these two streams of thought, contributing to the discovery of a new object of psychiatric attention, 'the idiosyncratic, meaning-saturated, morally inflected psychological life of the human being' (Zaretsky 2005: 333).

This human subject powerfully resonated with the new notion of personal life which emerged with the crumbling of the Victorian family ideal in the 1890s. In the Victorian era, the economy was founded on the traditional family enterprise, which assigned particular roles and identities to its members according to their function within its economic and social organisation. In this context, individuals' identities were closely related to their role within the family unit; hence, the private and the public sphere were deeply intertwined and the lines separating them blurred (Schorske 1980). As the mass production and mass consumption associated with the second industrial revolution started transforming Americans' lifestyles (1870-1914) and individuals started working outside the family household, the division between public and private

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<sup>374</sup> For expert witness testimonies using defendants' difficult relationships with their parents to explain their mental illnesses, personality disorders, and criminal behaviours see, e.g., *Morgan v. State*, 117 S.W.2d 76 (Tex.Crim.App. 1938), *Dr. Swope Test. Trial Tr.* 105; *Freeman v. State*, 317 S.W.2d 726 (Tex.Crim.App. 1958), *Dr. Crow Test. Trial Tr.* vol. 2, 359:10-361:3, 362:15-363:8; *Bryan v. State*, 406 S.W.2d 210 (Tex.Crim.App. 1966), *Dr. Crow Aff. Def's Hr'g On Am. Mot. for New Trial* 622¶4.

life became clear, and a new notion of personal identity, separated from and outside the family circle, began to emerge (Zaretsky 2005: 5, 23).

The founding idea of psychoanalysis, the *unconscious*, embodied this new notion of personal life (*Ibid.*, 5-6). Freud's unconscious demarcated an inner symbolic world, an intimate space in which the individual elaborated life experiences and impressions according to subjective needs, feelings and impulses. It marked a separation between the private and the public, interiority and exteriority, the personal and the social. Psychoanalysis did not assume a correspondence between socio-economic condition and subjectivity: for the first time, the personal world of the individual was given independent value.

The new notion of the 'self' stimulated by the diffusion of Freudian ideas had a significant impact on the ways in which mental health professionals framed and assessed mental illness and criminality from the 1920s and 1930s. It contributed to the transition from the 19<sup>th</sup> century notion of 'biological man' which saw criminals as organic machines regulated by their physical anatomy and genetic endowment, to a new concept of 'psychological man' which framed them as emotional subjects driven by their inner instincts, feelings, and childhood traumas (see Rieff 1979: 329-357). As the next section will show, when transposed into the trial context, psychoanalysts' reframing of the human subject in psychological terms helped bridge the traditional gap between folk psychological and mechanistic explanations of criminal behaviour, and to cast a new light on criminal acts previously perceived as unintelligible to the lay observer.

*c. Psychoanalysis, the Insanity Defence, and Texas Death Penalty Trials*

As argued in Chapter 4, legal notions of *mens rea* are based on a folk psychological interpretation of human behaviour, which theorises a connection between offenders' mental states - i.e. intentions, purposes, and desires - and their criminal conduct (Fingarette 1972: 86). Late 19<sup>th</sup> and early 20<sup>th</sup> century forensic psychiatrists rejected this teleological interpretation of the mind in favour of a mechanistic and deterministic understanding of human conduct, seen as a manifestation of physiological causes and energy patterns without reference to intent or purpose. Similarly, psychoanalysts writing in the 1950s and 1960s argued that, given their emphasis on the mechanical interaction between physiological mechanisms and psychic structures, their theories were incompatible with the folk psychological explanation of behaviour proposed by the criminal law (see, e.g., Hoedemaker 1948: 7; Group for the Advancement of Psychiatry 1954: 6; Roche 1958: 229-230).

However, despite psychoanalysts' claims to the contrary, their theories introduced a new approach to mental health and criminal behaviour which harmonised scientific and teleological interpretations of human conduct (Fingarette 1972: 86-91, 1963; Waelder 1960). Psychoanalysts relied on technical concepts (e.g. the *Id*, *Ego*, and *Superego*) inspired by the 19<sup>th</sup> century theory of reflex action, which framed human behaviour as a physiological reaction to internal and external stimuli. However, they departed from the 19<sup>th</sup> century paradigm by linking such concepts to defendants' inner values, emotions, and intentions. For example, when psychoanalysts explained a

violent act as the result of a ‘disruption of [the defendant’s] ego’,<sup>375</sup> they meant that the defendant lost control over his aggressive wishes and impulses, not that there was a physical breakdown in an inner machinery which caused an automatic unconscious movement (see Chapter 5: Section 2[a]). While the medical model of disease hoped to explain defendants’ behaviours in terms of mathematical relations of cause and effect, mid-20<sup>th</sup> century psychoanalysts aimed at demonstrating how apparently irrational behaviours could be made intelligible through a technical interpretation based on common-sense understandings of human conduct (Fingarette 1972: 87-88).

This theoretical innovation proved particularly helpful in elucidating the motivations behind defendants’ criminal behaviours in trial contexts. Whereas expert witnesses inspired by the somatic model of disease had failed to unpack the scientific mechanisms linking defendants’ organic conditions with their mental state at the time of the crime (see, e.g., Chapter 5: Section 4[d]), court psychoanalysts started translating their psychiatric theories into a common-sense language understandable to the lay observer. In so doing, they provided compelling theories connecting defendants’ difficult family backgrounds, repressed wishes, and emotional difficulties with their conduct at the time of the alleged offence, an aspect which would help expand the psychiatric gaze beyond the simple analysis of symptomatology and diagnostic classification to grasp the deeper meanings of human behaviour.

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<sup>375</sup> Rubenstein v. State, 407 S.W.2d 793 (Tex.Crim.App. 1966), Dr. Guttmacher Test. Trial Tr. vol. 5, 1086:17-1087:5.

However, as the Texas cases analysed in this chapter will show, while psychoanalysts helped cast a new light on the underlying motivations of defendants' criminal acts, their explanations did not necessarily result in successful insanity claims in criminal courts.<sup>376</sup> The reason can be found in the nature of their scientific reasonings and in their implications for legal doctrines of criminal responsibility. Rather than demonstrating that the defendants failed to understand the nature and consequences of their criminal acts as required by the Texas insanity standard, psychoanalytic theories tended to show that they acted under the influence of irresistible impulses, an argument which Texas courts have historically deemed insufficient to prove lack of guilt.<sup>377</sup>

To tackle this issue and tie their theories to a convincing insanity defence, a number of psychoanalysts started arguing that while defendants' psychological deficiencies did not impair their ability to *intellectually* understand the wrongfulness of their actions, it made it impossible for them to *feel* such wrongfulness at a deeper level.<sup>378</sup> By blurring the lines that traditionally separated cognitive and emotional understandings of wrongdoing, psychoanalysts were able to argue that defendants'

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<sup>376</sup> See, e.g., *McCaine v. State*, 211 S.W.2d 190 (Tex.Crim.App. 1948); *Gephart v. State*, 249 S.W.2d 612 (Tex.Crim.App. 1952); *Moon v. State*, 331 S.W.2d 312 (Tex.Crim.App. 1959); *Rubenstein*, 407 S.W.2d.

<sup>377</sup> See, e.g., *Morgan*, 117 S.W.2d, Dr. Swope Test. Trial Tr. 109-110; *McCaine*, 211 S.W.2d, Dr. Waterman Test. Trial Tr. 82: 21-83:15; *Gephart*, 249 S.W.2d, Def's Ex. 4, Report of Staff Meeting of Austin State Hospital of April 25, 1950 vol. 2, 115, Def's Ex. 5, Psychological Report Dated March 28, 1950 vol. 2, 115; *Freeman*, 317 S.W.2d, Dr. Crow Test. Trial Tr. vol. 2, 362:1-14, 374:10-25; *Rubenstein*, 407 S.W.2d, Dr. Guttmacher Test. Trial Tr. vol. 5, 1122:15-20.

<sup>378</sup> See, e.g., *Morgan*, 117 S.W.2d, Dr. Swope Test. Trial Tr. 113¶2-3; *McCaine*, 211 S.W.2d, Dr. Waterman Test. Trial Tr. 85:4-22; *Freeman*, 317 S.W.2d, Dr. Finney Test. Trial Tr. vol. 1, 127:18-128:2, Dr. Crow Test. Trial Tr. vol. 2, 355:24-356:13; *Rubenstein*, 407 S.W.2d, Dr. Guttmacher Test. Trial Tr. vol. 5, 1115:1-17, 1116:16-22; *Bryan*, 406 S.W.2d, Dr. Crow Aff. Def's Hr'g On Am. Mot. for New Trial 623¶2.

emotional deficiencies undermined their ability to distinguish right from wrong and conform their behaviour to legal requirements.

However, as Chapter 3 has shown, Texas has historically endorsed a cognitive interpretation of legal insanity, which argues that, in order to prove lack of guilt, defendants must show that they lacked the *intellectual* - rather than the *emotional* - capacity to understand the wrongfulness of their actions. This theoretical distinction made insanity claims based on psychoanalytic arguments particularly challenging, especially when defendants' behaviours before, during, and after the commission of the crime suggested the presence of premeditation and/or cover up, and the prosecution managed to leverage such behaviour to argue that the defendant knew that their conduct was wrong.<sup>379</sup>

Despite these difficulties, forensic mental health professionals testifying in Texas capital punishment trials in the 1950s and 1960s drew heavily from Freudian ideas. The appeal of Freud's theories was twofold. Firstly, while they provided a technical terminology capable of translating medical issues in folk psychological terms, they never abandoned the scientific paradigm, an aspect that gave them an aura of objectivity and legitimacy. Secondly, Freud's key theories and concepts reflected powerful concerns with the patient's moral views and ability to incorporate society's moral standards, an aspect which proved particularly helpful in courts of law. Freud's theory of criminality,

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<sup>379</sup> See, e.g., *McCaine*, 211 S.W.2d, Dist. Att'y Winborn Quest. Dr. Waterman Test. Trial Tr. 91:22-92:13; *Freeman*, 317 S.W.2d, Asst. Dist. Att'y Briscoe Quest. Dr. Dwyer Test. Trial Tr. vol. 1, 285:7-289:25, contra Dr. Crow Test. Trial Tr. vol. 2, 355:1-23; *Moon*, 331 S.W.2d, Asst. Dist. Att'y Briscoe Quest. Dr. Walter Test. Trial Tr. vol. 2, 257:13-21; *Rubenstein*, 407 S.W.2d, State Att'y Bowie Hyp. Quest. Dr. Stubblefield Test. Trial Tr. vol. 6, 1264:21-1265:17.

with its emphasis on the relationship between unconscious drives, rational control mechanisms, and moral standards of behaviour, constitutes a particularly illuminating example in this regard.

*d. Psychosexual Development, the Oedipus Complex, and Criminal Behaviour*

Freud associated psychopathology and criminal behaviour with an incorrect functioning of two essential spheres of the human mind: The *Ego* and the *Superego*. In his framework, the *Ego* signified the rational section of the mind mediating between unconscious aggressive impulses and external reality, whereas the *Superego* embodied the conscious part of the mind responsible for regulating behaviour according to society's moral standards (Freud 1961[1923]: 28, 34-39, 55-56; see Denno 2005: 617-618). In assessing the patient's *Ego*, an essential step in every psychoanalytic examination, the therapist was essentially evaluating the individual's awareness of, and capacity to deal with, society's moral standards, including its legal rules and prohibitions (Fingarette 1972: 110-111). Similarly, when a psychoanalyst evaluated a patient's *Superego*, he or she was effectively judging the person's moral attitudes, and the effectiveness of such attitudes in controlling the destructive pressures of the unconscious or *Id* (*Ibid.*, 112-113; see also Nunberg 1948: 192-193). Hence, psychoanalysts typically discussed psychopathology and criminal behaviour as an expression of an excessively 'weak', 'severe', or 'archaic' *Superego*, a framing that directly connected mental illness with a defect in the individual's moral attitudes, and tacitly implied a moral judgment by the psychiatrist using the concept (Fingarette 1972: 113-114). In this sense, psychoanalytic explanations of criminal behaviour included an evaluation of

defendants' ethical standards, an aspect that separated them from the neutrality and objectivity stressed by their predecessors and brought them closer to the moralistic approach taken by the criminal law (see also Wolberg 1954: 516; Waelder 1960: 187; Kubie 1960: 155-156).

Freud associated the *Ego* and *Superego* deficiencies leading to adult criminal conduct with a halt in psychosexual development experienced during the first five years of life. As individuals grew from infancy into adulthood, he argued, they went through five phases of psychosexual development, each one associated with a new erogenous part of the body which became the main source of libidinal drive and sexual fixation (Freud 1957[1916]: 332-33; 1961[1923]: 52; 1961[1928]: 186-187; see generally Fenichel 1945; Rapaport 1960; Fitzpatrick 1976: 69). Sexual frustrations experienced in these early stages prompted pathological copying mechanisms and anxieties that endured into adulthood and turned into neuroses and deviant behaviours.

At the age of three, the child started feeling sexual attraction for the parent of the opposite sex and secretly desiring to eliminate his natural competitor: the parent of the same sex. Freud called this infantile desire of incest and murder the 'Oedipus Complex' (Freud 1957[1916]: 332-333). Once children started experiencing these troubling instincts, anxieties and feelings of guilt started to emerge. Most children would use phantasy, sublimation, and repression to master the conflict internally without acting upon their sexual and homicidal impulses. In some cases, however, the impulse was too strong and the mechanisms of repression and sublimation too weak. In such cases, the sense of guilt that accompanied the Oedipus conflict survived in the

unconscious of the child into adulthood, prompting him to commit criminal acts and seek punishment to alleviate his internal suffering. This overwhelming guilt feeling, Freud explained, ‘derived from the Oedipus complex and was a reaction to the two great criminal intentions of killing the father and having sex with the mother’ (*Ibid.*, 333).

Freud’s theory of psychosexual development was closely related to his critique of Victorian parental education, with its authoritarian and repressive approach to youth discipline (see Hale 1995: 47, 53, 89-90; Freud 1961[1930], 2014a[1908]). According to Freud, parents played an essential role in mediating and regulating children’s aggressive and sexual impulses. As children grew up, they incorporated the norms and codes inculcated by the parents into their *Superego* or consciousness. When, due to parents’ punitive education, children internalised an excessively harsh *Superego*, they could develop aggressive reactions against their parents or against an authoritative parental tradition, rebel against society’s norms, and develop delinquent behaviour (see Freud 1957[1916]: 333, 1961[1923], 2014b[1926]). To counteract these tendencies, Freud proposed alternative parenting models aimed at encouraging children’s healthy sexual exploration and supporting their repression of the Oedipus conflict through early identification with a positive father figure.

Freud’s ideas on childhood education would prove deeply inspirational for progressive American psychoanalysts writing in the 1920s and 1930s (see Hale 1995: 89-91). Committed to promoting more understanding and tolerant attitudes towards children’s emotional needs and sexual impulses, Freud’s followers started arguing that

the *Ego* and *Superego* deficiencies leading to neuroses and adult aggression stemmed from insufficient love and warmth received during the childhood years, and the consequent inability to identify with the unloving parents (see, e.g., Aichhorn 1935; Healy & Bronner 1936; Friedlander 1949: 206, 214; Anna Freud 1949: 193-194; Alexander & Staub 1956). In this view, parental rejection and indifference, along with the use of physical punishment for misbehaviour, were counterproductive methods that could hinder or delay the development of a personal conscience, in some cases directly fostering the maturation of delinquent tendencies.

In the Cold War years, Freud's progressive views on childhood education encountered a number of critiques. At the time, the geopolitical tension between the Eastern and Western blocs had fuelled fears and anxieties in the American public, which fostered a conformist and conservative culture that harshly condemned any form of social deviance (Hartman 2008: 56). In this political climate, a number of psychoanalysts started expressing concerns that excessively permissive or forgiving attitudes might hinder the formation of the internal controls necessary to police children's behaviour and help them adapt to society's rules and regulations (see, e.g., Johnson 1949: 225, 228, 235; Bergler & Meerloo 1963; see generally Hale 1995: 231, 233-234; Zaretsky 2005: 278-279).

These concerns were fuelled by the popular media which, by describing juvenile delinquency as one of the most pressing crime issues of the time, contributed to a revival of parenting models based on strict discipline and control (Hartman 2008: 56). District attorneys seeking a plausible rationale to undermine the exculpatory potential of

evidence of abuse in Texas capital punishment trials strategically endorsed this conservative rationale. In so doing, they framed defendants' parents' use of corporal punishment as a legitimate means to deal with their children's unruly behaviours, lack of discipline, and hostility towards authority.

*e. Nearvel Moon, the Oedipus Complex, and the Debate on Parental Discipline*

The case of Nearvel Moon provides an illustrative example of the ways in which the cultural clash between progressive and conservative views on childhood education could manifest itself in a trial context.<sup>380</sup> Nearvel Moon was an 18-year-old white man charged with the shooting and killing of two men and a boy in a rural area of Harris County.<sup>381</sup> At the time of the shooting, one of the victims was carrying a whiskey bottle, a detail that would prove extremely significant for the psychoanalytic explanation of the crime provided by the defence. The defendant plead not guilty by reason of insanity and presented the testimony of an expert witness, Dr. Wagner, to support his claim. A psychiatrist with significant experience in forensic mental health evaluations, Dr. Wagner examined Moon in jail, administered physiological, psychological, and intelligence tests, and interviewed several members of his family.<sup>382</sup> The intelligence test revealed that Moon had an IQ of 70, which classified him as a 'borderline mental

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<sup>380</sup> *Moon*, 331 S.W.2d; see also *Alvarado v. State*, 912 S.W.2d 199 (Tex.Crim.App. 1995); *Penry v. State*, 178 S.W.3d 782 (Tex.Crim.App. 2005).

<sup>381</sup> *Moon*, 331 S.W.2d at 312.

<sup>382</sup> Dr. Wagner Test. Trial Tr. vol. 2, 184:15-185:10.

defective’, while the interviews with his family members revealed some disturbing details about his social background and early upbringing.<sup>383</sup>

According to Dr. Wagner, among all the families he had examined throughout his career, ‘this was one of the most socially degraded families that [he had] ever come in contact with.’<sup>384</sup> The interviews revealed that the defendant’s father was an alcoholic who repeatedly beat his wife, sons, and daughters, sexually abused one of his daughters, and encouraged his sons to commit criminal acts, criticising them if they got caught.<sup>385</sup> He gave his wife 10 dollars a week to support their eight children and lived in his own place where he spent significantly larger sums on alcohol.<sup>386</sup> He repeatedly came home to his family drunk, and beatings would typically follow. To give a sense of the moral degradation in which they were brought up, the defendant’s siblings reported that their mother once had a miscarriage at the 6<sup>th</sup> month of pregnancy and his father ‘showed [the baby’s body] to the kids and made a big commotion about it and threw it out to the dogs to eat.’<sup>387</sup>

According to the defendant’s mother, her husband’s beatings were extremely violent.<sup>388</sup> On numerous occasions, Moon tried to protect his mother by pointing a shotgun against his father and was hit into unconsciousness as a result.<sup>389</sup> The

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<sup>383</sup> *Ibid.*, 186:25-187:1.

<sup>384</sup> *Ibid.*, 187: 23-25.

<sup>385</sup> *Ibid.*, 188:1-189:17.

<sup>386</sup> *Ibid.*, 190:11-18.

<sup>387</sup> *Ibid.*, 191: 14-23.

<sup>388</sup> W. V. Moon Test. Trial Tr. vol. 2, 338:7-339:24.

<sup>389</sup> Dr. Wagner Test. Trial Tr. vol. 2, 193:2-10.

defendant resented his father for the violence he submitted his family to and hated alcohol because he associated it with his abusive behaviour.<sup>390</sup> Shortly before the shootings for which he was on trial, he told his mother and brothers that he would kill his father if he ever beat him or his mother again.<sup>391</sup>

Drawing from Freud's theory of the Oedipus complex, Dr. Wagner argued that by killing the victim carrying the whiskey bottle, the defendant had symbolically killed his father, satisfying his unconscious impulses and desires.<sup>392</sup> The fact that the defendant took the whiskey bottle and broke it on a rock following the shooting was additional proof of the psychological analogy that might have triggered the homicidal acts. Implicitly supporting a defence of irresistible impulse, the doctor proposed that the view of the older man in the group drinking from the whiskey bottle triggered the defendant's repressed feelings of anger against his father, causing a powerful psychological reaction which in turn led to the shooting and killing of the three victims.

The prosecution gave a completely different explanation of the defendant's behaviour. Rather than portraying the defendant's crime as a pathological reaction to the abuse he suffered at the hands of his father, Asst. DA Frank Briscoe associated it with his antisocial nature and rebellion against authority. To support this contention, he presented the testimony of two psychiatrists, Dr. Benjamin Sher and Dr. Paul Walter, who minimised Moon's mental disabilities and his difficult family history. Dr. Sher, for

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<sup>390</sup> *Ibid.*, 194:19-22.

<sup>391</sup> *Ibid.*, 193:15-19.

<sup>392</sup> *Ibid.*, 204:6-205:5.

example, examined the defendant and argued that he was a pleasant individual with a slight intellectual impairment, who had experienced ‘some altercations with some authority figures in the past’ and therefore resented authority figures and felt hostility towards his father.<sup>393</sup> Instead of investigating the defendant’s past to identify the possible source of this hostility, the doctor simply assumed that it was due to him disliking his father, for no apparent reason.<sup>394</sup> He concluded that the defendant knew the difference between right and wrong at the time of the crime and argued that evidence that Moon was abused and deprived of a moral education as a child would not change his opinion as to his legal sanity.<sup>395</sup>

In contrast to what was proposed by the defence, the prosecution portrayed the beatings as a justified response from a father dealing with uncontrollable children, who wouldn’t follow his guidance, and would rebel to his patriarchal authority. In this view, the children, and particularly the defendant, were physically abused not because their father was an alcoholic, immoral, and violent individual, but because they deserved it; the beatings being the result of their own antisocial tendencies. The Asst. DA’s cross examination of the defendant’s brother, General McArthur Moon, clearly illustrates this line of reasoning:

Q. The whippings that you referred to, isn’t it true that those things took place after one of you had done something wrong, or had misbehaved in some way?

A. We got one one time for not going over and feeding the dogs for our grandmother.

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<sup>393</sup> Dr. Sher Test. Trial Tr. vol. 2, 231:20-232:19.

<sup>394</sup> *Ibid.*, 234:21-235:1, 237:8-21, 247:24-248:18.

<sup>395</sup> *Ibid.*, 250:7-14. See also Dr. Walter Test. Trial Tr. vol. 2, 257:8-259:19, 264:8-265:12.

Q. That is what I had in mind, every time that your father would punish you it would be for some reason or for something that you failed to do?

A. Yes, sir.

Q. He did not punish you without reason, did he?

A. Sometimes he would.

Q. Did your father have any particular favoritism towards any of the children as far as you could tell?

A. Well, he was kind to me because I would do what he told me to do and not jaw back at him...

Q. Are you indicating that Nearvel doesn't do sometimes what he tells him to do and, as you put it, jaws back at him sometimes?

A. He would do it if he wanted to and if he didn't he wouldn't do it.

Q. And that is when the whipping would occur that you have talked about?

A. Yes, sir.<sup>396</sup>

As this passage shows, taking the authoritarian parenting model of the Cold War years to its extreme consequences, the Asst. DA portrayed the defendant's father's beatings as a legitimate disciplinary measure to manage his son's unruly behaviour, rather than as a failure in early parental education which would carry devastating consequences for the child's future mental health and social adjustment.

## 2. Psychoanalysis and the Construction of the Criminal Psychopath

As mentioned in Section 1(a), in the 1950s and 1960s most members of the American Psychiatric Association were trained in the psychoanalytic tradition. As a result, the diagnostic labels included in the first and second edition of the DSM, respectively published in 1952 and 1968, were powerfully influenced by psychoanalytic theories (APA 1952; 1968). This influence is particularly striking in the diagnosis of psychopathy or sociopathic personality disorder, a condition associated with particular personality

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<sup>396</sup> Asst. Dist. Att'y Briscoe Quest. Gen. McArthur Moon Test. Trial Tr. vol. 2, 316:14-317:14.

characteristics and antisocial tendencies, which has played a crucial role in Texas capital punishment proceedings from the 1950s onwards. The remaining part of this chapter will examine the development of this diagnosis as applied to male offenders, and show how, due to its malleability to shifting cultural values, it is possible to use this diagnostic category to identify the personality characteristics which American society perceives as most threatening for the hegemonic masculinity of the time, and therefore in need for social and, if necessary, penal neutralisation.

*a. The Criminal Psychopath as an 'Emotionally Immature' Individual*

From its first American popularisation in the mid-1910s (Healy 1915; Glueck 1918a, 1918b, 1923) to its inclusion in the DSM-I in 1952, psychopathy has been a diagnosis in continuous flux (White 1924: 175; Maughs 1941; Graham 1962: 446; Pichot 1978; Werlinger 1978; Rafter 1997b, 2004; Horley 2014: 92). Between 1915 and 1925 biological criminologists echoed the somatic views of many of their colleagues by defining psychopaths as constitutionally inferior individuals, who were born with a series of mental (albeit not intellectual) defects that inclined them to engage in antisocial behaviours (Rafter 1997a: 168, 173-174). However, from the 1930s onwards, this interpretation gave way to a psychoanalytic interpretation of psychopathy, which stressed the role of family relationships for the formation of the personality and behaviour of the child (Bromberg 1953-54: 166-167). This transformation reflected a larger theoretical shift from interpretations of psychopathy as an inborn mental disturbance to an understanding of the condition as an incorrigible personality disorder.

In the aftermath of the Second World War, American society underwent a crucial social transformation which would have deep consequences for psychoanalysts' framing of criminal psychopathy. At the time, the recent experience of fascist totalitarian regimes constantly reminded people of the importance of personal freedom, and of its close interconnection with civil and political liberties (Zaretsky 2005: 284). In order to protect themselves from oppressive external interferences, by the government and other structures of social organisation, Americans retreated into the privacy of family life, an intimate world now celebrated for its ability to fulfil men and women's aspirations, in the sentimental as well as in the vocational sphere (*Ibid.*, 284-285).

As Americans withdrew into the protective shield of family life, a new ethic of maturity, adulthood, and responsibility began to emerge. Within this ethical framework, for men

'maturity' implied [their] rejection of the homosocial, adolescent world of 'mates' and 'buddies', their reorientation to the heterosexual dyad, and their acceptance of the responsibilities of marriage, [along with] the acceptance of limits (*Ibid.*, 285).

In the conservative climate of the post-war years, men who escaped the responsibilities associated with family life (e.g. finding a stable occupation and committing to a lifelong monogamous relationship) were seen as psychologically immature and socially maladjusted, two aspects that made them more prone to engage in antisocial activities.

The ethic of maturity of the post-war years (Hartman 2008: 58) powerfully shaped American psychoanalysts' descriptions of criminal psychopathy (cf. Lindner 1956: 183; Rieff 1990: 8; Passerini 1997: 322; Zaretsky 2005: 285). Whereas in the

1910s and 1920s psychiatrists portrayed criminal psychopaths as defective subjects with a poor genetic endowment, psychoanalysts writing in the 1930s, '40s, and '50s pictured them as emotionally immature and socially maladjusted individuals who, due to a halt in their psychosexual development, had failed to develop the necessary moral standards to live a 'responsible' adult life (see, e.g., Bender & Schilder 1940; Levine 1940; Glueck & Glueck 1943; Banay 1943: 100-170; Lindner 1944; Karpman 1946, 1948; Bromberg 1947, 1953-54:172; Bender 1947; Mayer 1948: 578; Lipton 1949: 584-587).

For example, Harry R. Lipton, a psychiatrist from Georgia with experience in penal institutions, argued in 1949 that as a result of defective development stemming from early family conflicts, the child psychopath tended to cry easily, have sudden and aggressive reactions, rebel against parents and other figures of authority, and run away from home (Lipton 1949: 584-586). As the child psychopath transitioned into adulthood, these early symptoms became more marked, crystallising into permanent personality traits that reflected an 'infantile approach' to life. Rather than growing into a mature and well-adjusted citizen, the male psychopath kept behaving like a child, trying 'to use on the world those methods which [had] previously been effective with the parents' (*Ibid.*, 586). Due to this emotional immaturity, he denied responsibility for his actions, refused to accept the realities of life, and restlessly searched for the unattainable, failing to understand that 'adjustment and success necessitate a long steady pull'. Rather than working hard towards a planned goal, he preferred taking chances, expecting to obtain results 'by magic rather than by effort' (*Ibid.*, 587).

Benjamin Karpman, former Director of Psychiatry at St. Elizabeth Hospital in Washington DC, echoed Lipton's views. Discussing a male psychopath with a long criminal career, he suggested that early family dynamics had turned the subject into an emotionally immature individual, incapable of dealing with the realities of life and adjusting his behaviour to legal requirements (Karpman 1935: 274-275). 'Weak and delicate' from birth, as a child he craved constant care and attention, an aspect that gradually developed into a fixed personality trait. 'Maternal overprotection' had retarded his development, making him emotionally dependent, 'sexually conservative', and inapt to approach reality healthily and maturely (*Ibid.*, 274).

As a result of these developmental deficiencies, the man needed long periods of rest and was incapable of engaging in any productive occupation. Bullied at school, the subject started developing early phantasy formations to tackle the difficulties he experienced in real life. Behaviourally, these psychological mechanisms translated into school truancy and fantastic dreams of future achievement, which were regularly frustrated by his indulgence in daydreaming and lack of proper dedication. As reality kept disappointing him, he increasingly detached from it, living in his own world of phantasies and separating himself from the external world. As his dreamy wishes pressed for fulfilment, they 'sought vicarious expression in predatory crimes that would temporarily satisfy his phantasies', immature impulses, and unconscious drives (*Ibid.*, 275).

The expert evidence presented in the trial of Riley McCaine suggests that forensic psychiatrists testifying in Texas capital punishment proceedings drew from similar definitions in their evaluations.<sup>397</sup> McCaine, a white middle class man, was charged with the murder of Elnora Collins, a woman whom he did not know, in April 1947 and sentenced to death the following year. The evidence suggested that, after the murder, McCaine ran away from the crime scene, tried to hide the victim's body, and attempted to escape detection by leaving Texas and assuming a different identity, all facts which are typically considered strong common-sense indications of legal sanity in Texas courts.<sup>398</sup> Despite this unfavourable evidence, the defendant plead not guilty by reason of insanity.

To support his insanity plea, McCaine presented a number of lay witnesses who testified that his appearance, personality, and behaviour had undergone a dramatic change from the Spring of 1944, which had led them to believe that he was now of unsound mind. For example, the defendant's first wife stated that while McCaine had been an 'agreeable and happy person' throughout their marriage, which lasted between 1929 and 1936, when she saw him in April 1944, he looked thinner and his eyes were constantly twitching.<sup>399</sup> During their meetings, McCaine seemed moody, did not talk, was absorbed in his own thoughts, and struggled to follow the conversation.<sup>400</sup> Similarly,

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<sup>397</sup> *McCaine*, 211 S.W.2d, Dr. Waterman Test. Trial Tr. 81:28-82:12, 84:20-24. See also *Gephart*, 249 S.W.2d, Def's Ex. 4, Report of Staff Meeting of Austin State Hospital of April 25, 1950 vol. 2, 115, Def's Ex. 5, Psychological Report Dated March 28, 1950 vol. 2, 115; *Bingham v. State*, 290 S.W.2d 915 (Tex.Crim.App. 1956), Dr. Koeninger Test. Trial Tr. 307, Dr. Schinkler Test. Trial Tr. 333, Dr. Grice Test. Trial Tr. 351.

<sup>398</sup> *McCaine*, 211 S.W.2d at 192-193.

<sup>399</sup> Melba McCaine Test. Trial Tr. 53:11-13, 54:1-25, 55:11-20.

<sup>400</sup> Tardy Test. Trial Tr. 64:23-66:9, Riley McCaine Jr. Test. Trial Tr. 68:18-69:7.

Curtis Brown, an attorney who had worked on the defendant's second divorce proceedings, met with McCaine in November 1944 and confirmed Mrs. McCaine's general impression, adding that during their meeting the defendant was 'extremely nervous', 'smoked incessantly', and almost cried in his office.<sup>401</sup> Finally, the evidence suggested that McCaine, who at the time of his second divorce lived in Washington DC, had been hospitalised in the mental health ward of St. Elizabeth Hospital, and looked very thin and nervous upon his release.<sup>402</sup>

To corroborate the lay evidence, the defence presented the testimony of Dr. John Waterman, a Professor of Psychiatry practicing in Houston, Texas, who had conducted an extensive evaluation of McCaine following his arrest. According to Dr. Waterman, due to a halted development in infancy or childhood, McCaine had built 'a psychopathic personality with psychotic trends', a personality defect characterised by 'periods of mental disturbance which cause[d] him to do acts which ordinary people would consider wrong... without any recognition of the consequences'.<sup>403</sup> As a result of his psychopathic tendencies, McCaine was unable to plan ahead, acted impulsively, and never seemed to learn from experience.<sup>404</sup> His emotional immaturity and impulsivity were reflected in a marked inability to live a responsible life with regard to

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<sup>401</sup> Brown Test. Trial Tr. 51:21-62:17.

<sup>402</sup> Gant Test. Trial Tr. 46:1-3, 21-22.

<sup>403</sup> Dr. Waterman Test. Trial Tr. 81:28-82:4.

<sup>404</sup> *Ibid.*, 82:4-12.

family obligations and hold a job for more than two consecutive years, as shown by his failed marriages and employment history.<sup>405</sup>

Upholding an irresistible impulse argument, Dr. Waterman proposed that when external triggers prompted a psychotic episode, the defendant succumbed under the pressure of primitive urges, which took the form of neurotic symptoms, such as anxiety, heart palpitations, and death fears, and of disturbing urges and obsessions, such as the wish to go and choke someone, without apparent reason.<sup>406</sup> As a result of his mental condition, McCaine was incapable of feeling love, hate, anger, or guilt for his past actions.<sup>407</sup> While he had a rational understanding of the moral wrongfulness of his actions, the doctor concluded, this emotional void impaired his ability to feel the difference between right and wrong at a deeper level, making him insane according to legal standards.<sup>408</sup>

As these examples suggest, in the mid-20<sup>th</sup> century forensic psychiatrists endorsed the Freudian association between individuals' early childhood experiences and their future personality and behaviour. In this view, when negative parenting

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<sup>405</sup> *Ibid.*, 84:20-24. See also Melba McCaine Test 63:16-20. Along these lines, the expert witnesses testifying in the trial of Leonard Lionel Bingham, a white man convicted for murder in 1956, diagnosed the defendant with a psychopathic personality disorder, describing him as an emotionally immature, impulsive, and irresponsible individual who, due to an early halt in psychosexual development, was unable to postpone immediate gratification in view of future rewards. See *Bingham*, 290 S.W.2d, Dr. Koeninger Test. Trial Tr. 297, 299, 302, Dr. Schinkler Test. Trial Tr. 334, Dr. Grice Test. Trial Tr. 352-353.

<sup>406</sup> Dr. Waterman Test. Trial Tr. 82:21-83:15.

<sup>407</sup> *Ibid.*, 82:13-21.

<sup>408</sup> *Ibid.*, 85:4-22.

models or traumatic experiences hindered the child's emotional development at an early stage, the individual would fail to incorporate the necessary lessons to mature into a well-adjusted adult and tend to regress to that early stage of development throughout his or her life. By failing to sublimate or repress the unconscious impulses which dominated his or her early years, the individual was doomed to constantly relive these primitive urges, incapable of controlling his aggressive impulses and postponing immediate satisfaction to acquire future advantages.

However, by arguing that defendants' arrested psychosexual development undermined their ability to control their primitive urges, psychoanalytic explanations supported a defence of irresistible impulse, not of legal insanity. While in some cases experts tried to associate criminal psychopathy with an incapacity to feel the moral wrongfulness of the criminal act and to abide to legal standards, when the defendant's behaviour at the time of the alleged offence suggested that he had tried to escape detection, Texas jurors were unlikely to be sympathetic to this kind of argument and abandon the cognitive approach of the Texas insanity test.<sup>409</sup> As happened in previous decades, when the scientific explanations provided by the trial experts clashed with jurors' common-sense interpretations of defendants' behaviours, the latter would inevitably succeed, regardless of the severity of defendants' mental health conditions and/or personality defects.

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<sup>409</sup> *McCaine*, 211 S.W.2d, Dr. Waterman Test. Trial Tr. 82:13-21; *Rubenstein*, 407 S.W.2d, Dr. Guttmacher Test. Trial Tr. vol. 5, 1115:1-17, 1116:16-22.

*b. The Criminal Psychopath as a 'Sexual Pervert'*

This section will turn to a series of social and cultural developments which, in the late 1930s and early 1950s, led to the emergence of a new diagnostic category associated with antisocial tendencies: the sexual psychopath. The section offers two related arguments. Firstly, it proposes that the decline of Americans' traditional notion of 'civilised sexuality' prompted psychoanalysts to reframe the criminal psychopath as a 'sexual pervert' and an 'insatiable beast', and to use this conceptualisation when testifying in capital punishment proceedings involving sex-related offences. Secondly, it suggests that the decline of the traditional code of sexual morality gave new visibility to alternative sexual practices such as homosexuality, which, by challenging the traditional heterosexual couple and its related family values, encouraged conservative psychoanalysts to conflate criminal psychopathy with emasculation, and to use this association to stigmatise sexual behaviours which challenged the status quo.

The 19<sup>th</sup> century notion of 'civilised sexuality' restricted sexual intercourse within monogamous marriage, while celebrating female abstinence, purity, and self-control as direct paths towards moral rectitude and social adjustment (Hale 1995: 4). This sexual code fell perfectly in line with somatic psychiatry's association of mental health with control over the lower instincts through the self-restraining power of the brain or rational mind. However, as Freud's ideas gathered momentum, psychoanalysts started questioning this model, highlighting the neurotic effects of sexual repression in a number of female patients, and stressing the universal nature of sexual needs across genders (*Ibid.*). According to Freud and his followers, puritanism was a sterile

instrument of repression which led to emotional aridity and pathological controls of instincts and desires. In this view, puritanism was a moralistic and judgmental framework whose only purpose was to control people's natural and legitimate instincts and behaviours.

From the 1920s onwards, Freud's revolutionary ideas about sexuality, and the unconventional sexual behaviours promoted by the new urban bohemian culture, helped reframe Americans' understanding of what constituted proper sexual conduct (Freedman 1987: 86; Hale 1971; Burnham 1973; Robinson 1976). Influenced by these ideas, the white middle classes started detaching sexuality from procreation, practicing family planning, and accepting the reality of female sexual desire. While the puritan framework had theoretically protected women against males' aggressive sexual advances by encouraging a pious and monogamous life, as traditional gender roles were subverted and women claimed more sexual freedom, fears that women and children had become more vulnerable to men's unwarranted attacks began to emerge (Freedman 1987: 86-87, 89).

In the late 1930s and early 1950s, these fears were fuelled by a series of sex-motivated child murders which prompted American newspapers to increase their coverage of child rape and molestation (*Ibid.*, 83-84; see Glueck 1937: 318-320). This increased media coverage incited concerns amongst psychiatrists, legal authorities, and the lay public about a possible sex-crime wave striking the United States, despite a striking lack of evidence to support this contention. By sensationalising a stereotypical image of sex offenders as uncontrollable beasts possessed by overwhelming sexual

instincts and desires (Freedman 1987: 94; see, e.g., Hoover cited in Frosch & Bromberg 1939: 761-767; Hoover 1947), the media prompted several states and the federal government to take special measures for the management and control of ‘sexual psychopaths’, individuals incapable of controlling their sexual urges and ‘likely to attack... the objects of [their] uncontrolled and uncontrollable desires’ (Freedman 1987: 84; see also Swanson 1960: 228-235; Brakel & Rock 1971: 362-365). Beginning in the late 1930s, several governments instituted special commissions for the investigation of sex crimes, investing in research aimed at the study of sexual psychopaths, and funding specialised institutions aimed at their psychiatric treatment. Most importantly, a number of states began to draft new ‘psychopathy laws’, which compelled courts to impose indeterminate detentions in psychiatric institutions on defendants diagnosed with sexual deviations.

### The Sexual Psychopath as an ‘Insatiable Beast’

The work of Benjamin Karpman provides a clear example of psychoanalysis’ contribution to the debate on sexual psychopathy (Freedman 1987: 91; Werlinder 1978: 154-161; see Karpman 1935, 1940: 187-218, 204, 1951, 1954: 501). In line with Freud’s critique of puritan sexual morality, Karpman argued that parents’ tendency to repress and punish children’s curiosity in sexual matters, as well as their reticence to provide a frank and open sexual education, hindered the child’s natural sexual development, contributing to pathological expressions of sexuality in adulthood. By punishing children’s sexual experimentation, parents forced them to repress their natural sexual urges into the unconscious. Once repressed, these natural instincts got

distorted and corrupted, only to later re-emerge in the form of sexual disorders (Karpman 1947: 206-207).

The emotional and psychological immaturity that stemmed from the child's arrested psychosexual development, contributed to the formation of a primitive and underdeveloped subject, the sexual psychopath, dominated by his instincts and impulses and incapable of deferring pleasure (*Ibid.*, 207-208). The phantasies and dreams of the sexual psychopath were simple, primitive, focused exclusively on needs and desires. 'In a life that is lived on a simple, primitive plane', Karpman explained,

there is little opportunity for symbolization... normal judgment and other higher functions are interfered with by the continuous intrusion of primitive instincts that brooks no opposition. The mental organization is not merely savage and primitive but closer to the animal; indeed, individuals of this type are little more than animals in human form (*Ibid.*, 221).

While later psychoanalysts would argue that the sexual psychopath had an underdeveloped libido, Karpman insisted that they were 'insatiable beasts', closer to animals than to humans, always in search for sexual pleasure and erotic satisfaction (Freedman 1987: 91; Karpman 1940: 204, 1954: 501; see also Rouke 1950: 451; Geil 1945, 1948). Karpman's association of arrested childhood development, primitiveness, and unrestrained expression of lower impulses drew from two central ideas: the instincts theory developed by Freud and inspired by the old notion of reflex action, discussed above, and the notion of childhood development seen as a gradual progression from primitiveness to civilisation. The second idea, developed by G. Stanley Hall (1904), a prominent exponent of the progressive education movement, became extremely popular amongst American psychoanalysts and educators in the first half of the 20<sup>th</sup>

century. Inspired by 19<sup>th</sup> century theories of racial evolution (see Chapter 5: Section 3[a]), Hall argued that as he progressed from infancy to adulthood the individual followed the same pattern of development followed by the human races, from an early stage of primitiveness and barbarity to a final stage of maturity and civility (Hartman 2008: 18; see Hall 1904). It followed from this argument that any interruption in the healthy development of the child could prompt the unleashing of the primitive instincts and desires associated with the early stages of human development, and lead to beastlike sexual conduct and criminal behaviours.

In the 1950s and 1960s, psychoanalysts' explanations of the nature and origins of 'sexual perversions' contributed to a conceptual conflation between criminal psychopathy and various forms of 'sexual deviances' in Texas courtrooms.<sup>410</sup> The trial of Foley Ford Gephart provides an illustrative example in this regard. Gephart, a white 37-year-old man, was charged with the abduction and rape of three children - two girls and a boy between 8 and 10 years of age - in May 1950. The evidence suggested that the defendant, a schoolteacher who had met the victims at a playground some time prior to the offence, had picked up the children at their home and brought them to his apartment, where he had systematically raped them.<sup>411</sup> Called to the stand, the victims reported that this was not an isolated incident, that the two girls had been to the

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<sup>410</sup> For examples of expert witnesses conflating homosexuality, sex offences, and criminal psychopathy see *Gephart*, 249 S.W.2d, Dr. Hoerster Aff. Def's First Am. Mot. for New Trial 72¶2-73¶1; *Leath v. State*, 346 S.W.2d 346 (Tex.Crim.App. 1961), Dr. Holbrook Test. Trial Tr. 241:11-24. For later cases drawing from psychoanalytic theory to explain 'pathological' sexual assaults see, e.g., *Gribble v. State*, 808 S.W.2d 65, 75-76 (Tex.Crim.App. 1990).

<sup>411</sup> *Gephart*, 249 S.W.2d. at 614.

defendant's apartment before, and that each time he had forced them to have sexual intercourse with him.<sup>412</sup>

The defendant plead not guilty by reason of insanity. To support his insanity claim, he presented evidence suggesting that in April 1950 he had been committed to Austin State Hospital following a lunacy proceeding.<sup>413</sup> Shortly after his commitment, one of the victims in this case reported that she had been raped by the defendant, and the Travis county court immediately filed an order finding Gephart sane and free to be released. Following his discharge from the hospital, the defendant was immediately arrested for rape of a child under 18 years, at the time a capital offence.

During his stay at Austin State Hospital, the defendant was twice examined by a board of nine physicians, who concluded that he suffered from a severe mental illness. The defence introduced in evidence the minutes from the staff meetings, along with a report of a psychological evaluation conducted at the hospital. In the summary of the second staff meeting, the doctors reported that the defendant complained about 'uncontrollable sexual urges to fondle the genitalia of small girls', arguing that 'he neither received any pleasure, gratification or sexual stimulation' from this activity, but that it had helped him control his passion thus far.<sup>414</sup> Gephart was unable to provide any explanation for these uncontrollable urges, which were episodic, accompanied by confusion, and lasted for four to five days at a time. According to the doctors, the

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<sup>412</sup> *Ibid.*

<sup>413</sup> *Ibid.*, 615.

<sup>414</sup> Def's Ex. 4, Report of Staff Meeting of Austin State Hospital of April 25, 1950 vol. 2, 115.

evaluation suggested that the patient lacked judgement, insight, and morality and that due to his overwhelming sexual perversions and transient confused states, he had no consideration for other people's well-being. His criminal history, they concluded, coupled with his 'childishness at 37 years', and his failure to learn from experience, suggested that Gephart suffered from a 'psychosis with psychopathic personality disorder' and should therefore be kept in the hospital for further treatment.

The psychological report echoed these views, adding important considerations regarding the aetiology of the patient's mental condition.<sup>415</sup> As part of his evaluation, the psychological trainee who signed the report administered a series of projective tests, which suggested that the patient was dominated by his sexual obsessions and compulsions, and therefore tended to 'act on the spur of the moment with little thought of the consequences of his actions'. Due to 'an over attachment to the mother figure' in the early formative years, as a child Gephart had experienced a strong sexual conflict which had led to an arrest of his psychosexual development at 'a pregenital age' and to a marked emotional immaturity.<sup>416</sup> The diagnosis was 'over-ideational perschizophrenia with a premorbid obsessive-compulsive adjustment', a particular form of psychosis characterised by obsessions and compulsions.<sup>417</sup>

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<sup>415</sup> Def's Ex. 5, Psychological Report Dated March 28, 1950 vol. 2, 115.

<sup>416</sup> The chief defence expert in the trial of Leon Willis Johnston, a white man convicted for the rape of an 8-year-old girl, similarly associated the defendant's pathological relationship with his parents with his sexually deviant behaviours, which included masturbating obsessively, engaging in homosexual relations, and repeatedly raping his two-year old child. See *Johnston v. State*, 396 S.W.2d 404 (Tex.Crim.App. 1965), Dr. Rubin Test. Trial Tr. 176:3-178:21.

<sup>417</sup> See also Dr. Boelsch Test. Trial Tr. vol. 1, 117¶2,4-119¶1, 121¶3-4.

To counteract this evidence, the state called a number of expert and lay witnesses to the stand. The state witness list included the doctors who had signed the staff meeting reports at Austin State hospital,<sup>418</sup> the criminal justice officials who had brought the lunacy charges against the defendant and filed affidavits in support of his hospitalisation,<sup>419</sup> and a few experts who had examined him prior to the death penalty proceedings.<sup>420</sup> The witnesses who had observed and examined the defendant at the time of his civil commitment all testified that in their view the defendant was sane. While they had previously argued that the defendant was insane and needed to be hospitalised, they explained, these testimonies had the strategic purpose of keeping Gephart locked up as long as possible for public protection.<sup>421</sup> As the Sheriff of Fayette County clarified, when they signed the lunacy proceedings, Gephart had been arrested for sexually assaulting a few young girls but, given the current laws on sex offences, they believed that a traditional criminal proceeding would have led to a maximum sentence of two years for aggravated assault, an insufficiently long sentence to ensure public safety. As a result, they decided to file a lunacy proceeding against him, hoping that a finding of insanity would have led to a longer period of institutionalisation.

As this and other state testimonies suggest,<sup>422</sup> prior to the formulation of the new psychopathy laws, it was not unusual for forensic psychiatrists and criminal justice

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<sup>418</sup> Dr. Martin Test. Trial Tr. vol. 1, 156¶2-163¶1.

<sup>419</sup> Flournoy Test. Trial Tr. vol. 1, 74¶4-78¶2, Hart Test. Trial Tr. vol. 1, 164¶2-171¶1.

<sup>420</sup> Dr. Waide Test. Trial Tr. vol. 1, 78¶3-90¶3, Dr. Hanretta Test. Trial Tr. vol. 1, 104¶3-114¶1, Dr. Kuehne Test. Trial Tr. vol. 1, 90¶4-104¶1.

<sup>421</sup> Flournoy Test. Trial Tr. vol. 1, 77¶2-78¶1.

<sup>422</sup> Dr. Martin Test. Trial Tr. vol. 1, 158¶1, Hart Test. Trial Tr. vol. 1, 165¶4-166¶1, 167¶3-168¶1. The state experts who evaluated Gephart's mental state prior to the capital punishment proceedings concurred with the other state witnesses that the defendant was a sane individual and a 'sex pervert.' See

officials to use civil commitment proceedings to keep sex offenders in psychiatric institutions for a prolonged period of time, despite the fact that no one believed that they were actually insane to the point of needing hospitalisation. In this sense, the drafting of the new psychopathy laws in the 1950s may be read as a strategic move aimed at legitimising a well-established practice, which utilised the medicalisation of sexual deviances to incapacitate and control sex offenders through indeterminate institutionalisation, in the interest of public protection.

Despite the contradictory and ethically problematic statements provided by the prosecution's key witnesses, the jury relied on the state's version of the facts, judged Gephart sane at the time of the alleged offence and sentenced him to death. Once again, one can find a possible explanation for the jury's finding by looking at the medical explanations provided by the defence and at the defendant's behaviour following the crime. First, by arguing that the defendant's sexual misconduct was prompted by uncontrollable primitive urges, the psychiatric and psychological reports presented by Gephart's attorney seemed to support a defence of irresistible impulse rather than of legal insanity. Second, the evidence presented by the prosecution suggested that, following the sexual assaults, Gephart had warned the children to never tell anyone about what had happened, threatening to hurt them if they disobeyed, and promising gifts if they followed his instructions.<sup>423</sup> As most cases analysed in this thesis have shown, when the defendant's behaviour suggests an attempt to escape detection and arrest, the

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Dr. Waide Test. Trial Tr. vol. 1, 79¶2, Dr. Kuehne Test. Trial Tr. vol. 1, 91¶3-92¶2, Dr. Hanretta Test. Trial Tr. vol. 1, 105¶2-106¶2.

<sup>423</sup> *Gephart*, 249 S.W.2d at 614.

folk psychological interpretation of human behaviour tends to prevail over the medical one, prompting juries to infer a guilty state of mind and impose a death sentence.

### The Sexual Psychopath as a 'Latent Homosexual'

In the conservative climate of the post-war years, psychoanalysts turned their attention towards a particular category of 'sexual deviates' who, through their unconventional sexual preferences, challenged the traditional heterosexual dyad and all the values it represented: homosexuals. In the 1940s and 1950s a number of social institutions for gay and lesbians were raising public awareness about homosexuality, and political movements focusing on gay rights attempted to reframe homosexuality as a positive minority identity (Freedman 1987: 103). However, until 1973 homosexuality was still categorised as a mental disease, and many American states, including Texas, still criminalised homosexual encounters.<sup>424</sup> The fear that homosexuals could spread their 'sexual perversion' amongst youth and thereby corrupt the entire community might be one of the reasons behind the rapid spreading of psychopathy laws (Freedman 1987: 103-104; see East 1946; Jaines, Hoffman & Esser 1948: 425; De River 1949; Gerassi 1966; Bowman & Engle [n.d.] 117-119; see generally Schmeiser 2008). Indeed, between 1949 and 1955, homosexuals were regularly blamed for sex crimes committed against women and children, and

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<sup>424</sup> Texas decriminalised same-sex sodomy in the early 2000s, when the US Supreme Court held sodomy laws unconstitutional in *Lawrence v. Texas*, 539 U.S. 558 (2003).

the frequent overlap in the use of the terms sex criminal, pervert, psychopath, and homosexual, raises the question of whether *psychopath* served in part as a code for *homosexual* at a time of heightened public consciousness of homosexuality (Freedman 1987: 103).

Psychoanalysts writing in the 1940s and 1950s played a central role in stigmatising homosexuality as an abnormal sexual orientation stemming from a pathological mental condition (Zaretsky 2005: 299-300). While Freud's early writings on sexuality argued that all human beings had a bisexual disposition free from prescribed gender roles (*Ibid.*, 111; see Freud 1955[1918]: 100, 110-112, 1964[1940]: 188), post-war psychoanalysis refuted this interpretation by associating each gender with a particular sexuality (see, e.g., Rado 1940; Socarides 1979: 246; Bayer 1981: 28-30). In this view, homosexuals were latent heterosexuals who 'feared merging with the pre-oedipal mother' and hoped 'to achieve a shot of masculinity in the homosexual act' (Socarides cited in Bayer 1981: 36). Rather than being a natural expression of a particular sexual inclination, the homosexual act was the manifestation of an underlying pathology, stemming from the child's original failure to overcome - through a process of sublimation and repression - the Oedipus conflict. Due to this initial failure, the child developed a pathological sexuality which sought continuous satisfaction through unnatural acts aimed at temporarily restoring his feeling of masculinity (Zaretsky 2005: 300; Lewes 1988: 74-93).

The association of homosexuality with psychopathy and sexual deviance emerges clearly in one of the affidavits presented by Gephart's attorneys in their motion

for a new trial following their client's conviction.<sup>425</sup> In the affidavit, Dr. H. J. Hoerster, a physician who had known the defendant for over 18 years, drew from the stigmatisation of homosexuals as sexual perverts to argue that Gephart's unnatural sexual compulsions towards children were the result of a *latent homosexuality*, which had stemmed from arrested emotional development and become active following his enlistment and service in the Army.<sup>426</sup> The experience of being 'taken out of a home environment similar to his and thrust suddenly into rigorous military training among strangers and all males', he proposed, 'resulted in a transposition of the latent homosexual and related tendencies into an active condition', and in a pathological acting out of his hidden sexual perversions on young children as a temporary form of satisfaction.<sup>427</sup>

The trial of Fred Thomas Leath provides another illuminative example of post-war psychoanalysts' labelling of homosexuality as a psychopathic personality disorder associated with animalistic impulses and sexual perversions.<sup>428</sup> Leath, a 38-year-old white man, was convicted for the murder of a 15-year-old boy in April 1961 and sentenced to death. The defendant's written confession, along with the evidence presented at trial, suggested that the two had been involved in a homosexual relationship and that, shortly before the murder, the defendant had discovered that the

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<sup>425</sup> *Gephart*, 249 S.W.2d, Dr. Hoerster Aff. Def's First Am. Mot. for New Trial 72-74.

<sup>426</sup> *Ibid.*, 72¶2-73¶1; cf. Lorand (1939: 178).

<sup>427</sup> *Ibid.*, 72¶3, 73¶2.

<sup>428</sup> *Leath*, 346 S.W.2d.

victim had told the police about his sexual inclinations and a previous felony conviction.<sup>429</sup>

The defendant plead not guilty by reason of insanity. To support his claim, he called three key witnesses to the stand: his brother, Lloyd Leath, an old-time friend, Cato Hightower, and a psychiatrist, Dr. T. W. Grice. The expert witness testified that, according to his 14-minute examination, the defendant suffered from ‘schizophrenia, paranoid type’, a chronic condition associated with paranoid delusions and hallucinations, and was therefore insane at the time of the crime.<sup>430</sup> Dr. Grice’s argument was corroborated by the lay testimony, which showed that: 1) there was a significant history of insanity in the defendant’s family, with two of the defendant’s brothers, his father, and his mother all being committed to insane asylums at some point in time;<sup>431</sup> 2) the defendant suffered from insomnia;<sup>432</sup> and 3) that he had paranoid fears and persecutory thoughts, as manifested by his constant preoccupation with being poisoned<sup>433</sup> or hurt by someone when walking down the street.<sup>434</sup>

To challenge Dr. Grice’s finding of legal insanity, the state presented the testimony of Dr. John T. Holbrook, a renowned ‘hired gun’ for the prosecution, who

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<sup>429</sup> *Ibid.*, 347.

<sup>430</sup> Dr. Grice Test. Trial Tr. 138:11-139:2, 141:1-6.

<sup>431</sup> Lloyd Leath Test. Trial Tr. 114:23-117:19.

<sup>432</sup> *Ibid.*, 109:12-14.

<sup>433</sup> *Ibid.*, 109:20-25.

<sup>434</sup> *Ibid.*, 110:1-111:5, Guynes Test. Trial Tr. 178:3-13, 178:20-179:16; contra Debets Test. Trial Tr. 304:1-11, Campbell Test. Trial Tr. 341:1-4.

examined the defendant twice following his arrest.<sup>435</sup> According to Dr. Holbrook, Leath was a sane individual<sup>436</sup> who had developed a sociopathic personality, a condition typically affecting ‘narcotic addicts, alcoholics, and homosexuals’ and which was associated with a marked immaturity and inability to learn from experience.<sup>437</sup>

At the time, Texas law considered homosexuality a criminal offence and the path towards its destigmatisation and social acceptability remained fraught. Dr. Holbrook’s testimony reflected this legal and cultural background. First, given the legal prohibitions against homosexuality, the doctor proposed that the defendant’s persecutory thoughts should be read as a reflection of legitimate fears that the police and other members of society would go after him for his unlawful sexual inclinations, not as symptoms of a severe mental health condition, as suggested by Dr. Grice.<sup>438</sup> Second, drawing from psychoanalytic explanations of sexual psychopathy and from the 1950s stigmatisation of homosexuals as ‘uncontrollable beasts’, he described the defendant as a lonely individual, who, due to a halt in his psychosexual development, had failed to refine his aggressive and sexual instincts and therefore lived at a primitive level, closer to a wild animal than to a civilised human being, alert to any possible danger and always running for his life.<sup>439</sup>

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<sup>435</sup> Dr. Holbrook Test. Trial Tr. 231:13-17.

<sup>436</sup> *Ibid.*, 245:21-246:1.

<sup>437</sup> Dr. Holbrook Test. Trial Tr. 241:11-24.

<sup>438</sup> *Ibid.*, 241:24-242:16.

<sup>439</sup> *Ibid.*, 265:21-266:21.

The post-war stigmatisation of homosexuality emerges perhaps even more strikingly in the opinion of the TCCA. On appeal, the defendant complained that, in his opening argument, the DA described him as ‘a blood sucking vampire’, an untrue and clearly inflammatory and prejudicial statement.<sup>440</sup> However, the TCCA refused to reverse the conviction on these grounds, stating that

The argument, when considered in the light of the definition of a vampire as ‘one who lives by preying on others,’ particularly the young and healthy, and when weighed in connection with all the facts and circumstances in evidence - the unnatural relationship of the parties and the background and setting in which the killing occurred as shown by the evidence - does not call for a reversal.<sup>441</sup>

As this statement suggests, the judges of the TCCA shared other criminal justice officials and expert witnesses’ confusion about the potentially ‘pathological’ undertones and ‘inhuman’ nature of same-sex encounters. By accepting the prosecutors’ description of the defendant as a diabolical being who sucked the blood and life of others for his own survival, the TCCA aligned itself with those experts who, by associating homosexuality with sexual perversions such as paedophilia,<sup>442</sup> and by linking it with animalistic instincts and sociopathic tendencies,<sup>443</sup> reinforced public stigma around homosexuality, further delaying its decriminalisation.

As forensic psychiatric discourse in the Gephart and Leath trials has shown, in the 1950s Texas experts were equally influenced by the scientific developments and

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<sup>440</sup> *Leath*, 346 S.W.2d at 348.

<sup>441</sup> *Ibid.*

<sup>442</sup> *Gephart*, 249 S.W.2d, Dr. Hoerster Aff. Def’s First Am. Mot. for New Trial 72¶2-73¶1; *Johnston*, 396 S.W.2d, Dr. Rubin Test. Trial Tr. 178:1-20.

<sup>443</sup> *Leath*, 346 S.W.2d, Dr. Holbrook Test. Trial Tr. 241:11-24, 265:21-266:5.

moral values of their time. On the one hand, their explanations used psychoanalytic theory to argue that negative parental attachments could lead to an arrested psychosexual development and to a pathological unleashing of the individual's primitive sexual impulses in adulthood. On the other hand, they drew from conservative views around what constituted proper sexual conduct, to argue that unconventional sexual practices could 'corrupt' the mental health of the individual, prompting him to develop pathological conditions associated with antisocial behaviours. In so doing, psychiatrists created an intricate mix of scientific theory and moral judgment which promoted a conceptual conflation between those who deviated from conventional social norms around sexuality, and criminal offenders who engaged in violent sexual conduct against vulnerable victims.

*c. The Criminal Psychopath as an 'Egocentric Narcissist'*

The 1960s witnessed a number of social and cultural transformations which had long lasting consequences for psychiatrists' framing of criminal psychopathy. As argued in Section 2(a), the conservative 1950s celebrated a return to the privacy of family life, with its emphasis on long-term commitment and adult responsibility. In contrast, in the 1960s a new generation of youth started criticising traditional family values, now perceived as limiting and oppressive, while embracing alternative lifestyles that challenged traditional marriage rules and gender roles (Zaretsky 2005: 309-310). At the time, two decades of uninterrupted economic growth and scientific progress had given the new generation an unparalleled sense of power and possibility, prompting the

emergence of a 'new utopianism' which advocated gender equality and sexual freedom outside the private family unit (*Ibid.*, 307).

A number of commentators associated the new utopianism with the new world of media and advertisement. For example, in 1953, David Riesman argued that the rise of the entertainment industry had prompted Americans to turn away from the private world of the family to embrace the public sphere of mass media (Riesman, Glazer & Denney 1961[1953]). Rather than seeking autonomy from external interference, as the previous generation had done, Americans now sought 'mirroring and recognition' (Zaretsky 2005: 310). Instead of directing their attention inwards, they focused on the way others perceived them, constantly working to improve their personal appearance, social skills, and popularity (see also Susman 2012: xix-xxviii).

The 'other-directed personality' described by Riesman recalled Freud's early definition of *narcissism*, a condition associated with an early stage of childhood development characterised by self-love and a *constant need for recognition*, with potentially pathological undertones (Zaretsky 2005: 110; see Freud 1957[1914]: 88, 91, 95-97, 1958: 318). The psychoanalytic establishment (i.e. ego psychologists such as Heinz Hartmann, Ernst Kris, and Rudolph Loewenstein), endorsed the negative connotation of Freud's early definition, attacking the 'narcissist' culture of the 1960s for strengthening the primitive unconscious drives of childhood at the expense of the Oedipal authority (Zaretsky 2005: 312-313; Lowenfeld & Lowenfeld 1970: 590-607). Critics used the term *narcissism* to describe the 1960s generation's alleged inability to 'make commitments, engage in long term projects, and sacrifice the self for larger

purposes,' all aspects which were closely associated with their refusal of traditional family values (Zaretsky 2005: 314; see, e.g., Kernberg 1975). In this view, by indulging in sensual pleasures, daydreaming, and enjoyment, narcissistic personalities risked turning into irresponsible and maladjusted citizens, who engaged in criminal behaviour to cope with their real-life frustrations. Moreover, by trying to satisfy their pathological needs and achieve visibility and popularity, these 'egocentric attention cravers' would use their verbal skills to deceive and manipulate others, without concerns for the consequences of their actions.

A number of forensic psychiatrists shared these concerns and used them to redefine the characteristics of criminal psychopathy according to the new intellectual environment. For example, Hervey Cleckley, an influential psychiatrist who wrote extensively on the psychopathic personality between 1940 and 1975, described the male psychopath as a self-absorbed loner, an egocentric subject who, unable to feel genuine emotions of love and empathy, would carelessly crush other people's feelings to pursue his own needs (Cleckley 1941: 241-242; see also Adler 1920; Hulbert 1939: 5, 8). Due to a marked impulsivity and hedonistic approach to life, the male psychopath was unable to commit to a coherent life plan and pursue it with steady dedication (Cleckley 1941: 255). Thanks to a normal appearance, a superficial charm, and a pathological tendency to lie, the psychopath was able to hide his underlying disorder, constantly manipulate others, and bend them to his own will (*Ibid.*, 238, 240). His tendency to lie made him incapable of distinguishing truth from falsehood, taking responsibility for his actions, and feeling guilt and remorse for his misdeeds, all traits

that could lead to antisocial tendencies and repeated criminal behaviours (*Ibid.*, 239-240, 246).

While Cleckley and other psychiatrists associated narcissistic and egocentric personalities with social maladjustment and criminality, a number of psychoanalytic reformers tried to understand their underlying psychological dynamics in less condemning terms. Heinz Kohut, for example, argued that, due to an early psychological trauma, narcissistic patients needed constant ego reassurance, and therefore experienced an ‘intense hunger for a powerful external supplier of self-esteem and other forms of emotional sustenance in the narcissistic realm’ (1978: 479). Rather than morally condemning such need, he argued, psychoanalysts ‘should recognize the legitimacy of patients’ need to be mirrored, or to idealize a “self-object” who made them feel whole and important’ (Zaretsky 2005: 314). By aligning themselves with the changed cultural context, and by respecting narcissists’ emotional needs, psychoanalytic reformers could express sympathy and understanding for those who rejected family life, pursued activities and professions which served no social purpose, and expressed ideas and beliefs which challenged the established order (*Ibid.*, 315; see Kohut 1978: 803; Kohut 1971: 64, 46). In this sense, psychoanalysis could become a symbol of social change and personal freedom, rather than of social conformism and repression.

The trial of Jack Rubenstein (alias Ruby) provides an emblematic example of the way in which the ideological clash between those who framed narcissists as egocentric and hedonistic attention seekers, and those who described them as insecure

individuals with a low self-esteem, could translate in the legal arena.<sup>444</sup> Jack Ruby, a Jewish middle-aged white man, was charged with the murder of Harvey Oswald, a man accused of assassinating former President of the United States John F. Kennedy on 22 November 1963, during a parade in the city of Dallas (*Ibid.*, 794). Two days following the killing of the President, Ruby shot Oswald as, surrounded by journalists and television cameras, he was being transferred from the city jail to the county jail. A few days later, Ruby was indicted with the killing of Oswald and plead not guilty by reason of insanity. Thousands of people witnessed Oswald's shooting on television, including ten of Ruby's trial jurors, an aspect that led the TCCA to reverse the judgment of the trial court and order a new proceeding.

The state's theory was that Ruby had premeditated Oswald's killing and was conscious at the time of the commission of the offence, two aspects which directly challenged his insanity plea. According to State Attorney Bowie's reconstruction of the events, when Ruby saw Oswald in the basement of the city jail, he

removed a pistol from his pocket, made a quick and crouched motion toward Lee Harvey Oswald, saying, 'you rat son of a bitch, you killed the President,' and fired a shot almost simultaneous with the statement... immediately thereafter he was grappled to the ground, and he there stated... 'I hope the son of a bitch dies'... and... 'I first thought about killing him when I saw him in the show up Friday night.'<sup>445</sup>

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<sup>444</sup> *Rubenstein*, 407 S.W.2d; For later cases in which the expert witnesses framed psychopaths as charismatic and manipulative subjects see, e.g., *Adams v. State*, 577 S.W.2d 717 (Tex.Crim.App. 1979), *Dr. Grigson Test. Trial Tr.* 1408:6-15; *Burks v. State*, 583 S.W.2d 389 (Tex.Crim.App. 1979), *Dr. Buch Test. Trial Tr.* vol. 1, 527:11-529:22, *Dr. Grigson Test. Trial Tr.* vol. 1, 7624:22-7626:1; *Hawkins v. State*, 613 S.W.2d 720 (Tex.Crim.App. 1981), *Dr. Grigson Test. Trial Tr.* vol. 9, 1815:19-1819:19; *Alvarado*, 912 S.W.2d, *Edgemon Test. Trial Tr.* vol. 38, 62:12-24, 66:21-67:7.

<sup>445</sup> State Att'y Bowie Hyp. Quest. *Dr. Stubblefield Test. Trial Tr.* vol. 6, 1264:21-1265:17.

The admissibility of the state's reconstruction was the object of much controversy, both at trial<sup>446</sup> and on appeal, given that Ruby had reported these events, which amounted to a confession of premeditation, during an interrogation at the Dallas police department, before the officers had given him the statutory warnings regarding his right to remain silent and the potentially prejudicial effect of his statements.<sup>447</sup>

The defence experts challenged the interpretation provided by the State Attorney. In their view, Ruby suffered from psychomotor epilepsy - a condition associated with epileptic seizures followed by loss of consciousness and automatic movements - and had killed Oswald during one of these epileptic attacks.<sup>448</sup> In this view, the murder was the result, not of a cold and reasoned premeditation, but of a series of emotional stressors which had accumulated in the days preceding the murder and triggered an aggressive automatic movement at the time of the killing.<sup>449</sup>

Besides emphasising Ruby's organic condition, the defence experts stressed the role played by his personality characteristics and emotional make-up in prompting his criminal act.<sup>450</sup> They portrayed him as an insecure, impulsive, and emotionally unstable subject, obsessed with people's social approval, and constantly looking for influential connections to improve his self-esteem. For example, Dr. Roy Schafer, a

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<sup>446</sup> Dist. Att'y Wade Quest. Dr. Bromberg Test. Trial Tr. vol. 7, 1414:4-1420:23.

<sup>447</sup> *Rubenstein*, 407 S.W.2d at 794-795.

<sup>448</sup> Dr. Schafer Test. Trial Tr. vol. 4, 863:11-22, Dr. Guttmacher Test. Trial Tr. vol. 5, 1056:13-25, 1086:1-8, Dr. Bromberg Test. Trial Tr. vol. 7, 1395:11-1396:8.

<sup>449</sup> Dr. Schafer Test. Trial Tr. vol. 4, 928:12-929:4, 937:2-8, Dr. Guttmacher Test. Trial Tr. vol. 5, 1086:17-1087:20, Dr. Bromberg Test. Trial Tr. vol. 7, 1396:5-23.

<sup>450</sup> Dr. Schafer Test. Trial Tr. vol. 4, 872:16-873:2, 924:21-926:4, 928:12-929:4, Dr. Guttmacher Test. Trial Tr. vol. 5, 1086:10-25, 1092:23-1093:14.

Yale professor and clinical psychologist, gave Ruby a battery of psychological tests<sup>451</sup> which showed that he was extremely preoccupied with his personal appearance, with being liked and appreciated by others, and with acquiring personal prestige by associating with ‘important’ people.<sup>452</sup> On cross examination, DA Henry Wade suggested that these characteristics indicated that Ruby had a narcissistic personality, which prompted him to constantly seek the limelight and other people’s attention.<sup>453</sup> The doctor challenged this interpretation, aligning himself with psychoanalytic reformers’ view of narcissism as a reflection of the individual’s low self-esteem and need for constant ego-reassurance. In his view, Ruby’s

attraction to people in positions of prestige or class, was typically tied in with the idea of his acquiring some worth, or some feeling of esteem for himself since he depends very much on outside sources for feeling self-esteem. But this did not seem to be so much a matter of limelight, as being accepted by people in positions of prestige. The emphasis was on acceptance, rather than being the centre of things.<sup>454</sup>

According to the defence expert, Ruby’s vanity, along with his desire to appear ‘tough’ and strong,<sup>455</sup> was a compensatory mechanism associated with this feeling of inferiority, a trait shared by many individuals with neurotic and antisocial tendencies. As a result of his poor self-esteem, Dr. Schafer argued, Ruby was emotionally unstable, an aspect that made him more vulnerable to environmental stimulation and inclined to have

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<sup>451</sup> Dr. Schafer Test. Trial Tr. vol. 4, 867:9-16.

<sup>452</sup> *Ibid.*, 848:14-649:1, 916:6-22, 917:13-918:2. See also Dr. Guttmacher Test. Trial Tr. vol. 5, 1093:21-1094:20.

<sup>453</sup> Dist. Att’y Wade Quest. Dr. Schafer Test. Trial Tr. vol. 4, 953:12-17.

<sup>454</sup> Dr. Schafer Test. Trial Tr. vol. 4, 953:21-954:3.

<sup>455</sup> See also Howard Test. Trial Tr. vol. 3, 658:5-23.

outbursts of anger, and which played a pivotal role in triggering the loss of consciousness which allegedly accompanied the tragic events.<sup>456</sup>

Echoing this view, Dr. Manfred Guttmacher, an esteemed psychoanalyst employed by the Supreme Court Bench of Maryland,<sup>457</sup> argued that Ruby's impulsivity stemmed from a deep sense of insecurity and from a pressing need to reassert his masculinity.<sup>458</sup> The origin of this feeling of inferiority, he argued, could be traced back to Ruby's early childhood experiences. Raised by a mentally ill mother and by an alcoholic father 'who tyrannized his family', at the age of eight Ruby was separated from his siblings, and moved between different foster homes until he was considered old enough to take care of himself.<sup>459</sup> This difficult family background had triggered a psychosexual conflict during a crucial stage of Ruby's development, which had contributed to the formation of a 'weak ego-structure' that prompted Ruby to constantly reassert 'his masculinity by fighting, sexual promiscuity, [and] body building exercises.'<sup>460</sup> 'His narcissistic concern over his body weight and his baldness', the doctor explained, were further compensatory mechanisms for his feelings of inadequacy, as were his 'swaggering boastfulness' and his obsession with 'the impression he is going to make on others.'<sup>461</sup>

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<sup>456</sup> Dr. Schafer Test. Trial Tr. vol. 4, 928:12-929:4. See also Dr. Guttmacher Test. Trial Tr. vol. 5, 1093:21-1094:20.

<sup>457</sup> Dr. Guttmacher Test. Trial Tr. vol. 5, 1059:2-4.

<sup>458</sup> *Ibid.*, 1094:22-25.

<sup>459</sup> *Ibid.*, 1079:16- 1080:4. See also Dr. Bromberg Test. Trial Tr. vol. 7, 1426:3-1427:11.

<sup>460</sup> Dr. Guttmacher Test. Trial Tr. vol. 5, 1086:17-25, 1094:22-25.

<sup>461</sup> *Ibid.*, 1096:4-17, 1097:13-15. The defence experts' emphasis on Ruby's sense of inferiority and masculinity issues, along with their association with his difficult family relationships, recall Austrian psychoanalyst Alfred Adler's theories of the 'inferiority complex' and the 'masculine protest'; see Ansbacher & Ansbacher (1964: 108-112, 114-119, 249-250, 257-261). From the late 1930s onwards, a

Ruby's 'inferiority complex' fuelled strong feelings of hostility and aggression, which erupted 'in volcanic force' whenever Ruby's control mechanisms would break down, a fact corroborated by his historical involvement in numerous verbal and physical fights.<sup>462</sup> Supporting an irresistible impulse argument, Dr. Guttmacher argued that in the days preceding the killing, the defendant's

weak ego... was constantly assaulted by strong emotional stresses and was suddenly overwhelmed, permitting unconscious, hostile, aggressive impulses to gain ascendancy and to rob him of the realisation of the wrongfulness of his action, and an inability to control his destructive impulses.<sup>463</sup>

In typical psychoanalytic fashion, the expert explained Ruby's emotional involvement with the Kennedys' tragedy in symbolic terms. In his view, 'because of his own wretched family life', the defendant saw President Kennedy not only as 'the idealized father figure as the head of the state' but also as 'the leading member of a perfect family group' which he wished to vicariously join by retaliating against the President's killer.<sup>464</sup> While Ruby had an intellectual realisation of the wrongfulness of his act, his idealised view of the President, coupled with his depiction of the victim as a 'rat' to be exterminated, contributed to create a psychological justification for the killing in Ruby's mind, and to neutralise any feeling of guilt or remorse for the act committed.<sup>465</sup>

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number of expert witnesses drew from these ideas; see, e.g., *Morgan*, 117 S.W.2d, Dr. Swope Test. Trial Tr. 114¶2; *Freeman*, 317 S.W.2d, Dr. Finney Test. Trial Tr. vol. 1, 101:21-102:3, 120:1-121:12, Dr. Crow Test. Trial Tr. vol. 2, 355:18-357:15; *Morales v. State*, 458 S.W.2d 56 (Tex.Crim.App. 1970), Dr. Zyporyn Dep. Def's Mot. for New Trial 14:12-16, 18:8-21; *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1989), Ann Lackey Test. Trial Tr. vol. 32, 5249:12-5251:5, McBride Test. Trial Tr. vol. 32, 5301:13-5302:19.

<sup>462</sup> *Ibid.*, 1097:17-21. See also Templin Test. Trial Tr. vol. 3 615:10-616:9, 618:20-25, 620:19-621:3, Howard Test. Trial Tr. vol. 3, 648:5-11, 649:10-14, Dr. Towler Test. Trial Tr. 982:7-984:6.

<sup>463</sup> Dr. Guttmacher Test. Trial Tr. vol. 5, 1122:15-20.

<sup>464</sup> *Ibid.*, 1100:4-10.

<sup>465</sup> *Ibid.*, 1109: 7-9, 1115:1-17, 1116:16-22.

On cross examination, Asst. DA William F. Alexander challenged Dr. Guttmacher's conclusion, suggesting that, rather than being compelled by the defendant's weak ego structure, low self-esteem, and pathological identification with the Kennedys' tragedy, the murder was motivated by his desire to acquire notoriety and gain financial rewards. The following line of questioning clearly illustrates the clash between the prosecution and the defence's interpretations:

Q. Doctor, if you felt that the real motive for the shooting of Oswald was the desire to gain fame and fortune, and Ruby had misjudged public temperament and public feeling, would that make any difference in your evaluation?

A. I would certainly think he had sick judgment if he made such...

Q. If Ruby thought he would be 'no billed' by the grand jury, and hailed as a hero for doing what other people didn't have the opportunity or the 'guts' to do, would that make any difference?

A. I think it's sick judgment.

Q. Sick judgment doesn't mean insane, does it?

A. That's right.

Q. Would the fact that Ruby has been able to sell his life story to the newspapers make any difference to you, in your opinion?

A. I don't think it would have anything to do with what happened at the time...<sup>466</sup>

Along these lines, in his cross examination of defence psychiatrist Dr. Bromberg, DA Wade insinuated that the real reason for the killing could be found, not in the defendant's 'messianic trend', as argued by the doctor, but in his desire to be seen in television and become a hero in American history. The following extract is illuminating in this regard:

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<sup>466</sup> Asst. Dist. Att'y Alexander Quest. Dr. Guttmacher Test. Trial Tr. vol. 5, 1152:17-1153:19. See also Dist. Att'y Wade Quest. Howard Test. Trial Tr. vol. 3, 656:1-22, 658:5-23.

Q. And he had a feeling of wanting to be a hero, is that right?

A. A martyr, rather. He had a definite messianic trend, his motto being to rescue the Jewish people from the charge that they haven't got guts, to put it in his words...

Q. Don't you think, doctor, that shooting a man on television, before quite a number of people, would have the effect on a person having grandiose tendencies, would have the effect, he thought, of making him a hero?

A. I feel at that time he had no such thought because his consciousness was suspended; he was in turmoil and agitation...<sup>467</sup>

As these illustrative examples suggest, in Ruby's trial the defence and the prosecution provided two dramatically different interpretations of the defendant's personality and behaviour. On the one hand, the defence portrayed him as a brain damaged, emotionally insecure, and mentally unstable individual who, due to a defect in personality development, had developed a 'weak ego structure' which undermined his ability to control his behaviour and act rationally when put under extreme environmental pressure. On the other hand, the prosecution described him as an egotistical and narcissistic personality, who had premeditated the killing of Harvey Oswald to acquire fame and financial gains and be pictured as a hero by the American media and the wider public.

These conflicting views mirrored the ideological clash which was dividing conservatives and new utopians' standards of behaviour in the mid-1960s. By morally condemning Ruby's narcissistic traits as symptoms of his egotistical and attention craving tendencies, the prosecution endorsed the conservative critique of the world of mass media and advertisement, along with its celebration of the 1950s family values of

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<sup>467</sup> Dist. Att'y Wade Quest. Dr. Bromberg Test. Trial Tr. vol. 7, 1435:20-1436:18.

privacy and domesticity. In so doing, the DA voiced existing concerns amongst American conservatives that the new utopianism would create a generation of egocentric narcissists who lived a hedonistic lifestyle, escaped life-long commitments, and indulged in sensual pleasures. Ruby's habits and personal characteristics, coupled with his narcissistic tendencies, made him a perfect candidate to embody the negative traits feared by the 1960s establishment, an aspect which played a crucial role in fostering the negative public image promoted by the media and in determining his judicial destiny.

Ruby was a single man, without children, who owned a series of strip clubs in Dallas, and had been repeatedly involved in street fights due to his occupation and heated temperament. The local media leveraged these traits by portraying him as a 'Chicago mobster', a 'tough guy', and a 'strip joint owner',<sup>468</sup> all characteristics in stark contrast with the ideal model of masculinity as a responsible family man promoted by the conservative worldview. Coupled with the incredible publicity received by Oswald's shooting on television, and with the anti-Semitic sentiment fuelled by the media following the decision to change Jack's surname from 'Rubenstein' to 'Ruby' during the proceedings, these representations contributed to fuel strong local prejudice against the defendant in the days preceding the trial, as recognised by the TCCA in its reversal.

In this heated context, the defence's attempt to humanise Ruby by providing some background on his early family upbringing, and by explaining his need for

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<sup>468</sup> *Rubenstein*, 407 S.W.2d at 796.

attention in terms of low self-esteem rather than as an expression of his selfish need for self-aggrandisement, fell on deaf ears. Instead, the jury chose to endorse the interpretation provided by the prosecution, which, by insinuating that Ruby had premediated the killings and by describing him as an attention craving social misfit, aligned more readily with the public image promoted by the media, and with the cultural association of egocentric narcissism and antisocial tendencies promoted by the psychiatric establishment.

## Conclusion

As this chapter has shown, forensic psychiatrists operating in the 1950s and 1960s were still powerfully influenced by the social trends and ideological conflicts of their time. On the one hand, Freud's theory of childhood development, along with his critique of Victorian parental discipline and sexual education, prompted psychoanalytic reformers to stress the potentially pathological and criminogenic effects of harsh parental discipline and sexual and emotional repression experienced in the early formative years. These ideas in turn encouraged the emergence of a series of social movements which challenged traditional family values while promoting alternative lifestyles, sexual liberation, and new modalities of self-presentation. On the other hand, in the conservative climate of the Cold War years, these emancipatory movements prompted a traditionalist backlash, which proposed a return to strict parental discipline and framed the social categories which embraced alternative ways of life as individuals affected by personality disorders associated with antisocial tendencies.

Despite their powerful links with the social and cultural environment, however, forensic psychoanalysts never abandoned the scientific project. On the contrary, their theories and opinions always reflected an ongoing effort to link their moral judgments to psychoanalytic theory. In particular, when they identified characteristics such as emotional immaturity, sexual bestiality, and egocentric narcissism in defendants' personality makeups, they always associated them with an interrupted psychosexual development experienced in the early years of life. In so doing, they endorsed Freud's instinct theory along with his transposition of Darwinian evolutionism into a theory of childhood development, which created a symbolic analogy between the child's emotional progression from infancy to adulthood and the evolution of the human race from a primitive stage of savagery and aggressiveness to a civilised status of self-mastery and intellectual refinement (Hall 1904).

Moreover, this chapter has shown that, to support defendants' insanity defences, forensic psychoanalysts provided a number of psychological explanations of defendants' behaviour which attempted to partially bridge the traditional gap separating the teleological interpretation of the criminal law from the mechanistic explanations of biological medicine.<sup>469</sup> Departing from the scientific determinism promoted by 19<sup>th</sup> century reflex action theory, which suggested a direct relationship of cause and effect between physiological stimuli and external behaviour, psychoanalysts tried to locate the source of defendants' criminal acts in their unconscious wishes and motivations at the

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<sup>469</sup> See, e.g., *Moon*, 331 S.W.2d, Dr. Wagner Test. Trial Tr. vol. 2, 204:6-205:5; *Rubenstein*, 407 S.W.2d, Dr. Guttmacher Test. Trial Tr. vol. 5, 1100:4-10, 1109: 7-9, 1115:1-17, 1116:16-22.

time of the crime. This aspect contributed to the translation of bizarre criminal behaviours into understandable terms for the lay observer, and to unpack the deeper mechanisms connecting defendants' state of mind with its external behavioural manifestations.

However, as the cases analysed in this chapter have shown, defence strategies based on psychoanalytic explanations of criminal behaviour were often unsuccessful in Texas insanity trials. While psychoanalysts went beyond the superficial descriptive accounts provided by their early 20<sup>th</sup> century predecessors, their explanations still supported a defence of irresistible impulse rather than of legal insanity, and in this sense presented the same theoretical limitations displayed by biological criminologists in their earlier interpretations (see Chapter 5: Section 4[a]). Moreover, while psychoanalysts tried to bridge scientific and teleological views of human behaviour, when their opinions clashed with the folk psychological interpretation of defendants' behaviour provided by the prosecution, their strategies were unlikely to succeed, an aspect which, once again, is reminiscent of the issues faced by their early 20<sup>th</sup> century colleagues.

Finally, while Freud's association of defendants' criminal conduct with parental abuse and/or neglect powerfully influenced the criminological debate in the 1950s and 1960s, his claims lacked the scientific support of studies showing the empirical validity of such association. Rather than relying on scientific observations of tangible phenomena, Freud used subjective clinical techniques and drew his inferences from his personal experiences with individual patients, an aspect that might have prompted lay audiences to perceive psychoanalytic explanations as abstract speculations without

proper scientific grounding. As the next chapter will show, this issue would become increasingly pressing from the late 1960s, when striking developments in the fields of risk assessment, developmental psychology, and neuroscience prompted a transition to biopsychosocial explanations of criminal behaviour based on quantitative methods and standardised assessments, which would radically revolutionise expert discourse in trial contexts.

**CHAPTER 7. THE ‘NEW’ SCIENTIFIC PSYCHIATRY, ANTISOCIAL  
PERSONALITY DISORDER, AND FUTURE DANGEROUSNESS  
(1976-2002)**

Introduction

The medical transformations discussed in this chapter originate from a number of critiques which, from the mid-1960s onwards, took issue with psychoanalysts’ ‘unscientific’ approach to diagnosis and treatment, while promoting a return to the biological paradigm of mental disease (Zaretsky 2005: 334; see, e.g., Gitelson 1964: 462-463; Grünbaum 1984; Kurzweil 1989: 252; Luhrmann 2000: 173, 176). According to detractors of psychoanalytic theory, Freud’s subjective approach to the clinical evaluation, coupled with his lack of attention to the classification of mental diseases, had led to diagnostic inconsistencies across different evaluators, which in turn undermined the credibility of the psychiatric profession (Andreasen 2006: 108; see, e.g., Kendell 1975; Kendell et al 1971; Rosenhan 1973). In its place, they proposed a revival of the biological approach to psychiatric problems first promoted by Emile Kraepelin in the 19<sup>th</sup> century, with its emphasis on organic causes and on the importance of a rigorous diagnostic methodology for the correct administration of treatment. In this changed intellectual context, psychiatrists were encouraged to seek the origin of mental disorder not in the individual’s idiosyncratic experience, as proposed by Freud, but ‘beyond personhood, in biological microstructures that escape uniqueness’ (Grünbaum cited in Zaretsky 2005: 335).

The transition to a biological model of mental disease was fuelled by important discoveries in the field of neuroscience. The development of neuroscientific instruments for the observation of the brain, such as Magnetic Resonance Imaging, fostered a wide stream of research into the organic roots of mental health conditions, opening new possibilities in the areas of diagnosis and treatment (Zaretsky 2005: 335). These discoveries aligned with important findings in the field of psychopharmacology, which opened up new therapeutic horizons and completed the intellectual transition from the psychodynamic to the biological model of disease. While many antipsychotic drugs presented significant side effects, their ability to eliminate some of the symptoms associated with chronic mental illnesses was seen as a significant improvement over previous therapeutic methods and was therefore embraced with great enthusiasm (see generally Murray 2006; Kaut 2011).

To mark their departure from Freudian ideas, proponents of the new scientific psychiatry started to reformulate the psychoanalytic categories which had informed the first two editions of the DSM while planning the publication of a third edition which would take into account the new theoretical climate (Zaretsky 2005: 334). The DSM-III, published in 1980, tried to merge the biological and the psychodynamic approaches by associating the former with severe mental illnesses such as schizophrenia and bipolar disorder (Axis I diagnoses), and the latter with a range of personality disorders including narcissistic and antisocial personalities (Axis II diagnoses). However, as this chapter will show, the DSM-III effectively legitimised the biological approach to mental disorder and criminal behaviour, while shadowing alternative explanations based on

psychological and environmental causes linked with defendants' difficult family upbringings.

These scientific developments were accompanied by a series of cultural and legal changes which, from the mid-1970s onwards, radically transformed the ways in which legal actors and medical experts framed the intersection of mental illness and crime in Texas capital punishment proceedings. As the following discussion will show, the 1980s and 1990s witnessed a punitive turn in American politics which, departing from the rehabilitative approach of the 1960s, promoted an individualist notion of criminal responsibility which framed defendants' criminal conduct as an act of deliberate choice rather than as the result of social disadvantage and mental health issues. This punitive turn would prove particularly problematic for members of ethnic minorities, given the racial undertones characterising conservatives' criminal justice agenda, and the historical stigma associating African Americans and Hispanics with violence and aggressiveness.

The structure of the Texas capital sentencing statute approved following the reinstatement of capital punishment in 1976 provided the necessary legal instrument to put this punitive approach into practice in death penalty cases. By placing the issue of future dangerousness at the heart of jurors' punishment decisions, the Texas statute effectively side-lined the mitigation question while promoting a powerful theoretical association between previous criminal conduct and future violence. This structure had a strong influence on the ways in which Texas prosecutors and defence attorneys litigated their cases in the 1980s and 1990s, the former focusing their whole strategy on

proving that the defendant would constitute a continuing threat to society, and the latter concentrating their efforts on showing that, despite their antisocial past, defendants were capable of change through treatment and/or rehabilitation.

The political climate and legal paradigm of the 1980s and 1990s (see Melossi 2008: 197-252) would have dramatic consequences for defendants diagnosed with severe mental health conditions and antisocial personality disorders in Texas courts. Despite claims to the contrary, the biological model of mental disease contributed to increase the social stigma historically attached to these mental health conditions, supporting jurors' perceptions that the defendant would constitute a continuing threat to society unless permanently incapacitated. For example, by describing defendants' mental disorders as organic defects associated with a 'chemical imbalance' in the brain, defence experts reinforced the perception of mentally disordered individuals as dangerous and unpredictable, unless under the constant therapeutic effect of antipsychotic drugs. Similarly, by diagnosing defendants with psychopathy, sociopathy, or antisocial personality disorder (APD)<sup>470</sup>, and by describing these diagnostic labels as irredeemable conditions inscribed in defendants' bio-psychological make-up, state experts increased jurors' perceptions of defendants' inherent wickedness, powerfully tipping the scales in favour of death.

Taken together, these historical developments contributed to support the imposition of death sentences in a number of cases where the gravity of defendants'

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<sup>470</sup> This chapter will use the diagnoses of psychopathy, sociopathy, and antisocial personality disorder interchangeably, in line with contemporary practice (Weisman 2008: 197).

mental health conditions, coupled with their difficult family upbringing, arguably warranted a more lenient treatment. To illustrate this pattern, the chapter will first discuss the cultural, political, and legal context within which Texas attorneys and mental health experts operated, to shed light on the ontological assumptions informing trial debates in the last quarter of the 20<sup>th</sup> century (Section 1). Secondly, the chapter will turn to the specific dynamics found in Texas capital punishment proceedings and identify the strategies developed by the prosecution (Section 2) and the defence (Section 3) to prove that the defendant a) would constitute a continuing threat to society, b) was insane at the time of the crime, or c) deserved a life sentence due to severe mental disorder and/or difficult family upbringing. Each section will include a theoretical introduction discussing the scientific, legal, and/or cultural developments underpinning each strategy and provide a number of illustrative examples to show how these developments contributed to support a finding of future dangerousness in Texas courts. Finally, the chapter will conclude by analysing two cases of ethnic minorities diagnosed with APDs, and argue that, given the historically entrenched racist stereotypes linking African Americans and Hispanics with violence, this labelling can be particularly prejudicial for members of these ethnic groups (Section 4).

As the next sections will show, the crime control rhetoric of the 1980s and 1990s, coupled with the culture of fear advanced by the American media (see Garland 2001; Simon 2007), created an optimal cultural climate for the reception of essentialised explanations of criminal behaviour, seen as the simple product of defendants' evil natures rather than of a confluence of complex sociological, psychological, and biological factors. This cultural context, combined with the Texas capital sentencing

statute's emphasis on future dangerousness, gave Texas prosecutors a powerful advantage over the defence in death penalty proceedings, allowing them to exploit a diagnosis of APD to undermine defendants' mitigating evidence and turn it into an additional aggravating factor at sentencing.

## 1. The Conservative Years and the American Death Penalty

The 1980s and 1990s witnessed a punitive turn in American criminal justice policies. As a number of scholars have observed, the rise in crime - real or perceived - of the 1960s, coupled with the economic decline and social inequalities triggered by the 1973 oil crisis, prompted a strong conservative reaction amongst the American public, which found its most powerful resonance in the 1980s, the decade of the Reagan presidency (Melossi 2008: 199-200; see also Perkinson 2010: 294-297, 334-337; see generally Simon 2007; Garland 2001). Opinion polls suggested that, for the first time since the 1930s, most Americans saw crime as the most pressing domestic issue facing the country, described courts as 'too lenient', believed that 'criminals were getting off "too easily"', and called for criminal justice policies aimed at re-establishing public order (Perkinson 2010: 295-296; see Cronin, Cronin & Milakovich 1981: 60, 69, 75; Carter 1996: 30). In this political climate, conservative politicians, represented by the 'New Right', started using rising crime trends as a strategic rhetorical device to attract voters via the promise of tougher crime control policies (Perkinson 2010: 296-297). These policies, which included the imposition of mandatory sentences, harsher penalties for drug related offences, and rarer parole releases, led to an unprecedented growth in the

American prison population, which between 1965 and 2000 grew by 600% nationwide and by 1,200% in Texas alone (*Ibid.*, 6).

The media powerfully amplified public fears about crime and transformed the criminal subject into a scapegoat for society's social ills. As public discourse about crime became sensationalised, criminals were increasingly represented as 'mean and/or inferior types of human individuals... "predators" of all kinds, people who are not deserving of our sympathy' (Melossi 2008: 205, 210). Echoing the crime rhetoric of the 1920s and 1930s, when European fascist regimes stressed liberals' failure to properly address the crime problem, in the 1980s and 1990s,

the criminal was represented as a *monstruum* - a being whose features are inherently different from ours and shocking to the well-behaved... the criminal was once again portrayed as an incarnation of the ultimate sin of breaking the fabric of society apart, somebody who had to be contained through incapacitation or death in order to restore the unity and order of society (*Ibid.*, 219; see, e.g., Bennett, Dilulio & Walters 1996).

Republican politicians leveraged this political climate to their advantage, powerfully exploiting the 'law and order' rhetoric to undermine the work of their democratic predecessors and establish a new political agenda under their leadership. In so doing, they took issue with the welfare programs and rehabilitative interventions advocated by John F. Kennedy and Lyndon B. Johnson to reduce poverty and tackle social issues, arguing that by providing easy handouts to criminals while excusing their antisocial behaviour, these policies had favoured the rise in crime registered in the 1960s (Perkinson 2010: 296-297). In the view of Richard Nixon and his republican successors, rather than blaming social circumstances such as poverty or abusive childhoods for

offenders' criminal behaviour, society should hold offenders fully accountable for their crimes and punish them accordingly.

Starting from an individualist notion of personhood and criminal responsibility (see Glass & Rud 2012: 95-99), conservatives emphasised individual choice and freedom from societal constraints. They argued that offenders were solely responsible for their antisocial behaviour, and neither the government nor abusive family members, negligent teachers and/or mental health professionals should be blamed for the crimes committed. In this view,

choosing a career in crime is not the result of poverty or of an unhappy childhood... It is the result of a conscious, wilful choice made by some who consider themselves above the law, who seek to exploit the hard work and, sometimes, the very lives of their fellow citizens (Reagan cited in Beckett 1999: 49-50; see Perkinson 2010: 334).

The solution to the crime problem, conservatives proposed, was not to blame society for criminals' failures while funding more welfare programs and rehabilitative interventions, but to hold offenders fully accountable for their behaviour through harsh penal policies and 'swift and sure punishment' (Perkinson 2010: 334, 296, 340; see Nixon 1967: 3; Beckett 1999: 38; Parenti 2000: 8; Ivins & Dubose 2000: 154; Robison 1995: A29).

The punitive political climate of the late 20<sup>th</sup> century had dramatic consequences for the American capital punishment system. Whereas the liberal post-war decades had witnessed gradual declines in death sentences and executions, the conservative 1980s and 1990s registered the most striking increase in the use of the

ultimate punishment of death in American history (Steiker & Steiker 2012: 224-225). In the 1960s, the decline in death sentences and executions coupled with social and political factors such as the demands of the Civil Rights Movement and the death toll from the Vietnam War, prompted a number of states to abolish the death penalty for ordinary murder, in some cases securing total abolition. These national trends captured the attention of the US Supreme Court which, pressured by growing claims of racial discrimination, turned its attention to the ways in which states were administering the death penalty.

In 1972, the US Supreme Court formally recognised the rarity and arbitrariness with which states were administering the death penalty, ordering a moratorium on executions in *Furman v. Georgia*.<sup>471</sup> As they stood, the Court argued, current capital sentencing schemes failed to provide clear guidelines which could ensure that the death penalty would be imposed fairly and equally (Steiker & Steiker 2012: 225-226). Abolitionists hoped that the Court's moratorium would strike the final blow against what they saw as an arcane and unjust punishment; however, their wishes would soon be disappointed. In a context of rising crime rates and punitive upsurge in American politics, the Court's failure to rule the death penalty unconstitutional in all circumstances proved fatal for the abolitionist project. On the contrary, the Court's moratorium in *Furman* encouraged a punitive backlash which, through the creation of new capital sentencing schemes, reversed the historical trend of the post-war years, leading to a rise in death sentences and executions in the 1980s and 1990s.

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<sup>471</sup> 408 U.S. 238 (1972).

Texas led the way in this punitive turn. As discussed in Chapter 1 (Section 1), the state's sentencing and execution patterns mirrored broader national trends but distinguished itself in terms of severity and harshness, as reflected by the state's positioning as the nation's leading executioner since the reinstatement of capital punishment in 1976. While the reasons for Texas' peculiar pattern are multifaceted,<sup>472</sup> one aspect which likely played a role is the structure of the Texas capital sentencing statute upheld by the US Supreme Court in *Jurek v. Texas*<sup>473</sup> (1976; see Vartkessian 2011: 11-14). As detailed in Chapter 3 (Section 2), the Texas statute required jurors to answer two 'special issue' questions at the end of the penalty phase of the capital punishment trial: 1) whether the crime was committed deliberately and 2) whether they believed that the defendant might commit criminal acts of violence in the future. If they unanimously answered yes to both special issue questions, jurors were to impose a death sentence.

In the 1980s and 1990s, defendants and legal scholars repeatedly challenged the constitutionality of the Texas capital sentencing scheme.<sup>474</sup> By failing to include a special issue question asking jurors to consider whether the mitigating evidence

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<sup>472</sup> For example, legal scholars suggest that Texas' high execution rates may be partially explained by courts' failure to provide clear, well written, and consistent jury instructions in capital cases (ABA 2013a: ix-x), by the low levels of professionalism found amongst court appointed capital defence attorneys (*Ibid.*, xiv-xvii), by the electoral system used to appoint appellate judges (Walpin [n.d.]), and by the state's peculiar clemency process (ABA 2013a: xiv-xv). As scholars have highlighted, while most states grant exclusive clemency power to the governor, in Texas the Board of Pardons and Paroles must first recommend commutation in order for the governor to grant clemency, a procedure which dilutes responsibility while making a pardon more unlikely (Silverman 1995).

<sup>473</sup> 428 U.S. 262 (1976).

<sup>474</sup> See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1989); *Mines v. State*, 852 S.W.2d 941 (Tex.Crim.App. 1994); *Satterwhite v. State*, 858 S.W.2d 412 (Tex.Crim.App. 1993); Vartkessian (2011); Vartkessian et al (2017).

presented at trial warranted a life sentence, they argued, the Texas statute effectively denied jurors the possibility to make an individualised consideration of the defendants' moral culpability based on his background and circumstances, as required by the US Supreme Court in *Woodson v. North Carolina* (1976).<sup>475</sup> Moreover, by placing future dangerousness predictions at the heart of jurors' sentencing decision, the Texas statute effectively made speculations around the likelihood that the defendant would represent 'a continuing threat to society' the one and only criteria available to assess a defendant's moral blameworthiness, a particularly controversial issue given the difficulty of making such predictions with a satisfactorily degree of reliability, even with the support of medical experts.

## 2. Medical Developments, Future dangerousness, and Reversed Mitigation

By focusing on the future dangerousness question and side-lining the mitigation issue, the structure of the Texas capital punishment statute gives the prosecution a significant advantage over the defence in death penalty proceedings. The bifurcation of the capital trial into a guilt and a sentencing phase allows the prosecution to start introducing evidence relevant for the future dangerousness question from the beginning of the proceedings, when everyone's attention is focused on the nature of the crime committed and on the defendant's guilt (Vartkessian 2011: 135-136). On the contrary, unless they are trying to present an exculpatory defence, defence attorneys are not allowed to

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<sup>475</sup> 428 U.S. 280 (1976).

present any mitigating evidence during the guilt phase, ‘leaving the jury to focus entirely on the State’s case’ (*Ibid.*, 136).

To overcome this legal barrier, Texas defence attorneys working with clients suffering from severe mental disabilities often choose to pursue an insanity defence, even when the evidence supporting a similar claim is arguably insufficient.<sup>476</sup> This allows them to start presenting evidence as to the defendant’s mental condition and background from the guilt stage, rather than having to wait until the punishment phase to provide jurors with a counternarrative to the one provided by the state. Moreover, by ‘frontloading’ their mitigating evidence at the guilt stage of the trial, defence attorneys are able to overcome the epistemological rupture which separates the strictly ‘legal’ context of the guilt phase from the ‘human’ context of the punishment phase, by presenting a coherent narrative which may help jurors make sense of the defendant’s behaviour throughout the proceedings (Cheng 2010: 41).

While this strategy presents some advantages, the evidence presented in support of an insanity defence at the guilt phase is often inadequate to humanise the defendant in the eyes of the jury. Given its narrow focus on the ‘right or wrong’ question, the insanity defence tends to give jurors the impression that unless the defendant’s mental disorder directly prompted him to commit the criminal act, the fact that he suffered from a mental health condition should have no bearing on their sentencing decision. Moreover, by focusing the punishment phase on the future dangerousness question, the

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<sup>476</sup> See, e.g., *Burks v. State*, 583 S.W.2d 389 (Tex.Crim.App. 1979); *Mines*, 852 S.W.2d; *Satterwhite*, 858 S.W.2d; *Colburn v. State*, 966 S.W.2d 511 (Tex.Crim.App. 1998); for exceptions see, e.g., *Alvarado v. State*, 912 S.W.2d 199 (Tex.Crim.App. 1995).

Texas statute suggests that the only relevant consideration with regard to the defendant's mental condition should be whether it increases or decreases the likelihood that he will commit acts of violence in the future, an aspect which, given the social stigma attached to mental health conditions, shifts the focus in favour of the prosecution.

In the 1990s, the TCCA regularly upheld these notions, by arguing 1) that in order to be eligible for additional special instructions on mitigation, the defendant's mitigating evidence must have a direct nexus with the crime committed;<sup>477</sup> and 2) that the Texas statute was constitutional since it allowed jurors to consider the mitigating evidence presented within the ambit of the two special issue questions.<sup>478</sup> As the next sections will show, these legal constraints, coupled with developments in the fields of forensic psychiatry and psychology, had a powerful impact on the litigation strategies developed by Texas prosecutors and defence attorneys dealing with mentally disordered capital defendants in the last quarter of the 20<sup>th</sup> century.

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<sup>477</sup> *Lackey*, 819 S.W.2d at 134-135, n 10 at 135; *Richardson v. State*, 879 S.W.2d 874, 6-7 (Tex.Crim.App. 1993); *Goss v. State*, 826 S.W.2d 162, 165 (Tex.Crim.App. 1992); *Nobles v. State*, 843 S.W.2d 503, 162 (Tex.Crim.App. 1992); *Satterwhite*, 858 S.W.2d at 426-428; contra *Mines*, 852 S.W.2d at 952-956, 959-960.

<sup>478</sup> *Lackey*, 819 S.W.2d at 134; *Mines*, 852 S.W.2d at 951-952; *Satterwhite*, 858 S.W.2d at 425-426; contra *Mines*, 852 S.W.2d at 962, Baird, J., dissenting; see Chapter 3: Section 3. The US Supreme Court has deemed both these arguments unconstitutional in *Penry v. Johnson*, 532 U.S. 779 (2001).

*a. Prosecutorial Strategies*

Psychopathy, Future Dangerousness, and the Death Penalty

Texas prosecutors typically rely on three types of evidence to argue that the defendant constitutes a continuing threat to society. The first type of evidence relates to the nature of the crime for which the defendant is on trial and is aimed at demonstrating its peculiar gruesomeness. Texas courts have historically upheld the relevance of this kind of proof for jurors' sentencing determination, arguing that, in some instances, the facts of the crime alone are sufficient to support a finding of future dangerousness.<sup>479</sup> The second type of evidence relates to the defendant's criminal history and relies on lay witness testimonies describing episodes in which the defendant engaged in antisocial behaviours, especially if of a violent nature and resulting in criminal convictions. This kind of evidence often includes examples of antisocial behaviour that occurred both while at liberty and during incarceration, to show that even if the defendant is placed in a controlled institutional setting for the rest of his life, he will be unable to control his violent tendencies.

The third kind of evidence, which will form the core of the present discussion, relates to the nature of the defendant himself and aims at demonstrating that, due to an inborn personality defect, the defendant is inherently wicked and unlikely to be

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<sup>479</sup> *Mitchell v. State*, 650 S.W.2d 801 (Tex.Crim.App. 1983); *Smith v. State*, 683 S.W.2d 393, 407 (Tex.Crim.App. 1984); *Keeton v. State*, 724 S.W.2d 58, 61 (Tex.Crim.App. 1987); *Johnson v. State*, 853 S.W.2d 527, 531 (Tex.Crim.App. 1992).

rehabilitated. A number of studies suggest that mental health experts testifying for the prosecution on the issue of future dangerousness routinely diagnose defendants with psychopathy, sociopathy, or APD to support their contention that they will constitute a continuing threat to society if their lives were to be spared (Edens & Cox 2012: 239, 248; Edens et al 2013: 175). These diagnoses are particularly powerful in this context since they encapsulate and medicalise all the characteristics typically associated with future violent behaviour, while turning them into immutable personality traits which express the defendant's true character. Indeed, a number of simulation studies have shown that defendants' perceived level of psychopathy strongly predict jurors' support for executions, with interpersonal and affective traits associated with this condition - such as remorselessness, 'grandiose self-worth', and a 'manipulative interpersonal style' - playing the most significant role in increasing the likelihood of a death sentence (Edens et al 2013: 175).

Jurors' punitive approach towards individuals diagnosed with psychopathy, sociopathy, and APD is partially due to the stigmatising effect of these diagnoses. Traditional notions of psychopathy, such as the ones found in Hervey M. Cleckley (1976) and Robert D. Hare's (1993) classic works on the subject, are associated with highly undesirable social traits such as callousness, lack of empathy, and remorsefulness, all characteristics typically associated with 'evil' and 'badness' (Cavadino 1998: 5-6). The stigma associated with these conditions is further exacerbated by the sensationalised depictions provided by the media, which tend to either associate psychopathic traits with fictional incarnations of evil, such as Hannibal Lecter, or with

serial killers which have left a long-lasting impression on the public for their extreme cruelty, such as Ted Bundy or Charles Manson (Edens et al 2013: 175).

The origins of contemporary notions of criminal psychopathy date back to the early 20<sup>th</sup> century. While 19<sup>th</sup> century psychiatrists such as James Pritchard and Isaac Ray depicted apparently unexplainable criminal acts committed by cognitively lucid subjects as pathological manifestations of a mental disease ('moral insanity'), at the turn of the 20<sup>th</sup> century psychiatrists started describing them as the natural expression of inherently wicked personalities (Weisman 2008: 191-196). Inspired by the biological and evolutionist framework of their time, early 20<sup>th</sup> century psychiatrists viewed criminal psychopathy as an hereditary and organic affliction, and criminal psychopaths' wrongdoings as the manifestation, not of a mental health problem, but of their true inner self characterised by 'moral insensibility', 'coldness of heart', and lack of 'scruples of conscience or repentance' (Krafft-Ebing 1905: 623; Weisman 2008: 195). Psychiatrists writing in the third quarter of the 20<sup>th</sup> century drew heavily from this view, depicting criminal psychopaths as rational yet inherently immoral subjects, who strategically and deliberately exploit others through cunning and manipulation (Cleckley 1976: 337-364; Hare 1998: 106). In these formulations, while the main manifestations of the pathology are behavioural, their deeper roots are inherently characterological (Weisman 2008: 198). For criminal psychopaths, antisocial behaviour is nothing but a natural expression of their true inner being, an immutable personality trait unlikely to be redeemed.

These descriptions powerfully resonate with Texas prosecutors' dispositional view of defendants' mental states and antisocial behaviours (see Chapter 4: Section 2[a]). In this view, the defendant's criminal act is an essential element of the defendant's true character, not a behavioural symptom of a mental disorder. When speaking of defendants diagnosed with APD, prosecutors often refer to them as 'rapists', 'sexual predators', or 'thrill killers', a language which contributes to merge the actor and the action into an indiscernible thing.<sup>480</sup> In the trial of Johnny Paul Penry, for example, DA Joe L. Price started from this ontological perspective to depict the defendant as a 'natural born criminal', separate and different from the law-abiding community:

[H]e's a faker. And he always has been. He's a manipulator... What character have you been shown of him? He's a rapist. He attempts to rape his own brother. He - he rapes women, he kills people. That's his character... you're talking about a sadist, he is one. He is the most sadistical person you will probably ever come into contact with. He is a sexual predator. He is a sadist. He is a cold-blooded killer. He is a sociopath with an antisocial personality... He has no conscience. He's never shown any remorse.<sup>481</sup>

By describing defendants as 'sexual predators' and 'cold-blooded killers', and by labelling their antisocial tendencies as the product of APD, Texas prosecutors have created an ontological association between defendants' capital crime and their inner essence, which echoes the characterisations found in conservative media accounts while giving them an aura of scientific legitimacy. In this view, 'the potential for dangerousness is inherent in an individual if it is present' and while the environment in

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<sup>480</sup> See, e.g., *Penry v. State*, 178 S.W.3d 782 (Tex.Crim.App. 2005), Dr. Gripon Test. Trial Tr. vol. 46, 97:16-23, Asst. Dist. Att'y Hon Quest. Dr. Pincus Test. Trial Tr. vol. 51, 233:21-234: 2, Asst. Dist. Att'y Hon Cl. Arg. on Punishment vol. 58, 31:24-32:10; *Burks*, 583 S.W.2d, Dr. Grigson Test. Trial Tr. vol. 2, 557:16-566:16, Dr. Holbrook Test. Trial Tr. vol. 2, 796:11-798:22, 807:8-808:19, Asst. Dist. Att'y Ludwick Cl. Arg. on Punishment Trial Tr. vol. 2, 823:2-13.

<sup>481</sup> *Penry*, 178 S.W.3d, Dist. Att'y Price Cl. Arg. on Punishment vol. 58, 112:10-15.

which a defendant lives can potentially diminish the expression of that violence, this ‘doesn’t remove the fact that the person poses a threat’.<sup>482</sup> Through this line of argument, Texas prosecutors have suggested that defendants diagnosed with APD will always represent a future danger to society, both inside and outside the prison walls, and that the only way to stop them from producing more harm is to physically eliminate them.

An additional factor which makes a diagnosis of APD particularly controversial in Texas capital punishment proceedings is its association with cunning and manipulation (see Chapter 4: Section 2[d]). Mid-to-late 20<sup>th</sup> century formulations of criminal psychopathy have portrayed individuals affected by this condition as strategic social performers, who use their superficial charm (Cleckley 1976: 434) and ability to simulate feelings without effectively experiencing them (Hare 1993: 46-51) to build relationships of trust with their victims and friends in order to exploit them and bend them to their own will. In this view, psychopaths are masters at mimicking genuine feelings and at controlling the reactions of their audience, an aspect which requires the maximum attention from experts asked to evaluate their mental competency in capital proceedings. Texas prosecutors regularly exploit this conception, using a diagnosis of psychopathy or APD to argue that the defendant has a pathological tendency to lie and to cast doubt on the reliability of the mitigating evidence presented.<sup>483</sup> For example, in the trial of Samuel Hawkins, state expert Dr. James Grigson, a controversial figure who

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<sup>482</sup> *Ibid.*, Asst. Dist. Att’y Hon Quest. Dr. Gripon Test. Trial Tr. vol. 46, 113: 10-17.

<sup>483</sup> See, e.g., *Burks*, 583 S.W.2d, Asst. Dist. Att’y Garrigan Cl. Arg. on Guilt or Innocence Trial Tr. vol. 2, 698:9-703:8; *Wilkins v. State*, 847 S.W.2d 547 (Tex.Crim.App. 1992), Asst. Dist. Att’y Henry Quest. Dr. Allen Test. Trial Tr. vol. 31, 79:23- 88:2, Asst. Dist. Att’y Henry Quest. Dr. McNeel Test. Trial Tr. vol. 31, 15:8-24:3; *Penry*, 178 S.W.3d, Dr. Saunders Test. Trial Tr. vol. 43, 236:23-240:3.

helped Texas prosecutors to secure almost 200 death sentences in the 1980s and 1990s (see Tolson 2004; Acker 2017: 764), applied this diagnostic label to suggest that the defendant had used his trial testimony to manipulate the jury by pretending that his criminal act was due to an underlying mental health condition. The following statement is illustrative of the doctor's argument:

[The defendant says], 'see, I must be sick, something is wrong with me.' Now, what he is doing, as most sociopaths will do, they will make minor concessions such as he doesn't mind telling you about his horrible sexual drive and all the terrible things which he has done, but what he hopes to gain from this is a major concession. The con job is, 'you have got to see how crazy I am and how sick I am. You can't consider finding me guilty because of what I am.'<sup>484</sup>

When Hawkins, who was acting as his own attorney, objected to Dr. Grigson's use of his testimony as evidence of his manipulative tendencies, the DA took advantage of his objection to ask the doctor whether, from his observation of the defendant as he stood up in court to object, he noticed any signs of anxiety.<sup>485</sup> Dr. Grigson denied, arguing that Hawkins was just 'trying to get attention and play like an attorney' and that playing this role fed his 'ego'.<sup>486</sup> Embracing the late 20<sup>th</sup> century characterisation of the criminal sociopath as a social performer, always looking for an opportunity to feed his narcissistic needs, Dr. Grigson ridiculed Hawkins' legitimate right to represent himself at trial and used it against him to support his diagnostic conclusion.<sup>487</sup>

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<sup>484</sup> *Hawkins v. State*, 613 S.W.2d 720 (Tex.Crim.App. 1981), Dr. Grigson Test. Trial Tr. vol. 9, 1818:13-23.

<sup>485</sup> Dist. Att'y Curtis Quest. Dr. Grigson Test. Trial Tr. vol. 9, 1819:14-17.

<sup>486</sup> Dr. Grigson Test. Trial Tr. vol. 9, 1819:18-19.

<sup>487</sup> This practice was openly condemned by the TCCA on appeal, see *Hawkins*, 613 S.W.2d at 727-729.

A final factor which makes a diagnosis of psychopathy or APD particularly prejudicial for defendants charged with capital murder is the devastating prognosis associated with the condition. Contributing to this bleak view on the possibility of future treatment is the severity of the symptoms linked with the disorder and its lack of association with a known mental disease (Weisman 2008: 199; see, e.g., Arrigo & Shipley 2001: 328-329). The perception of psychopathy's incurability is exacerbated by recent research associating it with physiological and neurological defects with potentially genetic roots, a framing which 'further widens the gap between psychopathy and normality even as it strengthens the case for therapeutic pessimism' (Weisman 2008: 199; see, e.g., Hare 1998; Abbott 2001; Blair, Mitchell & Blair 2005). In the criminal justice context, this unresponsiveness to treatment is further aggravated by the notion that criminal psychopaths cannot feel suffering for their wrongs, or for the punishment received as a result of such wrongs. Consequently, they do not learn from their mistakes and are unresponsive to any form of rehabilitative intervention in penal settings.

The trial of James Wilkens Jr. provides a compelling example of the ways in which Texas prosecutors have used the diagnosis of APD to claim that the defendant's criminalistic tendencies are likely to be permanent.<sup>488</sup> Asked by the prosecutor whether the defendant's antisocial traits would likely change over time, state expert Dr. Thomas Allen argued as follows:

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<sup>488</sup> *Wilkens*, 847 S.W.2d; but see *Avarado*, 912 S.W.2d, Dr. Follett Test. Trial Tr. vol. 38, 168:18-170:10.

[O]ur basic personality structure is set fairly early in life. There is some flexibility... An individual may become, say, more or less introverted or extroverted, more outgoing or more quiet and reserved over time depending on the circumstances, but if an individual is basically introverted and that's the basic personality structure, then he's going to be introverted pretty much all his life. If an individual's basic personality structure is that of an antisocial personality, it's extremely unlikely that that's ever going to change in his lifetime.<sup>489</sup>

In light of these considerations, Dr. Allen concluded that the prospects for the defendant's rehabilitation were minimal and his likelihood to continue to represent a future threat for society high, an opinion shared by all the experts who testified in Wilkens' proceedings.<sup>490</sup>

Given these characterisations, defendants labelled with APD in Texas capital punishment proceedings have a difficult path ahead. Having been cast as emotionally and possibly biologically different from others, inherently inclined to commit antisocial acts, and unresponsive to treatment, defendants' attempts to convince the jury that they are capable of change is likely to fall on deaf ears. Moreover, having been described as manipulative liars whose words and attitudes should always be looked at with suspicion, their efforts at convincing jurors to trust the sincerity of their statements rather than seeing them as strategic performances set up in order to escape punishment may prove to be an almost unsurmountable challenge.

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<sup>489</sup> *Wilkens*, 847 S.W.2d, Dr. Allen Test. Trial Tr. vol. 33, 85:20-86:12.

<sup>490</sup> *Ibid.*, 87:13-88:17; see also Dr. McNeel Test. Trial Tr. vol. 33, 26:19-31:16, 32:15-33:17.

### *b. Defence Strategies*

In the 1980s and 1990s, defence attorneys working with capital defendants relied on a number of strategies to convince jurors to either find their clients not guilty by reason of insanity or to impose a life sentence. The following sections will focus on two main tactics. The first strategy involves the presentation of evidence suggesting that the defendant suffered from a severe mental disorder at the time of the crime, and that this condition affected his ability to understand the consequences of his act and/or to control his violent impulses. To support this contention, defence experts typically argued that the defendant suffered from paranoid schizophrenia or some other psychotic condition, and that at the time of the alleged offence he was operating under the influence of paranoid delusions and/or command hallucinations.

The second tactic concerns the presentation of evidence showing that the defendant suffered abuse and neglect as a child and that this difficult upbringing had a negative impact on his mental health and social adjustment. This kind of evidence relied on a communitarian notion of criminal responsibility which, challenging the individualist ideology promoted by the conservative establishment, highlighted the role played by social institutions in facilitating or preventing the formation of antisocial tendencies in youth. The following section will focus on the first defence strategy and argue that the biological paradigm upon which it was based, coupled with the tactics developed by prosecutors to reverse the mitigating effect of the evidence presented, contributed to increase, rather than decrease, jurors' perception of the defendant's future dangerousness at sentencing.

*c. The Biological Paradigm and Future Dangerousness*

From the mid-1970s onwards, medical experts asked to testify regarding defendants' mental health in Texas proceedings tended to describe mental disorders as organic conditions associated with brain defects. As argued in the introduction, the publication of the third edition of the DSM-III in 1980 signalled the beginning of a new era of psychiatric diagnosis and treatment and the triumph of the biological model of mental disease. The main objective of the DSM-III was to address the diagnostic inconsistencies and imprecisions identified in the work of American psychiatrists of psychoanalytic orientation, by providing a unified framework and language which would enhance diagnostic consistency and communication between clinicians (Andreasen 2006: 110-111). To accomplish this goal, the DSM-III would take an atheoretical approach to aetiology, focus on diagnostic categorisation, and take a multi-axial approach to classification aimed at integrating the medical and psychosocial components of the clinical evaluation.

Despite its stated objectives, the DSM-III effectively sacrificed the psychosocial component of the evaluation in favour of the biological one. The reasons for this are twofold. Firstly, the drafters of the DSM-III were powerfully influenced by the ideas of the 'New Psychiatry' movement, a group of scholars which, inspired by Kraepelin's work, emphasised the biological roots of mental disorders while underplaying the sociological and psychological ones (see, e.g., Kaut 2011: 205, 217; see generally Leeman 2007; Lewis 2010). According to representatives of this movement, mental disorders were a chronic condition resulting from a 'chemical imbalance' in the brain,

which required expert medical treatment via the administration of psychotropic drugs (Murray 2009: 285; see Kuppin & Carpiano 2006). By endorsing this idea, the drafters of the DSM-III officially sanctioned the biological paradigm of mental disease and the massive use of antipsychotic medications, while delegitimising alternative explanations based on environmental stressors, and therapeutic solutions such as psychotherapy (Murray 2009: 287-288, 2011: 287). Secondly, while the authors of the DSM-III warned that the diagnostic criteria included in the manual should not be taken as a substitute for a thorough clinical evaluation of the patient's background and history, psychiatrists operating inside and outside courts of law typically followed a 'check-list' approach, which limited the assessment to a search for symptoms included in the DSM, and tended to privilege organic factors over socio-psychological ones (Andreasen 2006: 111).

The biological paradigm has had controversial effects for mentally disordered capital defendants tried in Texas courts. The reasons are threefold. Firstly, by reducing the clinical encounter to 'the use of DSM checklists', and by side-lining history taking as a non-essential component of the psychiatric evaluation, the DSM-III discouraged psychiatrists from getting to know the subjects of their evaluations (Andreasen 2006: 111), hindering the humanising effect of clinical assessments in courts of law. Indeed, regardless of their validity and/or reliability, tentative explanations of how a particular mental disorder came about can help to bring a defendant's history and background to life, contributing to that humanising effect which courts have repeatedly stressed constitutes one of the core functions of the sentencing phase of capital punishment

proceedings.<sup>491</sup> Secondly, by promoting an image of ‘disease and disability’, rather than of ‘wholeness and recovery’, the biological model of mental disorder negatively affects both patients’ trust in their ability to overcome their psychological and behavioural difficulties, and the social stigma surrounding their conditions (Andreasen 2006: 111). As Bruce Lachter (2001: 313) argues with regards to depressed patients, ‘there may be a chemical imbalance... but the suffering is about loss or fear or hostility or trauma’, all psychological aspects which jurors are arguably more likely to relate to.

Finally, by relying on the administration of psychotropic medications, the biological paradigm has promoted an image of mental disorders as chronic and untreatable. In the medical framework, treating is effectively used as a metaphor for ‘tranquillising’: the purpose of the drugs being to sedate the gross symptoms associated with the condition, rather than to cure the underlying causes of the ‘disease’, which are typically assumed rather than proved (Murray 2006: 310-311, 2011: 287-288, see, e.g., Jackson 2006; Joseph & Ratner 2010). This idea tends to suggest that, without the constant therapeutic effect of psychotropic drugs, psychiatric patients are incapable of controlling their emotional and behavioural reactions, making them highly unpredictable and in need of constant supervision. This assumption can have a powerful stigmatising effect in Texas courts since, as highlighted by a number of expert witnesses in the 1980s and 1990s, one of the main ‘issues’ encountered in this treatment

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<sup>491</sup> Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 536 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

style is patients' non-compliance, i.e. the refusal to take the prescribed medications due to their negative side-effects.<sup>492</sup>

Empirical research seems to support such claims. For example, a number of studies suggest that the framing of mental disorders as 'brain diseases' tends to increase the public's perception of psychiatric patients as dangerous and unpredictable (Read & Harré 2001: 223-225; Sarbin & Mancuso 1970; Golding et al 1975; Schwartz & Schwartz 1977), whereas associations of mental health conditions with emotional and psychological distress tend to reduce such stigma (Mehta & Farina 1997). Along these lines, some scholars propose that both psychiatrists and lay people are more likely to see psychological problems as incurable when associated with biological causes; an aspect which increases the stigmatising effect of diagnostic labelling based on the disease model (Hermann 2001). Finally, as highlighted by John Read and Niki Harré (2001: 225),

organisations of 'psychiatric patients' have long railed against the effects of a 'medical model' perspective on their self-esteem, accusing it of increasing stigma while minimising the complexity of their lives and their capacity for recovery (see Campbell 1992; O'Hagan 1992).

This evidence suggests that defence psychiatrists' reliance on DSM checklists, coupled with their framing of defendants' mental disorders as biological defects, have the effect of increasing, rather than decreasing, jurors' perception that the defendant might represent a future threat to society. Firstly, by limiting their diagnosis on an evaluation of the list of symptoms included in the manual, psychiatrists have tended to

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<sup>492</sup> *Burks*, 583 S.W.2d, Dr. Vogtsberger Test. Trial Tr. vol. 1, 320:9-25, 325:3-7; *Colburn*, 966 S.W.2d, Dr. Quijano Test. Trial Tr. vol. 25, 219:22-220:6, 223:9-224:2.

overlook defendants' social and psychological history and to eschew explanations which go beyond the 'chemical imbalance' theory of the brain. In so doing, they have missed the opportunity to shed light on aspects of the defendant's character, background, and experience which could have helped jurors make sense of the defendant's behaviour and decrease the social stigma associated with his mental condition. Secondly, by endorsing the biological reductionism proposed by the New Psychiatry movement, and by arguing that the defendant's antisocial behaviour can only change if the underlying medical condition is kept under control via the constant administration of psychotropic drugs, defence experts have supported jurors' perception of mentally disordered defendants as dangerous and unpredictable, depicting them as biologically different and only manageable under particular treatment conditions.

#### Stanley Burks: Command Hallucination or 'Thrill to Kill'?

The trial of Stanley Keith Burks provides a compelling example of the ways in which defence arguments drawing from biological explanations of mental disease can contribute to a finding of future dangerousness in Texas courts.<sup>493</sup> Burks, a 19-year-old African American man, was convicted for the murder and robbery of an elderly man, Mr. Rogers, in April 1979, and sentenced to death. According to his own confession, armed with a hammer and some kitchen knives, Burks entered the victim's house while the man was sleeping, went through his pockets and bedroom drawers, and watched him for about thirty minutes while he was sound asleep.<sup>494</sup> Then, for no apparent

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<sup>493</sup> *Burks*, 583 S.W.2d.

<sup>494</sup> Burks Conf. Trial Tr. vol. 1, 308:7-310:13.

reason, he started beating the victim's skull with the hammer for a total of 32 times, slit his throat with a razor, and cut his abdomen open with the knives. Following this brutal killing, he ransacked the house over a three-day period, returning on multiple occasions to collect more items, all in broad daylight.<sup>495</sup>

At the guilt stage, the defence presented an insanity claim, arguing that Burks suffered from paranoid schizophrenia and that, at the time of the crime, he had experienced a command hallucination ordering him to kill the victim to help him re-join his deceased wife in heaven.<sup>496</sup> To support its contention, it presented extensive lay and expert testimonies suggesting that, from the teenage years, Burks had experienced visual and auditory hallucinations, severe depression, and drug addiction, which had led to several suicide attempts and to numerous, albeit brief, hospitalisations.<sup>497</sup> With regard to his hallucinations, the defence witnesses reported that Burks believed that 'devils were chasing him' and that, every time he coughed, an evil spirit named Zodacus would enter his body and temporarily modify his voice, manner, and appearance.<sup>498</sup>

The content of Burks' hallucinations was likely influenced by his strong religious education. The defendant's father, C. L. Burks, was an evangelist preacher for the Church of God and Christ who dealt with spiritualism and seances, the practice of

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<sup>495</sup> *Burks*, 583 S.W.2d. at 390.

<sup>496</sup> Dr. Lett Test. Trial Tr. vol. 2, 656:7-16, 659:22-660:23.

<sup>497</sup> Def. Att'y Cunningham Op. Arg. on Guilt or Innocence Trial Tr. vol. 1, 312:1-313:21, Dr. Lewis Test. Trial Tr. vol. 1, 370:12-371:14, Dr. Harrington Test. Trial Tr. vol. 1, 380:11-19, Tillman Test. Trial Tr. vol. 1, 385:14-387:22, Robinson Test. Trial Tr. vol. 1, 393:13-396:7, Kimberly Burks Trial Tr. vol. 1, 340:16-344:10, Debra Ann Burks Test. Trial Tr. vol. 1, 414:23-417:3, C. L. Burks Test. Trial Tr. vol. 1, 478:13-482:16.

<sup>498</sup> Beecham III Test. Trial Tr. vol. 1, 111:3, Debra Ann Burks Test. Trial Tr. vol. 1, 412:8-413:25.

making contact with the dead.<sup>499</sup> He had founded his own evangelistic outreach, the Grain of Mustard Seeds Ministry, whose teachings were disseminated through radio broadcasting and revivals, services conducted for the purpose of eliciting a religious awakening. At the age of 14, the defendant started travelling with his father across the state of Georgia to learn and disseminate his religious teachings.<sup>500</sup> During this time, he attended his father's meetings and seances, was initiated on how to contact 'familiar spirits', and was eventually ordained as an evangelist minister.<sup>501</sup> Given Burks' fragile mental health, these experiences likely made a powerful impression on him, affecting his phantasies and thinking patterns.

The state challenged the defence's theory that Burks' crime was prompted by command hallucinations. It argued that the defendant was an incorrigible sociopath and a 'thrill killer', who had killed the victim out of sheer hedonistic enjoyment and faked his hallucinations and suicidal tendencies to manipulate his family, friends, and defence experts in order to escape punishment.<sup>502</sup> The Asst. DA took particular issue with the credibility of the defendant's hallucinations, highlighting that he only mentioned hearing voices after the trial had begun:

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<sup>499</sup> C. L. Burks Test. Trial Tr. vol. 1, 466:18-23, 368: 24-470:17.

<sup>500</sup> *Ibid.*, 475:15-22, 477:20-478:12.

<sup>501</sup> *Ibid.*, 485:11-386:25.

<sup>502</sup> See, e.g., Dr. Bolch Test. Trial Tr. vol. 2, 494:13-497:24, Dr. Buch Test. Trial Tr. vol. 2, 526:5-529:22, Dr. Grigson Test. Trial Tr. vol. 2, 557:16-566:16.

[D]oes it strike you a little bit unusual that he has told no one, no one at all until he talked to Dr. Lett last week that he killed this man because the voices told him to send him up to be with his wife... only after this man sat in the courtroom with each and every one of you when we explained insanity to you, only then did he go upstairs and tell a psychiatrist, 'I was driven to do this by voices'. Does that sound believable to you?<sup>503</sup>

The jury endorsed the sceptical view advocated by the state and found the defendant guilty of capital murder. At the punishment stage of the trial, the defence experts' claims that the defendant's actions were directed by command hallucinations once again backfired. In line with the biological paradigm of the time, the defence experts emphasised the organic origin of the defendant's mental health condition but failed to stress the role that his social background might have played in eliciting some of his delusions and hallucinations.<sup>504</sup> As argued above, this biological reductionism tends to reinforce lay people's association of severe mental disorders with violence, non-treatability, and dangerousness, an aspect which likely contributed to the jury's decision to impose a death sentence. Even the defence's chief expert witness played into this stereotype, when he argued that, due to his mental disorder, there was a risk that Burks would commit unmotivated violent acts against strangers in the future, if he heard a voice that ordered him to kill again.<sup>505</sup>

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<sup>503</sup> Asst. Dist. Att'y Garrigan Cl. Arg. on Guilt or Innocence Trial Tr. vol. 2, 700:24-701:9.

<sup>504</sup> This tendency is particularly evident in psychiatrists' continuous emphasis on psychotropic drug treatment. See, e.g., Dr. Vogtsberger Test. Trial Tr. vol. 1, 316:20-318:14, Dr. Lett Test. Trial Tr. vol. 2, 634:24-635:13. For a similarly decontextualized approach see *Colburn*, 966 S.W.2d, Dr. Quijano Test. Trial Tr. vol. 25, 216:8-25, 232:17-234:17.

<sup>505</sup> *Burks*, 583 S.W.2d, Dr. Lett Test. Trial Tr. vol. 2, 669:2-18.

Given its relevance for the second special issue question, the treatability of Burks' mental condition and behavioural difficulties would be a key point of contention between the defence and the prosecution at punishment. According to state expert Dr. Grigson, what made Burks' sociopathic personality disorder particularly threatening was its severity and absolute resistance to treatment. In his view, Burks would always represent a danger to society, if kept alive:

A. ... This is not a stage he's going through. It's not a passing fancy. As long as he lives, he's going to be a danger to society whether it be inside a prison wall or whether it's outside, wherever it is, as long as he lives.

Q. Eight, nine, ten years from now, twenty years from now?

A. It won't matter.

Q. Can't be rehabilitated?

A. There's absolutely nothing that can be done.<sup>506</sup>

Defence expert Dr. Charles Lett, on the other hand, argued that the defendant's paranoid schizophrenia could be treated through the use of psychotherapy combined with the administration of anti-psychotic drugs.<sup>507</sup> The psychiatrist who treated Burks following his arrest, had prescribed him a strong daily dose of Haldol, a potent tranquiliser and antipsychotic drug aimed at controlling Burks' hallucinations and violent impulses.<sup>508</sup> Dr. Lett, who had significant experience in the treatment of psychotic patients, reported that since Burks had started taking this medication his behaviour had improved, a finding supported by the testimony of the defendant's

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<sup>506</sup> Dr. Grigson Test. Trial Tr. vol. 2, 779:17-25; see also *Wilkins*, 847 S.W.2d, Dr. Allen Test. Trial Tr. vol. 33, 87:13-88:17, Dr. McNeel Test. Trial Tr. vol. 33, 26:19-31:16, 32:15-33:17.

<sup>507</sup> *Burks*, 583 S.W.2d, Dr. Lett Test. Trial Tr. vol. 2, 634:19-435:10.

<sup>508</sup> Dr. Vogtsberger Test. Trial Tr. vol. 1, 316:20-318:14.

mother and step-father at the punishment phase of the trial.<sup>509</sup> To challenge the idea that Burks' violent tendencies could effectively be controlled, the state presented the testimony of a nurse who argued that Burks had been refusing to take his medications while in jail without manifesting the symptoms typically observed in mentally ill patients who had stopped their treatment.<sup>510</sup>

By highlighting the absence of withdrawal symptoms, the state could pursue a two-pronged strategy. On the one hand, it could use such absence to support its contention that Burks had an antisocial personality disorder and that he did not suffer from a mental illness to being with. This argument relied on a common misconception associated with the use of psychotropic drugs; namely that it is possible to infer the presence or absence of a mental disorder based on the subject's reactions to treatment. Critics have repeatedly challenged this contention, highlighting that the remission of symptoms following the administration of psychotropic drugs tells us nothing about the effective presence of mental disease and/or about the potential biological underpinnings of an individual's emotional and behavioural difficulties (Murray 2011: 288).

On the other hand, the state could argue that, even conceding that the defendant suffered from a severe mental health condition besides his sociopathic personality disorder, the dangers and difficulties involved in the management and

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<sup>509</sup> Dr. Lett Test. Trial Tr. vol. 2, 634:13-18; Bobbie Rolan Test. Trial Tr. vol. 2, 817: 9-19, Lorene Rolan Test. Trial Tr. vol. 2, 820:7-11.

<sup>510</sup> Stacey Test. Trial Tr. vol. 1, 344:24-346:24, 349:4-16.

control of mentally disordered capital defendants in a prison setting made a life sentence in this case undesirable. By emphasising the risk that Burks could refuse his medications, the difficulties involved in the monitoring of inmates' compliance with their treatment plan, and the dangerous withdrawal symptoms associated with such non-compliance, the state was able to alert the jury as to the risks involved in relying on medical treatment for the management of violent, mentally disordered, individuals. Thanks to this strategy, the state was able to undermine the defence's argument that Burks' medical condition and violent tendencies could be managed via the administration of antipsychotic medications, and to turn it into additional evidence of Burks' unreliability, unpredictability, and future dangerousness.

#### James Colburn and Deinstitutionalisation

The trial of James Blake Colburn provides another illustrative example of the ways in which exculpatory defences and mitigation strategies based on biological notions of mental disease can backfire in Texas death penalty proceedings.<sup>511</sup> Colburn, a white young man, was convicted for the murder of a lady whom he did not know in 1998 and sentenced to death. The evidence suggests that the woman met the defendant outside his apartment while hitchhiking and asked him for some water.<sup>512</sup> The defendant agreed and led her into his apartment where, after an attempted rape, he strangled her and cut her neck with a kitchen knife. The defendant was arrested shortly thereafter

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<sup>511</sup> *Colburn*, 966 S.W.2d.

<sup>512</sup> Asst. Dist. Att'y Hileman Op. Arg. on Guilt or Innocence Trial Tr. vol. 23, 4:1-6:11.

and confessed to the murder. His confession was recorded and played for the jury at trial.

The defence's theory was that Colburn suffered from chronic paranoid schizophrenia, that he experienced visual and auditory hallucinations, and that at the time of the murder a voice had ordered him to kill the victim to fulfil his wish to go to prison.<sup>513</sup> According to the defence, due to his command hallucinations, the defendant did not know the difference between right and wrong at the time of the murder and was therefore insane according to legal standards. The state challenged the defendant's insanity claim, arguing that his criminal act was the result, not of a 'command hallucination' as argued by the defence, but of a rational thought which had prompted him to kill the victim to pursue his plan to get incarcerated.<sup>514</sup> According to the prosecution, Colburn should be seen not as a mentally ill individual succumbing to a sick mind, but as a 'mean' criminal, who would always represent a 'threat' and a 'danger' to Texas society.<sup>515</sup>

The defence's explanation of the murder constitutes an emblematic example of the ways in which an apparently exculpatory or mitigating argument can contribute to a finding of future dangerousness in Texas courts. Besides stressing the role of Colburn's command hallucinations in prompting his criminal act, the defence portrayed the murder as the desperate gesture of a man whose mental health condition made life

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<sup>513</sup> Def. Att'y Crow Cl. Arg. on Guilt or Innocence Trial Tr. vol. 26, 367:9-368:22.

<sup>514</sup> Asst. Dist. Att'y Hileman Op. Arg. on Guilt or Innocence Trial Tr. vol. 23, 7:1-9:14.

<sup>515</sup> Asst. Dist. Att'y Hileman Cl. Arg. on Guilt or Innocence Trial Tr. vol. 26, 403:8-11, 403:20-404:3.

outside a controlled institutional setting unbearable.<sup>516</sup> In this view, Colburn's desire to go to prison was the result of an institutional failure on the part of the Texas mental health services which, by refusing to hospitalise him for a prolonged period of time, had left him with no other choice than to seek 'refuge' in the Texas Department of Corrections.<sup>517</sup> As explained by Dr. Walter Quijano, a psychologist famous for his racially charged testimonies in death penalty cases,<sup>518</sup> at the time in which Colburn was seeking treatment for his mental health condition antipsychotic medications had become very popular. This popularity was accompanied by a trend towards the rapid discharge of mentally ill patients, no matter how severe their symptoms:

[T]he United States were closing down state hospitals and the vogue then was to treat the person very rapidly and discharge, to treat them in a hospital in an acute basis. Once the frank symptoms are gone, you discharge them. So, this was the time when long hospitalization was no longer in practice and was criticized if you held somebody too long... The hospital then saw itself as a place to treat acute phase of the illness while the person is actively hallucinating, hearing voices, seeing things, agitation. They would keep them, medicate them to the point they are sedated and if - and they are kept that way for a while and then they are discharged to the community. And the community was supposed to take over through the MHMR [Mental Health and Mental Retardation] system.<sup>519</sup>

However, if the community failed to provide this support network, as happened in most instances (Gronfein 1985), the symptoms were likely to reoccur:

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<sup>516</sup> Dr. Quijano Test. Trial Tr. vol. 25, 251:21-252:14.

<sup>517</sup> Def. Att'y Stover Cl. Arg. on Guilt or Innocence Trial Tr. vol. 26, 383:16-18.

<sup>518</sup> See *Buck v. Davis*, 137 S.Ct. 759 (2017); Grissom (2011); Acker (2017: 769-775).

<sup>519</sup> Dr. Quijano Test. Trial Tr. vol. 25, 236:25-238:1.

If the person is discharged from the state hospital, remember only the acute frank symptoms are controlled. The other symptoms of thinking disorder continue, inability to work, inability to socialize, all the other - inability to be independent and to be sufficient are not there. So, when they are sent back, somebody has to catch that person and maintain the medication to control the frank symptoms, but also to cultivate the person to do the best they can. If that care is not provided, then the person will become acute again, sent back to the state hospital and thus the revolving door.<sup>520</sup>

In line with this historical trend, Colburn was repeatedly hospitalised for his mental health condition, administered antipsychotic medications, and rapidly released. However, the evidence provided at trial suggests that, given the severity of his mental health condition, life in the community was extremely difficult for Colburn. His ongoing hallucinations, which included seeing devils coming outside of his stomach, seeing his face sinking in, and hearing voices ordering him to do things, undermined his ability to hold a job and made him severely depressed, prompting him to commit between 15 and 20 suicide attempts over the years.<sup>521</sup> His mental health problems and adjustment difficulties in turn prompted him to engage in a number of criminal activities, including an attempted burglary and a robbery, which resulted in multiple convictions and seven years of imprisonment.<sup>522</sup> While in prison, Colburn was given food and shelter, regularly administered his medications, and told what to do at all times, all things which gave him a sense of order and helped him cope with his hallucinations and delusions.<sup>523</sup>

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<sup>520</sup> *Ibid.*, 238:12-24.

<sup>521</sup> Fitzsimmons Test. Trial Tr. vol. 25, 178:4-15, 184:7-13, 184:21-185:15, 186:19-21.

<sup>522</sup> *Ibid.*, 187:8-18.

<sup>523</sup> *Ibid.*, 189:2-19.

Following his release from prison, Colburn fell back into the old pattern of depression, hallucinations, and suicide attempts.<sup>524</sup> Given that the state hospitals had precluded him the possibility of prolonged hospitalisation, Colburn reasoned, prison was the only option left if he wished to return to an institutional environment where he would be constantly monitored, medicated, and controlled.<sup>525</sup> According to the defence, this reasoning was a clear indication that, at the time of the crime, the defendant had lost touch with society's traditional notions of right and wrong:

[T]he voice, this command hallucination that Dr. Quijano told you about says kill someone to go to prison. Now, that's crazy. I mean, you and I know you don't kill someone to go to prison. But if he believed this, if he truly believed this, then killing someone was not wrong... he knows if he kills someone, he's going to go back where he's safe. Because Dr. Quijano has told you he needs a structured environment. He needs a place where he doesn't have to make decisions, where he would be told what to do.<sup>526</sup>

The objective of this kind of evidence was threefold. Firstly, it could help support the defendant's insanity claim by arguing that his criminal act was the result of the 'crazy' reasoning of a deranged man, desperately trying to escape the demons that were populating his mind. Secondly, it could challenge a finding of future dangerousness at the punishment stage by suggesting that, if placed in a structured environment such as the Texas Department of Criminal Justice, Colburn's symptoms and violent behaviour could be kept under control. Finally, it could promote the idea that, by failing to provide the treatment and support he desperately needed, the Texas mental health services were indirectly responsible for Colburn's criminal act, especially given his stated desire

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<sup>524</sup> *Ibid.*, 188:5-189:1.

<sup>525</sup> *Ibid.*, 190:9-15, 192:4-7.

<sup>526</sup> Def. Att'y Stover Cl. Arg. on Guilt or Innocence Trial Tr. vol. 26, 385:16-386:7.

to be placed in an institutional setting and his use of the murder to accomplish this goal. In so doing, the defence could further the communitarian notion of criminal responsibility promoted by liberal social reformers, in the hope that it would help distribute the blame across a number of actors who, wittingly or unwittingly, contributed to the tragic events for which Colburn was on trial.

However, the outcome of Colburn's trial suggests that rather than advantaging the defence's case, this evidence backfired. Firstly, by stressing the failure of the Texas mental health services in providing Colburn with constant monitoring and supervision, the defence inadvertently portrayed the defendant as a dangerous and unstable subject, incapable of managing his behaviour unless regularly medicated. Secondly, by stressing that Texas state hospitals tended to rapidly treat patients and release them into the community without further support, the defence indirectly suggested that, if the defendant was judged insane and entrusted to the mental health services, he would shortly be back on the streets, ready to engage in the next violent attack. As a result, this evidence enhanced rather than diminished the perceptions of risk and unpredictability associated with Colburn's mental health condition, undermining both its exculpatory and mitigating potential.

*d. Child Abuse and Neglect and the Risk of Future Violence*

Mitigating evidence suggesting that a defendant experienced abuse and neglect during his upbringing carried a similar risk in Texas capital punishment proceedings. Diminished culpability claims based on abuse evidence were based on two main

arguments. The first argument relied on discoveries in the field of developmental psychology, and suggested that negative childhood experiences, especially if combined with mental health issues and/or neurological impairments, could undermine an individual's ability to control his impulses and abide by legal standards (Lewis et al 1979, 1986).

Research into the criminogenic effects of child abuse was fuelled by a large research project commissioned by the National Institute of Justice in 1992. After having followed 1,575 cases throughout their developmental years, the researchers found that 'childhood abuse increased the odds of future delinquency and adult criminality overall by 40 percent', a particularly striking figure (Widom 1992: 1; see also Dodge, Bates & Pettit 1990: 1682; Monahan et al 2001: 48). This finding, which confirmed the claims made by a number of researchers in the 1970s and 1980s (Monahan et al 2001: 48; see, e.g., Bandura 1973; Feldman, Mallouh & Lewis 1986; Lewis et al 1988a, 1988b; Widom 1989a, 1989b; see generally Haney 1995: 569-574), suggested that 'a childhood history of physical abuse predisposes the survivor to violence in later years', an aspect that extended even to victims of child neglect, such as abandonment, lack of medical attention, or severe malnutrition (Widom 1992: 1). Child abuse and neglect were therefore essential conditions for the perpetuation of the 'cycle of violence' across generations, a pattern commonly found in the lives of capital defendants (Arenella 1995: 708; Feldman et al 1986; Lewis et al 1986; McCord 1994).

The second idea drew from the communitarian notion of criminal responsibility advocated by liberal reformers to distribute the blame for defendants' criminal

behaviour across a number of social institutions which, over the years, had failed to give defendants the necessary care and support to grow into well-adjusted citizens. Defence attorneys and medical experts embracing the communitarian view believed that families, schools, and hospitals had a duty to protect and support children, especially if struggling with mental health issues and learning disabilities.<sup>527</sup> When such protection and support were missing, and children grew up to become adult criminal offenders, the responsibility for the crimes committed should be distributed across a number of social actors who, directly or indirectly, contributed to turn these disadvantaged children into violent individuals. By taking responsibility for its institutional failures, society acknowledged that many criminal acts could have been prevented through appropriate rehabilitative interventions and that, if caught in the criminal justice system, mentally disordered and/or socially disadvantaged offenders deserved a more lenient treatment, given that society had failed them in the first place.

To challenge these ideas, Texas prosecutors relied on two main arguments. The first argument stressed that ‘not everybody’ who experienced abuse and/or neglect as a child turned to a life of crime as an adult.<sup>528</sup> This kind of reasoning supported the notion that the defendant was ‘bad from the start’, and that his criminal act was the result of a wilful choice rather than of his difficult social upbringing (Haney 1995:

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<sup>527</sup> See, e.g., *Alvarado*, 912 S.W.2d, Def. Att’y Gates Op. Arg. on Punishment Trial Tr. vol. 38, 5:21-6:6, Def. Att’y Harney Quest. Edgemon Trial Tr. vol. 38, 82:19-83:3, Dr. Follett Test. Trial Tr. vol. 38, 167:1-25.

<sup>528</sup> *Alvarado*, 912 S.W.2d, Asst. Dist. Att’y Morgan Cl. Arg. on Punishment Trial Tr. vol. 39, 392:14-393:3.

597).<sup>529</sup> The second argument, which will be the centre of the present analysis, appealed to the individualist notion of criminal responsibility advocated by conservative politicians to suggest that the defendant was solely responsible for the difficult life experiences which led to his criminal act, and that his attempt to blame others for his behaviour was an additional indication of his maladaptive traits.<sup>530</sup> In this view, social institutions' refusal to educate, hospitalise, and/or treat the defendant over the years ought to be seen as an understandable response to the defendant's criminalistic tendencies, rather than as a sign of parental failure and institutional negligence.<sup>531</sup>

The individualist and communitarian notions of criminal responsibility endorsed by Texas prosecutors and defence attorneys coexisted in a constant state of struggle throughout the 1980s and 1990s. However, the punitive climate promoted by the conservative establishment, coupled with the Texas capital sentencing statute's emphasis on future dangerousness, meant that in many instances the individualist framework advocated by Texas prosecutors tended to prevail, no matter how compelling the mitigating evidence presented. As the trial of James Wilkens Jr. will show, in some cases these background conditions were exacerbated by defence attorneys' failure to thoroughly investigate defendants' family history and to examine

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<sup>529</sup> But see, e.g., Lewis et al (1988a); Masten & Garmezy (1985); *Perry*, 178 S.W.3d, Dr. Cunningham Test. Trial Tr. vol. 53, 290:23-294:7, 297:19-298:22, Asst. Dist. Att'y Hon Quest. Vogelsang Test. Trial Tr. vol. 50, 296:19-298:3, Asst. Dist. Att'y Hon Quest. Dr. Pincus Test. Trial Tr. vol. 51, 146:3-147:2, 180:8-191:22.

<sup>530</sup> *Wilkens*, 847 S.W.2d.

<sup>531</sup> See also *Alvarado*, 912 S.W.2d, Asst. Dist. Att'y Morgan Cl. Arg. on Punishment Trial Tr. vol. 39, 385:24-387:23; *Perry*, 178 S.W.3d, Asst. Dist. Att'y Hon Cl. Arg. vol. 58, 37:21-39:25.

expert witnesses that could help jurors make sense of such evidence in relation to the instant offence.

### James Wilkens Jr.: Parental Abuse or ‘Troubled Social Background’?

James Wilkens Jr. was a 26-year-old white man charged with the attempted murder of his ex-girlfriend, Sandra Williams, as well as with the murders of her lover, Richard Wood, and of her four-year-old son, Larry McMillen Jr. The defendant confessed to the killings but plead not guilty by reason of insanity. His defence was mainly based on the claim that he had blacked out at the time of the tragic events, could neither remember the exact dynamic of the crime nor some of the events preceding and following the murders, and had experienced a series of auditory and visual hallucinations which had compelled his acts of violence.<sup>532</sup>

According to the defence, Wilkens had a history of child abuse and suffered from severe depression and drug and alcohol addiction. The defendant testified on his own behalf, revealing disturbing details about his traumatic childhood and the impact these early experiences had on his mental state and behaviour. According to Wilkens’ testimony, his father physically abused him and his sisters during their upbringing. When he was five, the State of California took custody of his 6-year-old sister due to the abuse she was suffering at home. As Wilkens explained,

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<sup>532</sup> *Wilkens*, 847 S.W.2d, Wilkens Jr. Test. Trial Tr. vol. 30, 71:13-79:20.

the reason the State of California took my sister was because my father had started making us bend over a card table while he stood at the end of the hallway and shot us with a pellet gun. And I don't know who called the state, but they came and looked at my sister and took her away... the reason I remember this so well is because that was the only time I ever saw her smile is when she was being taken away.<sup>533</sup>

That same year, his father allegedly killed his infant sister as 'he was trying to get her to shut up' and, when the police arrived, he told them that the baby had fallen out of the crib.<sup>534</sup>

One day, the defendant went home after being hit by some boys at school. His father, who was half drunk, started hitting him as a punishment for being 'beat up.'<sup>535</sup> The defendant hit him back, ran away, and started living in a garage. Following this episode, his father left the family home and his parents divorced. When the defendant returned home, his mother accused him of driving her husband away and started treating him in a hateful manner.<sup>536</sup> One night, she even went to his room and tried to molest him. Believing that his mother hated him, the defendant ran away and started harbouring suicidal and homicidal thoughts:

I started thinking about killing myself all the time. I didn't have anything to live for... and when I was twelve my mother and I got in a fight and I told her I was going to kill myself and she told me that I would be doing her a favour if I did. So, I ran and got a knife and cut my arm. She screamed at me and told me to get out of her house, so I left.<sup>537</sup>

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<sup>533</sup> *Ibid.*, 12:10-22.

<sup>534</sup> *Ibid.*, 13:2-7.

<sup>535</sup> *Ibid.*, 19:9-23.

<sup>536</sup> *Ibid.*, 20:9-15.

<sup>537</sup> *Ibid.*, 20:17-21:6.

From then on, Wilkens' life would be a continuous succession of tragic events, severe depressions, failed suicide attempts, and drug abuse. His suicide attempts eventually led to his commitment to Rusk State Hospital, where he was treated with antidepressants for five months.<sup>538</sup> Following his release, he started working as a janitor in a restaurant, where he met Sandra Williams, one of the victims in this case.<sup>539</sup> The two had a brief love affair which ended abruptly due to the woman's romantic involvement with another man, Richard Wood.<sup>540</sup> According to the defendant's account, the discovery of the woman's new relationship precipitated his mental condition, prompting the first auditory hallucinations and the tragic murder of the woman's lover and her four-year-old son.<sup>541</sup>

Strikingly, the defence failed to introduce expert testimonies which could support the defendant's contention that he was physically and emotionally abused as a child, and that such abuse had a devastating effect on his mental condition and behaviour. Instead, it relied on the testimony of a number of psychiatrists who had examined Wilkens prior to his commitment to Rusk State Hospital but had never investigated his family background and early upbringing. The experts agreed that the defendant had an antisocial personality disorder associated with paranoid tendencies

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<sup>538</sup> *Ibid.*, 40:15-42:8.

<sup>539</sup> *Ibid.*, 52: 19-53:20.

<sup>540</sup> *Ibid.*, 61:9-23, 66:10-67:8.

<sup>541</sup> *Ibid.*, 71:13-77:6.

and depression, a condition which made him manipulative, paranoid, and provocative, but left his ability to distinguish right from wrong intact.<sup>542</sup>

The defence experts provided a detailed description of the symptoms, characteristics, and behaviours associated with their diagnosis; however, they never mentioned Wilkens' history of abuse in their evaluations. In describing the defendant's background, they recounted his history of antisocial behaviour, drug abuse, and suicidal attempts, not the painful experiences he went through during his childhood.<sup>543</sup> Rather than highlighting the emotional conflicts and psychological traumas which had characterised Wilkens' social upbringing, their testimonies contributed to portray Wilkens as a mono-dimensional being, whose past history could be reduced to a succession of escalating antisocial behaviours, and whose mental health condition could be simplified via the application of a psychiatric label. Instead of humanising the defendant, this decontextualized narrative contributed to portray him as a criminal and a drug addict: a dangerous individual who needed to be restrained for his and others' protection.

The prosecution played into this image to undermine the credibility of Wilkens' account and turn his difficult family upbringing into additional evidence of his antisocial tendencies. To accomplish these goals, it relied on a two-pronged strategy. First, it used Wilkens' diagnosis of APD to frame his alleged history of abuse, depression,

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<sup>542</sup> Dr. Crow Test. Trial Tr. vol. 29, 68:9-70:4, 71:21-72:8, 75:8-14, Dr. Hatton Test. Trial Tr. vol. 29, 128:16-23, 129:8-15, Dr. Rodriguez Test. Trial Tr. vol. 29, 156:5-158:10.

<sup>543</sup> Dr. Crow Test. Trial Tr. vol. 29, 68:9-70:4, Dr. Rodriguez Test. Trial Tr. vol. 29, 157:18-158:5, 160:14-24.

attempted suicides, and drug addiction as a strategic device used by a narcissistic and manipulative subject to escape from his responsibilities.<sup>544</sup> In this view, Wilkens' constant preoccupation 'with what had gone wrong in his life, how his parents had abused him, how people didn't appreciate him' was an indication of 'self-pity and projected anger and blame, blaming everybody and taking no responsibility himself', rather than a natural reaction to miserable life circumstances.<sup>545</sup> Through this line of argument, the state delegitimised Wilkens' suffering along with his defence strategy, depicting it as a vile attempt to blame others for his personal choices and avoid the consequences of his criminal act.

Second, the state leveraged the negative image painted by the defence and state experts to frame Wilkens' 'troubled background' - including his 'problems at home', 'running away problems', and history of drug abuse - as further evidence of his 'maladaptive personality traits' and propensity for future violence.<sup>546</sup> In this view, the fact that Wilkens was hit by his father, ran away from home to avoid the beatings, and started abusing drugs as a coping mechanism, ought to be seen, not as an aspect calling for a more merciful response, but as additional indications of Wilkens' antisocial traits and likelihood to engage in future violent behaviour.

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<sup>544</sup> See, e.g., Asst. Dist. Att'y Henry Quest. Dr. Allen Test. Trial Tr. vol. 31, 79:23- 88:2, Asst. Dist. Att'y Henry Quest. Dr. McNeel Test. Trial Tr. vol. 31, 15:8-24:3; see also *Burks*, 583 S.W.2d, Dr. Bolch Test. Trial Tr. vol. 2, 494:13-497:24, Dr. Buch Test. Trial Tr. vol. 2, 526:5-529:22, Dr. Grigson Test. Trial Tr. vol. 2, 557:16-566:16.

<sup>545</sup> Asst. Dist. Att'y Henry Quest. Dr. Allen Test. Trial Tr. vol. 31, 75:13-19.

<sup>546</sup> Dr. Rodriguez Test. Trial Tr. vol. 29, 157:18-158:5.

## Johnny Penry and the Communitarian Notion of Criminal Responsibility

As Wilkens' case suggests, in the 1980s and 1990s, mental health professionals who examined capital defendants before the commission of the offence often failed to thoroughly investigate their family backgrounds and to link their antisocial tendencies to childhood traumas.<sup>547</sup> A similar pattern can be identified in the case of Johnny Paul Penry,<sup>548</sup> whose horrific history of abuse and neglect only emerged after three trials, two reversals from the US Supreme Court,<sup>549</sup> and decades of investigations.

Johnny Penry, a 23-year-old white man at the time of the crime, was charged with the rape and murder of Pamela Carpenter, a woman he barely knew, in 1979. The evidence presented by the defence in his 2002 proceedings suggests that Johnny suffered from severe mental impairments and organic brain damage, was placed in special institutions for the mentally retarded from an early age and had a disturbing history of child abuse and torture. According to his family members and acquaintances, Johnny's mother, Shirley Penry, was a mentally disturbed woman who submitted her four children to severe emotional, verbal, and physical abuse and neglect. While Shirley was abusive with all her children, she was particularly cruel with Johnny. Instead of lovingly helping him deal with his learning difficulties, she 'repeatedly beat him, threatened him with a butcher knife, and made him eat his own faeces because he had

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<sup>547</sup> See also *Alvarado*, 912 S.W.2d, Edgemon Test. Trial Tr. vol. 38, 65:17-24, Iglecias Test. Trial Tr. vol. 38, 287:14-288:18.

<sup>548</sup> *Penry*, 178 S.W.3d.

<sup>549</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 779 (2001).

a “broken brain.””<sup>550</sup> Sometimes, she forced his siblings to watch her while she was torturing him, and to laugh as he cringed with pain.<sup>551</sup>

Throughout Johnny’s childhood, his mother used to lock him in a pantry, leave him there for several hours at a time, and give his siblings instructions to never let him out, not even to use the bathroom, ‘no matter what noises, what banging, what screaming, what crying’.<sup>552</sup> While Johnny was locked in the pantry, Shirley would go out drinking with her sister, leaving him and his siblings alone for several hours, and return late at night visibly intoxicated.<sup>553</sup> On top of physically abusing, humiliating, and torturing Johnny, Shirley kept him out of school and deprived him of the education and support he desperately needed during his developmental years. As a result of his intellectual disability and lack of education, Johnny’s development was extremely delayed. At the age of seven, Johnny would only communicate with single words, such as ‘eat’, ‘no’, and ‘please’, and would be fed like an infant.<sup>554</sup> As his cousin explained, ‘he’d have food that was cut up on a plate and eat with his hands, or he had baby food fed to him like a baby would, out of baby food jars’.<sup>555</sup>

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<sup>550</sup> *Penny*, 178 S.W.3d at 796; Gonzalez Test. Trial Tr. vol. 49, 71:7-75:24, Trudy Ross Test. Trial Tr. vol. 49, 148:24-158:19, 166:24-171:11; Kasicky Jr. Test. Trial Tr. vol. 47, 186:16-197:1, Barnett Test. Trial Tr. vol. 47, 163:7-166:14.

<sup>551</sup> Dr. Pincus Test. Trial Tr. vol. 51, 240:5-9.

<sup>552</sup> Kasicky Jr. Test. Trial Tr. vol. 47, 202:5-7.

<sup>553</sup> *Ibid.*, 191:2-192:5.

<sup>554</sup> *Ibid.*, 206:2-7.

<sup>555</sup> *Ibid.*, 207:8-10.

Several adult witnesses, including Penry's father, were aware of, or at least suspected, that Johnny was being abused by his mother.<sup>556</sup> However, only one neighbour, Billie Johnson, tried to stop her by contacting the Child Protection Services.<sup>557</sup> Unfortunately, the call only led to a brief visit to the Penry residence on the part of the local constable, who did not take further action with regard to the abuse allegations.<sup>558</sup> Most strikingly, when Johnny enrolled at Mexia State School, an institution for mentally retarded children, the employees discovered several scars on his head but failed to report the incident to the authorities, despite the fact that he explained to them that they were the result of his mother's beatings.<sup>559</sup>

To explain to the jury the impact of Shirley's abuse and neglect on Johnny's future behaviour, the defence presented a number of expert witnesses. In line with the communitarian notion of criminal responsibility advocated by social reformers, the defence experts stressed the negative impact institutional neglect can have on children's emotional development and social adjustment, especially when other sources of support are lacking. For example, Jan Vogelsang, a clinical social worker hired to conduct a biopsychosocial evaluation and a risk assessment, stressed that besides being physically abused and tortured throughout his life, Johnny was deprived of the community support which could have shielded him from the negative consequences of his violent family environment. In abusive and neglecting families, Vogelsang explained, the community can play a crucial role by providing children with a safeguard net:

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<sup>556</sup> Trudy Ross Test. Trial Tr. vol. 49, 233:10-234:15, Vogelsang Test. Trial Tr. vol. 50, 105:21-107:18.

<sup>557</sup> Johnson Test. Trial Tr. vol. 47, 255:17-258:8.

<sup>558</sup> Vogelsang Test. Trial Tr. vol. 50, 105:21-107:7.

<sup>559</sup> *Ibid.*, 135:8-137:14.

for children who are living in a home that is unsettled, or a home that is violent or a home that has a lot of conflict and problems, the community is often the last resort for that child. What happens when they walk out the door can make a difference in their lives. If the community has schools and churches, has good neighbours, has friends, has social services, services for children with special needs programs, community activities, those are the kind of things that can make a real difference in a child's life, if there are severe and chronic problems in the family that are ongoing.<sup>560</sup>

The community in which the Penrys lived, Baicliff, had none of these characteristics. On the contrary, in the 1950s when 'the petrochemical plants came in... it became a community that basically had a constable, a justice of the peace, a gas station, a school and a church.'<sup>561</sup> The place tended to attract 'families who were down on their luck, sometimes people who were running from the law', and offered neither the law enforcement nor the kinds of services that could help a child like Johnny find an external source of help and support.<sup>562</sup> As a result, he was left alone to deal with his mentally ill mother's bizarre abuses, amongst the indifference of the adults surrounding him. The accumulation of risk factors coupled with the absence of protective factors in Johnny's life, Vogelsang concluded, undermined his already impaired ability to form judgement, make rational decisions, and control his impulses.<sup>563</sup> Hence, '[w]ithout institutionalisation, structure and supervision, he was at high risk to cause harm'.<sup>564</sup>

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<sup>560</sup> *Ibid.*, 99:2-13.

<sup>561</sup> *Ibid.*, 100:3-6.

<sup>562</sup> *Ibid.*, 100:7-12.

<sup>563</sup> *Ibid.*, 182:14-186:12.

<sup>564</sup> *Ibid.*, 186:10-12.

Jonathan Pincus, a Professor of neurology at Georgetown University School of Medicine, confirmed Vogelsang's findings. He argued that Johnny suffered from a neurological impairment, and that it was the combination of this neurological condition with his intellectual disability and abusive family environment that had prompted his violent behaviour. 'The abuse generates the desire or the impulse toward violence', the doctor explained, while 'the disease of the brain that is represented by neurologic damage and mental illness, lessens the capacity of the person to check and impede that impulse and desire.'<sup>565</sup> According to his studies, 'two thirds of murderers have all three factors, and the others have two of the three'.<sup>566</sup> Challenging the 'not everybody argument' endorsed by the prosecution, the doctor explained that 'the three factors that I considered to be important in producing violence can each exist independently without producing it. It's when they combine that we have an electric situation.'<sup>567</sup>

The state challenged Penry's mitigating evidence on multiple grounds. Firstly, it minimised the extent of the abuse he suffered as a child and explained it as the result, not of the lack of love, understanding, and support of his parents, but of his own antisocial tendencies and uncontrollable behaviour.<sup>568</sup> Secondly, it argued that Penry was neither intellectually disabled nor brain damaged, and that the low IQ scores found in his old medical records were either the result of his careless and lazy attitude towards the test, or a deliberate attempt to manipulate the system by faking mental

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<sup>565</sup> Dr. Pincus Test. Trial Tr. vol. 51, 146:23-147:2.

<sup>566</sup> *Ibid.*, 148:11-13; see Lewis et al (1988a, 1989).

<sup>567</sup> Dr. Pincus Test. Trial Tr. vol. 51, 191:19-22.

<sup>568</sup> Asst. Dist. Att'y Hon Cl. Arg. on Punishment vol. 58, 37:21-39:10.

retardation.<sup>569</sup> To support these claims, the state experts argued that, from an early age, Penry suffered from a conduct disorder - a natural precursor of APD in adulthood - which inclined him to engage in pre-delinquent behaviour, lie, and manipulate others.<sup>570</sup> This diagnosis enabled the prosecution to argue that some of Shirley's abusive actions, such as locking Johnny up in the pantry, were a criticisable, albeit understandable, reaction to his uncontrollable behaviour, rather than an indication of her parental failures. State expert Dr. Edward Gripon's testimony provides an illustrative example of this kind of reasoning:

Q. We talked about serious violations of the rules, often staying out at night despite parental prohibitions and things of that nature, returning away from home several times, being truant from school and so on. Have you seen instances of that in John Paul Penry's records?

A. Yes. The records reflect actually that he was locked in at night in order to keep him from leaving. Not exactly a parental response I would applaud, but apparently that was what was felt to be necessary at the time.

Q. Parents were afraid he would wander around in the neighbourhood... and get in trouble?

A. Apparently, they felt... that they couldn't control him unless they locked him up.<sup>571</sup>

Besides undermining the mitigating effect of Penry's history of abuse, the diagnosis of conduct disorder allowed the state to challenge the reliability of the results of the numerous IQ tests Penry had taken over the years. According to defence expert Dr. Saunders, Penry's personality disorder artificially lowered his IQ scores, regardless of his effective level of intelligence:

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<sup>569</sup> Dr. Gripon Test. Trial Tr. vol. 46, 37:4-22, 46:7-17, 48:22-50:10.

<sup>570</sup> Dr. Saunders Test. Trial Tr. vol. 43, 213:2-218:4.

<sup>571</sup> Dr. Gripon Test. Trial Tr. vol. 46, 52:10-53:1.

Q. That conduct disorder could interfere with a true evaluation of his IQ?

A. Yes... generally speaking, there's oftentimes a lack of motivation, they just don't care, they're easily distracted and are not - are not reinforced by external rewards... they may be more apt to follow impulses or kind of internal drives and impulses and act on them as opposed to conducting themselves appropriately and following the rules.

Q. Such as, just decide I don't want to do it?

A. Right.

Q. I can do it, but I don't want to?

A. I can, right.<sup>572</sup>

Even if one were to concede that Penry was effectively mentally retarded, the state argued, his low IQ scores were due to his lack of education and social deprivation, not to an organic condition as suggested by the defence.<sup>573</sup> By proving this association, the state could claim that, given his disruptive behaviour at home and in school, Penry was responsible for his poor achievements, and that neither organic dysfunctions nor parental and institutional neglect could be blamed for his antisocial conduct in adulthood. Asst. DA William Hon forcefully advocated this view in his closing argument on punishment,

was he educationally and socially deprived? I think he probably was during the time period... but... he was not neglected. He was placed in school. His behaviour got him kicked out... He was not neglected by the state. I don't think the state of Texas has anything to feel guilty about in any respect in terms of the type of service this man was provided over the years.<sup>574</sup>

Leveraging the stigma associated with a diagnosis of conduct disorder and APD, the state could claim that Penry's criminal acts were the result of his 'bad character', rather

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<sup>572</sup> Dr. Saunders Test. Trial Tr. vol. 43, 236:25-237:16.

<sup>573</sup> Dist. Att'y Price Quest. Dr. Price Test. Trial Tr. vol. 52, 124:14-125:13.

<sup>574</sup> Asst. Dist. Att'y Hon Cl. Arg. on Punishment Trial Tr. vol. 58, 39:11-16, 22-25.

than of a failure on the part of his family and community to give him the necessary care and support. In so doing, the state managed to turn each piece of mitigating evidence presented by the defence into further proof of Penry's wicked nature and propensity for future violence, and to persuade the jury to impose a death sentence.

*e. Race, Stigma, and Future Dangerousness*

The historical stigma associating ethnic minorities with a higher propensity for future violence makes a diagnosis of APD particularly prejudicial for African Americans and Hispanics accused of capital murder. Research has consistently shown that the American public tends to see Hispanics and African Americans as more violent and dangerous than whites, a longstanding prejudice rooted in the country's history of racial conflict and in recent developments in criminal justice policy (Hicks 2004: 23). These racist prejudices powerfully influence the ways in which criminal justice officials interpret African Americans' criminal behaviours in legal settings. As argued in Chapter 1, criminological investigations have shown that while US legal institutions tend to interpret white women's violent acts as a symptom of mental disorder, when African Americans engage in similar behaviours criminal justice officials tend to frame them as the natural expression of offenders' 'dangerous personalities', rather than as a possible manifestation of an underlying mental health condition (Sniderman & Piazza 1993; Quillian & Pager 2001; Chiricos & Eschholz 2002). Lay individuals seem to share this perception, as demonstrated by their disproportionate use of diagnoses such as conduct disorder and APD - two conditions directly linked with antisocial traits - to describe African Americans in mock forensic psychiatric evaluations (Hicks 2004: 22-

23; see Kilgus, Pumariega & Cuffe 1995; Iwamasa, Larrabee & Merritt 2000; DelBello et al 2001). This deep-rooted prejudice emerges particularly prominently in capital punishment proceedings, where both the race of the defendant and the race of the victim have been found to powerfully influence jurors' perceptions of the defendant's potential for future violence (Baldus et al 1997; Haney 2005).

The 'law and order' rhetoric promoted by the conservative establishment played a central role in strengthening the cultural association of blackness, violence, and criminality in the last quarter of the 20<sup>th</sup> century (Radelet & Vandiver 1986; Zimring 2004; Wacquant 2009; Alexander 2010; Perkinson 2010; Campbell 2011, 2012). As the abolition of Jim Crow segregation laws fuelled anti-black sentiments, republicans started framing drugs as the leading security issue of the time and linking it to failed welfare programs and urban blacks in the public imagination (Perkinson 2010: 296-299, 303-304, 334-337). These arguments were accompanied by the development of discriminatory penal policies such as the Anti-Drug Abuse Act of 1986 which, by imposing harsher sentences on predominantly African American crack cocaine users, led to the disproportionate growth of the black prison population and to the reinforcement of racial stereotypes linking blackness with violence in the American collective consciousness (Perkinson 2010: 336; see Hallinan 2003: 45; Mauer 2006: 61, 155-56; Abramsky 2007: 54; Wacquant 2009; Bosworth 2009; Alexander 2010).

The structure of the Texas capital sentencing statute allowed these racial stereotypes to have a direct bearing on jurors' sentencing decisions in death penalty cases tried in this jurisdiction. As post-1970s US penal policies led to the

disproportionate targeting of African Americans, race became a chief determinant of the number of contacts with the criminal justice system likely experienced by an individual during his lifespan (Harcourt 2015: 238-240). Modern risk assessors consider a long criminal record as the most powerful predictor of future criminal behaviour, and Texas courts have routinely legitimised future dangerousness predictions based on similar assumptions. Given African Americans' higher likelihood to be caught in the criminal justice system, it follows that, by focusing on defendants' criminal records, risk assessors have effectively placed race at the heart of their future dangerousness predictions. This aspect has proven particularly prejudicial for ethnic minorities tried in Texas courts, given the centrality of the future dangerousness question for jurors' sentencing determination in this jurisdiction.

Post-*Furman* investigations into Texas' sentencing patterns have consistently confirmed that the racist stereotypes associating blackness with violence have a powerful influence on jurors' decision to impose a death sentence. For example, Sheldon Ekland-Olson (1988) compared the racial composition of the Texas' death row population with that of the state's arrests in the period between 1974 and 1983, and found that offenders killing white victims were more likely to be sentenced to death regardless of the circumstances of the offence (see also Bowers & Pierce 1980). In particular, black males accused of raping and killing white females were almost five times more likely than average to receive a death sentence, making this offender group the most represented category on Texas death row in the nine-year-period under analysis. Given the centrality of the future dangerousness question in the Texas capital sentencing statute, the disproportionate imposition of death sentences on black

defendants killing white victims speaks directly to the existence of a powerful racial prejudice associating blackness with violence amongst Texas jurors.

When an African American or Hispanic defendant is diagnosed with APD, the stigma linking ethnic minorities with a propensity for future violence is exponentially amplified. The prejudicial effect of such stigma in Texas courts is further intensified by experts' tendency to provide decontextualized accounts of defendants' personal history, which denotes a general sociological insensitivity towards broader patterns of racial discrimination and a tendency to medicalise social issues. The following sections will examine two cases which clearly illustrate this trend and argue that, given the prejudicial nature of defendants' accounts and the cultural context in which the trials occurred, the defendants' race, coupled with experts' tendency to apply stigmatising labels while failing to contextualise defendants' behaviours and rationalisations, likely played a role in jurors' perception of the defendant's future dangerousness and in prompting them to impose a death sentence.

#### Samuel Hawkins: The 'Black Rapist'

The case of Samuel Hawkins provides an illustrative example of the ways in which experts' tendency to medicalise social issues can increase the stigma associated with a defendant's minority status.<sup>575</sup> Hawkins, an African American man, was convicted for the kidnapping, attempted rape, and murder of a 12-year-old white girl, Rhonda Keys,

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<sup>575</sup> *Hawkins*, 613 S.W.2d.

in Amarillo, Texas, in January 1981 and sentenced to death. Hawkins plead not guilty by reason of insanity and asked to represent himself in his trial proceeding, a particularly striking request given the defence he was trying to pursue. The court warned the defendant of the risks involved in self-representation, but granted his request following a competency hearing which found him mentally competent to stand trial.<sup>576</sup> For the first time in Texas history, a capital defendant was going to represent himself in his trial proceedings.

To support his insanity defence, Hawkins testified on his own behalf in narrative form. In his statement, he gave a detailed and disturbing account of his life, claiming that his criminal act was due to an uncontrollable sexual drive which, from the age of 12, had prompted him to engage in various illicit sexual activities in a desperate attempt to tame his impulses.<sup>577</sup> According to his own account, Hawkins grew up in a strict and religious family in a rural area near Wadley, a small town in Georgia. His father was a preacher in a Pentecostal Holiness Church and was very submissive to white people. There were only two rules in their family: go to church and obey white people's orders; if any of these rules were disobeyed, beatings would follow for both his wife and children.<sup>578</sup> During his life in Georgia, Hawkins explained, his family and generally African American people 'suffered a lot of domination by whites' and the schools and services provided for blacks were significantly inferior to the ones offered to whites.<sup>579</sup>

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<sup>576</sup> *Ibid.*, 722-723.

<sup>577</sup> Hawkins Test. Trial Tr. vol. 9, 1678:20-1679:2.

<sup>578</sup> Def's Ex. 1, 7-page Handwritten Statement by Mr. Hawkins, 1958-1959.

<sup>579</sup> Hawkins Test. Trial Tr. vol. 9, 1679:2-4.

From childhood, Hawkins' uncontrollable sexual urges prompted him to masturbate obsessively, seek relief through sexual relations with animals, and sexually molest his younger sisters.<sup>580</sup> To control his sexual obsession, he got fanatically involved in his father's religion, becoming a preacher himself and following strict rules regarding drinking, smoking, and cursing.<sup>581</sup> As he grew up, his sexual urges became increasingly overwhelming, causing him significant difficulties in terms of employment and social adjustment.<sup>582</sup> He was fired from multiple jobs because of his sexual misconduct, which went from obscene acts such as public masturbation, to actual sexual assaults. His uncontrollable sexual drive, coupled with his religious fanaticism, prompted strong feelings of guilt, inferiority, and depression, which led him to seek psychiatric help.<sup>583</sup> He went through several months of therapy but, like his religious commitment, the medical treatment did not improve his ability to control his sexual urges.

In an attempt to escape from his daunting sexual impulses, Hawkins moved from town to town, in the hope that a change of scene would calm his inner feelings.<sup>584</sup> However, his urges remained unchanged, prompting him to commit a series of rapes in each town he visited. When he was arrested for the attempted rape and murder of Rhonda Keyes, he admitted to raping 13 women, and to killing two of them, just in Amarillo.<sup>585</sup> The seriality of his sexual assaults, coupled with his *modus operandi* - he

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<sup>580</sup> *Ibid.*, 1679:5-18, 1680:10-13.

<sup>581</sup> *Ibid.*, 1679:10-1680:9.

<sup>582</sup> *Ibid.*, 1682:19-1683:22.

<sup>583</sup> *Ibid.*, 1682:11-18, 1684:2-1685:16.

<sup>584</sup> *Ibid.*, 1686:16-24.

<sup>585</sup> *Ibid.*, 1686:25-1687:3.

always raped white women in their home while pushing a pillow on their face to avoid detection - gained him several media nicknames, including the 'Traveling Rapist', the 'Black Rapist', and the 'Pillow Rapist'.<sup>586</sup>

As his multiple attempts to control his impulses failed, Hawkins started thinking that he had become an instrument of God and that his rapes were a means to fulfil a divine mission:

God was the cause and reason for my sex drive and was using me and that in his own time would set me free. I thought I had no choice but submit to his will. I compared my case to several other cases where God did so with other men. My victims were white so I thought that God had a mission for me to fulfil with whites and that it would later open eyes to end prejudice.<sup>587</sup>

Hawkins did not feel responsible or guilty for the crimes committed, because he believed that he was helping God to bring social justice through an act of revenge against the white oppressor. This belief made particular sense in light of a statement made by his father to him as a little boy: 'the best way to get to the white man [is] through his women'.<sup>588</sup> This statement was repeated several times at trial, by Hawkins himself as well as by the expert witnesses, an aspect that likely prompted strong feelings of anger in the white audience and jurors alike, especially if one considers Texas' long history of racial tensions and the punitive approach taken by jurors against black defendants for raping and killing white victims in this jurisdiction.

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<sup>586</sup> Boyett Jr. Test. Trial Tr. vol. 9, 1731:15-25.

<sup>587</sup> Def's Ex. 1, 7-page handwritten statement by Mr. Hawkins, 1961-1962.

<sup>588</sup> Dr. Wall Test. Trial Tr. vol. 9, 1758:24-25.

Besides providing his own testimony, the defendant called Dr. Richard Lee Wall, a clinical psychologist who had examined him while in jail, to testify as to his mental condition. Following his evaluation, the expert concluded that Hawkins suffered from paranoia, a condition associated with delusions of persecution and feelings of grandeur and was therefore legally insane.<sup>589</sup> In the psychological report presented in evidence, the expert explained Hawkins' delusional system in the following terms:

In this delusional system, whites have oppressed the blacks for a long period of time just as the Egyptians oppressed the Jews. As in biblical times when God appointed prophets and others to gain the release of the Jews, so God has appointed some black people today to gain the blacks release from white oppression. His attack of the young lady in question was in his mind simply carrying out his assigned task as one of God's appointed. He remembers his father saying that the best way to get to the white man is through his women.<sup>590</sup>

As this passage shows, rather than framing Hawkins' desire for revenge as a member of the black community as a conceivable, albeit violent, reaction to unjust social conditions, the doctor interpreted it as a symptom of a complex psychiatric pathology. In so doing, he transformed Hawkins' reference to African Americans' history of oppression into a delusional belief without foundation in history and fact, thereby delegitimising his feelings of frustration and outrage against the white community.

The state provided a similarly decontextualized account of Hawkins' rationalisations. Using a well-established prosecutorial strategy, it challenged the credibility of Hawkins' delusions and hallucinations by labelling him as an incorrigible

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<sup>589</sup> *Ibid.*, 1754:23-1755:2, 1756:2-6, 1757:22-1758:2.

<sup>590</sup> Def's Ex. 4, Psychological Summary from Dr. Richard Lee Wall on Samuel Hawkins, Date of Examination January 16 and 17, 1978, 1962§5.

sociopath with a pathological tendency to lie.<sup>591</sup> By framing Hawkins' thoughts, feelings, and behaviours as a simple manifestation of his antisocial tendencies, the state undermined the complexity of Hawkins' social background and the role played by his minority status, peculiar parental education, and pathological sexual urges in prompting his criminal acts. In this essentialised description, while Hawkins' rapes were nothing but the expression of his hedonistic search for pleasure, his explanations were calculated strategic devices used to manipulate the audience and escape responsibility for the crimes committed.<sup>592</sup>

As decades of social scientific research has shown, the lives of African American capital defendants are replete with harsh and brutalising experiences associated with their minority status, with irreparable consequences for their psychological well-being and future conduct (Haney 1995: 579-583). These brutalising experiences are often exacerbated by the socio-economic disadvantage under which most African Americans are brought up, an aspect which deepens the stigma associated with blackness, while heightening 'the sense of injustice, the righteous outrage that develops in what one commentator has termed a "subculture of exasperation"' (Harvey cited in Haney 1995: 582). Given the social context in which Hawkins grew up, and the nature and content of his 'delusions', it is reasonable to speculate his life might have been characterised by similarly brutalising experiences and disadvantaged conditions, and that his desire for revenge against the white oppressor could be the result of the continuous humiliation suffered by him and his community during his formative years.

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<sup>591</sup> Dr. Grigson Test. Trial Tr. vol. 9, 1811:13-1816:16.

<sup>592</sup> *Ibid.*, 1816:17-1818:24.

While this contextual analysis in no way excuses Hawkins' criminal behaviour, it does help explain it. Hence, its complete lack of discussion at trial strikes as a deliberate attempt at silencing the role played by racial injustice and oppression in fostering violent reactions amongst the African American community. In particular, psychiatrists' attempt at labelling Hawkins' mission to 'end racial prejudice' through violent sexual attacks against white women as a simple symptom of paranoia or as a manifestation of his sociopathic personality disorder, strikes as a sociologically insensitive medical strategy which systematically ignores the social context while reframing the defendant's thoughts, as well as his criminal acts, as symptoms of a medical condition or personality defect, rather than as an extreme form of social protest. These medical techniques, coupled with the stigma associated with Hawkins' minority status and alleged personality disorder, likely increased jurors' perception of Hawkins' future dangerousness, powerfully tipping the scales in favour of death.

#### Steven Alvarado: The Hispanic Gang Member

The trial of Steven Bryan Alvarado provides another powerful example of the ways in which a diagnosis of APD, coupled with experts' failure to highlight the role played by the defendant's social background in prompting his antisocial tendencies, can increase jurors' perception of the defendant's future dangerousness.<sup>593</sup> Alvarado, a 17-year-old Hispanic man, was convicted for the murder of two drug dealers, Manuel Sustaita and his mother Carmen Sustaita in El Paso, Texas, in 1995 and sentenced to death.<sup>594</sup>

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<sup>593</sup> *Alvarado*, 912 S.W.2d.

<sup>594</sup> *Ibid.*, 203-204.

According to the state's version of the facts, Alvarado and two accomplices had gone to the Sustaita's residence armed with kitchen knives with the intent of killing the Sustaitas because they had allegedly 'cheated' in a drug deal.<sup>595</sup> The defendant had then 'intentionally and unjustifiably killed Manuel Sustaita' while his two accomplices killed the other victim.

The defence did not raise an insanity claim. However, it presented extensive mitigating evidence suggesting that Alvarado was a paranoid schizophrenic with a severe drug addiction and a learning disability,<sup>596</sup> who grew up without a stable father figure,<sup>597</sup> and was physically and verbally abused by his mother throughout his childhood.<sup>598</sup> The state counteracted this mitigating evidence by emphasising Alvarado's history of antisocial behaviour.<sup>599</sup> According to the state witnesses, from early adolescence, Alvarado had been implicated in a series of violent conflicts with his mother, which on numerous occasions led to police involvement and, in one instance, to the defendant's hospitalisation.<sup>600</sup> Connie Edgemon, a psychological associate from Big Spring State Hospital, examined Alvarado as part of a protective custody order following one of these violent episodes.<sup>601</sup> She argued that the defendant, who at the

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<sup>595</sup> *Ibid.*, 207.

<sup>596</sup> Def. Att'y Gates Op. Arg. on Punishment Trial Tr. vol. 38, 5:1-21, Dr. Follett Test. Trial Tr. vol. 38, 168:1-17, 164:24-165:21, 171:17-172:8.

<sup>597</sup> Dr. Follett Test. Trial Tr. vol. 38, 170:20-171:16.

<sup>598</sup> Iglecias Test. Trial Tr. vol. 38, 242:20-249:22.

<sup>599</sup> Gagnon Test. Trial Tr. vol. 38, 10:7-15:3, Meyers Test. Trial Tr. vol. 38, 53:4-54:12, Nava III Test. Trial Tr. vol. 38, 148:7-150:4.

<sup>600</sup> Williams Test. Trial Tr. vol. 38, 24:6-26:3, 33:4-40:5, 43:8-15, Plaza Test. Trial Tr. vol. 38, 124: 12-126:21.

<sup>601</sup> Edgemon Test. Trial Tr. vol. 38, 58:19-20.

time was only 15, was a violent and dangerous individual with a ‘full blown anti-social personality disorder’.<sup>602</sup> During the interview, Alvarado revealed disturbing details about his past antisocial activities. He told her that he abused and sold intravenous drugs, sold illegal weapons, and had assaulted people with a knife.<sup>603</sup> Most strikingly, he bragged that he was a member of a satanic coven, and that during one of its rituals he had personally ‘engaged in cutting the fat and genitals off live infants and pouring hot wax into their eyes’.<sup>604</sup> Besides boasting about his criminal past, Alvarado denied having suffered abusive behaviours from his family members or having experienced academic difficulties at school, all aspects which were challenged by both lay and expert witnesses and which could have worked to his advantage at sentencing.<sup>605</sup>

At first glance, the image projected by Alvarado seems to be entirely consistent with a diagnosis of APD. However, a closer analysis of his social background suggests that Alvarado might have sensationalised some of his accounts in order to project a ‘macho’ image of power and invulnerability. The evidence presented at trial suggests that the defendant was a member of a Mexican-American criminal street gang in El Paso, ‘Los Midnight Locos’, which was known to the authorities for its involvement in drug trafficking and other criminal activities.<sup>606</sup> A number of studies have shown that members of Hispanic street gangs, especially if involved in the consumption and selling

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<sup>602</sup> *Ibid.*, 62:18-19.

<sup>603</sup> *Ibid.*, 69:19-70:15.

<sup>604</sup> *Ibid.*, 70:19-23.

<sup>605</sup> *Ibid.*, 65:17-24, 80:14-81:1; contra Iglecias Test. Trial Tr. vol. 38, 239:19-241:2, 242:20-249:22, Dr. Follett Test. Trial Tr. vol. 38, 171:17-172:8.

<sup>606</sup> Williams Test. Trial Tr. vol. 38, 40:16-41:1.

of intravenous drugs, tend to project a 'macho' image consistent with the one projected by Alvarado in order to establish their power and prominence on the streets (Quintero & Estrada 1998: 152-153). In this group of men, machismo is seen as a collection of hypermasculine traits based on dominance and aggression, which includes 'fighting, drinking, performing daring deeds, seducing women, asserting independence from women, and... bragging about escapades' (Casavantes 1976: 149).

For individuals spending most of their time on the streets buying, selling, and consuming drugs, an attitude of dominance, pride and aggression becomes critical for the establishment of the reputation and defences necessary to avoid constant victimisation and exploitation. In this context, controlling the production and distribution of drugs, while showing a willingness to confront threats and fight challengers, contributes to projecting an image of toughness which helps drug addicts navigate 'a life-world in which others constantly seek to exploit vulnerability for personal advantage' (Quintero & Estrada 1998: 155-156, 158). Alvarado's criminal history, his boastful behaviour during his mental health evaluations, his defiance of police authorities, and his continuous bragging about his drug dealings and violent activities are all consistent with this kind of image.

What made Alvarado's 'machismo of the street' particularly problematic in the context of his psychiatric evaluations was that it contributed to a medicalisation of his behaviour through his labelling as an antisocial personality and paranoid schizophrenic. As mentioned above, Alvarado was a young drug addict affiliated to a local Mexican gang; an aspect that should have alerted the mental health professionals who examined

him to the possibility that his arrogant and aggressive attitudes during the interview might be part of an entrenched habit aimed at exerting power and dominance over others as a strategy of identity affirmation and street survival. These aspects were further exacerbated by Alvarado's history of abuse, which likely made him more inclined to use violence and dominance as a means to protect himself after years of repeated domestic victimisation.

Research into gang membership has shown that difficult socioeconomic backgrounds and toxic family environments play a central role in fostering a culture of violence and aggressiveness amongst urban youth (Haney 1995: 585-588). Hence,

a given gang member's display of aggressive traits or involvement in violent exchanges is not necessarily pathological; rather it is appropriate behaviour in an environment whose socioeconomic conditions are pathological (Jankowski 1991: 312).

In cities such as El Paso, where Alvarado grew up, social and political factors such as 'institutionalized racism, economic exploitation, and the violence of poverty and deprivation' play a crucial role in pushing young Hispanic men towards drug use and gang involvement, and in making 'certain aspects of machismo a necessary means of engaging in certain social-life worlds' (Quintero & Estrada 1998: 163).

If read against this complex background, Alvarado's history of antisocial conduct, along with his attitude during the mental health evaluations, acquire a different light. However, none of the mental health professionals who examined Alvarado over the years ever considered his behaviour in view of his social and cultural

context. For example, defence expert Dr. William Follett, an experienced psychiatrist from El Paso, recognised that Alvarado might have exaggerated some of his accounts, particularly the ones associated with his membership of the satanic coven, to project an image of power and domination.<sup>607</sup> However, rather than explaining them as a possible manifestation of the ‘street machismo’ typically found amongst drug addicted gang members, he framed them as the product of phantasies and delusions associated with an underlying psychosis:

During the course of the examination, [Alvarado] had some rather bizarre fantasies which he gradually and painstakingly revealed to me. This was not at all the type of examination where he came out with all of these things like saying, ‘I am crazy, doc, and I need to get off for what I have done’ in terms of responsibility. He very freely admitted doing things that are against the law and also several things that we felt, both Dr. Gifford and I, the other psychiatrist that examined him, felt that he may even be making up things as maybe part of his illness where, of course, we are not clear on that whether he did some of these things or not, but that was the extent of it. It was just too much, it seemed like.<sup>608</sup>

Dr. Follett’s diagnosis helped cast some doubt on the reliability of Alvarado’s alleged involvement in satanic ritual abuses, a particularly important function given the national hysteria surrounding these practices at the time of the proceedings (see, e.g., Lanning 1992; Stidham, Fitzgerald & Baldwin 2012: 1074-1081; Hughes 2017: 691). However, by pathologizing Alvarado’s attitudes and behaviours, the doctor unwittingly supported the stereotyped image of sickness and unreliability typically associated with mentally ill individuals in the 1990s, while minimising alternative sociological accounts which could have challenged this association.

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<sup>607</sup> Dr. Follett Test. Trial Tr. vol. 38, 166:2-12.

<sup>608</sup> *Ibid.*, 161:25-162:14.

While Dr. Follett questioned the reliability of Alvarado's accounts, the state experts took his statements at face value. In their view, Alvarado's bragging attitude was nothing but a typical manifestation of his antisocial personality, manipulative tendencies, and narcissistic traits, and an additional indication of his criminalistic tendencies.<sup>609</sup> For example, state expert Dr. Richard Coons, an Austin based psychiatrist with extensive experience in capital cases, emphasised that narcissists are 'full of themselves, they brag, they - they want to be a big shot and act like it', all attitudes consistent with Alvarado's behaviour during his evaluation.<sup>610</sup> The defendant's gang membership and macho attitudes, coupled with their labelling as typical expressions of an untreatable personality disorder, projected an image of criminality, dangerousness, and incorrigibility which likely played a pivotal role in jurors' decision to impose a death sentence.

By medicalising Alvarado's personality and behaviours, the expert witnesses denied the jury the possibility to consider the defendant's antisocial past in light of the difficult life circumstances associated with his ethnic background, socioeconomic conditions, and family history. While these background considerations might have been insufficient to secure Alvarado a life sentence, they would have given the jury the necessary context to evaluate the credibility of the evidence adduced by the defendant regarding his antisocial past, and to use these considerations to make an informed assessment as to the defendant's future dangerousness at sentencing.

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<sup>609</sup> Edgemon Test. Trial Tr. vol. 38, 66:24-67:7, 68:23-69:11, Asst. Dist. Att'y Morgan Quest. Dr. Follett Test. Trial Tr. vol. 38, 186:14-187:16, Dr. Coons Test. Trial Tr. vol. 39, 336:18-337:12.

<sup>610</sup> Dr. Coons Test. Trial Tr. vol. 39, 337:6-8.

## Conclusion

The legal developments which transformed the United States' capital sentencing schemes in the last quarter of the 20<sup>th</sup> century created a powerful legal paradox in Texas courts. On the one hand, the US Supreme Court's post-1976 capital punishment jurisprudence encouraged defendants to present a wide range of mitigating evidence at punishment which could prompt jurors to impose a life verdict. On the other hand, by focusing the sentencing decision exclusively on the future dangerousness question, the Texas capital sentencing statute effectively undermined jurors' ability to give effect to such evidence, unless directly connected to the crime committed or relevant within the ambit of the future dangerousness issue.

This legal paradox had dramatic consequences for mentally disordered capital defendants tried in the 1980s and 1990s. Inspired by the punitive political climate of the time, and emboldened by the advantages presented by the Texas capital sentencing scheme, prosecutors were able to successfully exploit a diagnosis of APD to show that most defendants could represent a continuing threat to society, and secure death sentences in a number of cases where the defendant's mental health condition and difficult family upbringing might have warranted a more merciful response. In contrast, defence attorneys' attempts at humanising defendants by demonstrating that they suffered from a 'chemical imbalance' in the brain and/or had suffered tremendous abuse during their childhood were often strikingly ineffective. The reasons for this unsuccess are both related to the disadvantages related to the Texas capital sentencing scheme, which allowed prosecutors to turn such evidence into an additional indication

of the defendant's propensity for violence, and to the social stigma associated with mental health conditions linked to organic causes.

As happened in previous decades, the interpretation of the intersection of mental illness and crime advanced by Texas attorneys and mental health experts in the 1980s and 1990s was powerfully influenced by the historical developments of the time. Taken together, these legal, political, and scientific changes fostered the creation of an essentialised version of the criminal subject, seen either as a mentally ill and biologically different being devoid of personal agency and in constant need of monitoring, or as an inherently evil personality, incapable of feeling basic moral emotions, immune to any rehabilitative intervention, and likely to reoffend at the first available opportunity. By detaching defendants from their social and cultural backgrounds, these essentialised descriptions fostered an ontological association between the defendant and the criminal act, while denying jurors the possibility to situate the crime within the broader circumstances surrounding the event.

Defence attorneys and mental health professionals drawing from communitarian notions of criminal responsibility tried to challenge this ontological association. By emphasising the sociological origins of criminal behaviour, advocates of the communitarian framework hoped to make a conceptual separation between the defendant and the criminal act itself and hold Texas institutions accountable for their failure to provide defendants with the necessary care during their formative years. Moreover, by emphasising the importance of community support for children's healthy development and social adjustment, these actors hoped to demonstrate that, if placed

in different social contexts, most capital defendants had the potential and ability to change, regardless of their mental health issues and antisocial past. However, as the outcome of the cases analysed in this chapter have shown, the individualist framework dominating public debate in the 1980s and 1990s, coupled with Texas courts' concern with future dangerousness and incapacitation, meant that, in most instances, these arguments were insufficient to convince jurors to spare defendants' lives, no matter how compelling the mitigating evidence presented.

## CONCLUSION

This thesis has taken a critical approach to the analysis of scientific and legal knowledge. In line with a number of critical and cultural theorists, constructivists, and poststructuralists inspired by the postmodern challenge to scientific positivism and Western Enlightenment philosophy, this thesis has sought to problematise dominant psychiatric and legal frameworks, challenge their assumptions, and highlight their socially constituted nature (see Section 2 below). Deviating from traditional intellectual histories which tend to depict psychiatry and the law as increasingly sophisticated methods for the discovery of truth, this thesis started from the idea that ‘truth is unknowable’ and that the dominant psycho-legal discourse is only one among several ways of interpreting the world. The thesis’ historical journey through 20<sup>th</sup> century forensic psychiatric publications and Texas court documents has confirmed this initial assumption. In so doing, it has lent credence to the idea that rather than taking the dominant psycho-legal framework as the ultimate authority on issues of subjectivity, agency, and criminal accountability, one should see it as a subjective and partial interpretation of reality, which has acquired meaning and acceptance as it resonated with specific cultural codes shared by particular social groups (see Valverde 2009).

This conclusion will demonstrate how the thesis has supported this idea and advanced existing knowledge of the intersection of mental illness and criminal responsibility in courtroom settings. To accomplish these goals, Section 1 will restate the thesis’ answers to the research questions, Section 2 will highlight the thesis’

contributions to the field, and Section 3 will reflect on what questions this study was unable to answer and provide some suggestions for future research.

## 1. Has the Thesis Answered the Research Questions?

This thesis has sought to answer three main research questions. Firstly, how have psychiatric and legal developments spanning the 20<sup>th</sup> century influenced trial debates on defendants' mental health and criminal culpability in Texas death penalty cases? Secondly, how have dominant values and standards of behaviour affected expert and lay interpretations of mental illness and criminal responsibility in the scientific literature and in courtroom interactions? Thirdly, how have psychiatric and legal discourse contributed to the labelling of marginalised male offenders, and with what consequences for their fate in capital punishment proceedings?

### *a. Question 1. How Have Psychiatric and Legal Developments Spanning the 20<sup>th</sup> Century Influenced Trial Debates on Defendants' Mental Health and Criminal Culpability?*

This thesis has identified three main paradigmatic shifts which have transformed psycho-legal discourse on mental illness and criminal responsibility over the 20<sup>th</sup> century. The first paradigm, analysed in Chapter 5, covered the period between 1909 and 1952, and marked the emergence of biological explanations of criminal behaviour, heredity theories, and new assessment instruments aimed at the diagnosis of syphilis,

epilepsy, and feeble-mindedness. The second paradigm, covered in Chapter 6, focused on the 1952-1976 timeframe, and signalled the transition to psychoanalytic interpretations of mental illness and criminality which highlighted the role of early environmental influences on offenders' mental health and behaviour. The third paradigm, analysed in Chapter 7, concentrated on the 1976-2002 period, and identified a return to the medical model of disease which explained offenders' mental health conditions and deviant conduct as a result of a 'chemical imbalance' in the brain which could be treated with antipsychotic medications.

While these scientific developments powerfully informed expert witnesses' explanations of defendants' criminal acts in death penalty proceedings, their effectiveness in reducing defendants' criminal culpability in the eyes of the law was substantially impaired by psychiatry's epistemological and methodological limitations and by the legal questions experts were required to answer in Texas courtrooms. For example, defence psychiatrists operating within the biological paradigm often limited themselves to superficial descriptions of symptoms and diagnostic labels and were therefore ineffective in supporting legal insanity claims which required an explanation of the mechanisms connecting defendants' mental 'impairments' with their criminal conduct. Moreover, even when psychiatrists of biological or psychoanalytic orientation tried to trace the complex physiological and psychological mechanisms triggering defendants' criminal acts, their theories tended to support a defence of irresistible impulse rather than of legal insanity and were therefore ineffective in supporting defendants' legal exculpation in Texas courts. Finally, when defence experts tried to mitigate defendants' sentences by relying on the 'chemical imbalance' theory of the

brain, they unwittingly increased the public stigma associating mental illnesses with violent behaviours, an aspect which, given the centrality of the future dangerousness question for Texas' reformed capital sentencing statute, proved particularly fatal for defendants tried in late 20<sup>th</sup> century Texas proceedings. Whereas in the first two time periods the debate was powerfully shaped by the cognitive focus of Texas' right and wrong test, following the introduction of Texas' special issue questions the discussion came to be dominated by speculations surrounding defendants' potential for future violence.

*b. Question 2. To What Extent Have Dominant Values and Standards of Behaviour Affected Expert and Lay Interpretations of Mental Illness and Criminal Responsibility in the Scientific Literature and in Courtroom Interactions?*

The thesis has highlighted a series of cultural influences which have informed, shaped, and modified expert and lay discourse about mental illness and criminal responsibility over the 20<sup>th</sup> century. As argued in Chapter 5, early 20<sup>th</sup> century psychiatrists were powerfully influenced by Darwinian evolutionism, 'race science', and a puritan work ethic which prompted them to recast male offenders (particularly if African American or Catholic immigrants) as genetically inferior, intellectually and morally 'primitive', devoid of 'self-control' and ambition, and therefore more likely to succumb to their lower instincts and impulses. Similarly, as discussed in Chapter 6, psychoanalysts' explanations of offenders' behaviours were shaped by Freud's critique of Victorian parental education, his challenge to traditional codes of sexual morality, and by the emergence of a new culture of mass media, which prompted them to explain defendants'

mental illnesses and crimes as the result of excessively harsh parental discipline, latent homosexual drives, and a narcissistic need for recognition. Finally, as illustrated in Chapter 7, mental health professionals and legal actors operating in the last quarter of the 20<sup>th</sup> century were strongly influenced by the culture of fear, individualist notion of criminal responsibility, and the racialised depiction of dangerousness which was shaping political debates and criminal justice policy at the time, urging them to interpret defendants' offences as acts of deliberate choice stemming from their inherently wicked natures.

The notion of culture 'as a historical confluence of dominant and non-dominant expressions, alternatively existing in an antagonistic, cooperative, or neutral relationship with one another' (see Chapter 1: Section 3) has proven particularly helpful in elucidating these issues. Firstly, besides highlighting the dominant scientific and legal paradigms outlined above, this approach to cultural analysis has helped to identify alternative perspectives which were regularly silenced or ignored in Texas courts. For example, as argued in Chapters 4 and 7, starting from the assumption that jurors are more receptive to biological over socio-psychological explanations of mental illnesses and criminal behaviours, throughout most of the 20<sup>th</sup> century defence attorneys focused their strategies on the former at the expense of the latter. In so doing, they regularly failed to investigate defendants' family history and social background, while directing jurors' attention towards measurable symptoms which could be attributed to an organic cause. Along these lines, prosecutors used a number of strategies to silence defendants' voices in the process, such as asking state experts to base their opinions on hypothetical questions rather than on mental status examinations, or labelling defendants as

sociopaths with a natural tendency to lie, suggesting they are malingering or exaggerating their symptoms and distress in order to escape punishment.

Secondly, the notion of culture developed in Chapter 1 has helped to highlight that, while influenced by a shared framework of meaning, over the 20<sup>th</sup> century experts' interpretations of defendants' behaviours were regularly contested in Texas courtrooms. On the one hand, defence teams explained defendants' behaviours as the result of 'bad heredity', parental abuse, and institutional neglect, in order to 'distribute the blame' for the criminal event across a number of social actors. On the other hand, the state teams depicted these behaviours as a natural expression of defendants' 'wicked personalities', as demonstrated by their history of alcohol and drug abuse, past offences, and by the gruesomeness of the crime itself. While modified by the epistemological context of the courtroom, these conflicting explanations were strongly influenced by the ideological struggles dividing liberals and conservatives in public debates, with the former generally believing in offenders' ability to change and advocating rehabilitative interventions, and the latter seeing offenders' behavioural tendencies as immutable and therefore suggestive of a need for their permanent incapacitation.

*c. Question 3. How Have Psychiatric and Legal Discourse Contributed to the Labelling of Marginalised Male Offenders, and with What Consequences for their Fate in Capital Punishment Proceedings?*

The thesis has identified a number of instances in which psychiatric and legal discourse has contributed to the labelling of marginalised male offenders in a way that increases the public stigma attached to particular social groups while encouraging condemnatory attitudes amongst Texas jurors. For example, Chapter 5 has shown how early 20<sup>th</sup> century psychiatric theorists, expert witnesses, and the TCCA reinforced the social stigma attached to a diagnosis of syphilis through their arguments and opinions, supporting its original association with sexual promiscuity, moral dissolution, and poor self-control, and lending support to racist and classist arguments linking the spreading of the disease to the behaviour of African Americans and ‘lower grade’ whites. Along these lines, Chapter 6 elucidated how mid-20<sup>th</sup> century mental health professionals and legal actors have used the diagnosis of sexual psychopathy to conflate homosexuality with paedophilia, rape, and other sex-related offences, reinforcing the public’s moral outrage when confronted with deviations from the standards of heteronormativity, along with perceptions of homosexuality as an ‘unnatural’ sexual perversion. Finally, Chapter 7 has illustrated how late 20<sup>th</sup> century state experts and prosecutors have leveraged the diagnosis of sociopathy or APD to depict capital defendants as inherently wicked, manipulative, and irredeemable, supporting public perceptions of the criminal as a monster and predator, always ready to attack the next prey and therefore in need for permanent incapacitation. By using psychiatric labels to explain capital defendants’ ‘deviant’ lifestyles and behaviours, psychiatrists and legal actors have reinforced the

view of mental illness and criminal behaviour as ‘dispositional’ (Loughnan 2012: 49-57), i.e. an expression of defendants’ natural disposition and true character, and therefore untreatable. This ontological view, coupled with Texas laws’ retributive approach towards mentally ill defendants, has given a significant advantage to the prosecution which, by leveraging public fears of ‘difference’ and the social stigma attached to particular mental health conditions and ‘deviant’ behaviours, has secured a number of death sentences even in cases where the exculpatory and/or mitigating evidence presented arguably justified a less punitive response.

## 2. What Is the Thesis’ Contribution to the Field?

This thesis provides theoretical, empirical, and methodological contributions to the field. From a theoretical perspective, the thesis advances the critique of scientific positivism and Western enlightenment philosophy developed by French postmodern philosophers (see, e.g., Derrida 1973, 1981, 1993; Baudrillard 1981 Foucault 1978, 1980, 1988; Lyotard 1984) and by theorists from a number of different fields inspired by their approach. Specifically, by revealing the historically contingent nature of representations of mental illness, criminality, masculinity, and blackness in psychiatrists and lay actors’ accounts, the thesis advances critical and cultural theorists, constructivists, and poststructuralists’ challenges to the biological and metaphysical foundations of scientific and legal categorisations (see, e.g., Haraway 1988, 2013; Hacking 1990, 1999; Smart 1990, 2013; Rosenberg 1976; Lacey 1998; Edmond 2001; Jasanoff 2009; Valverde 2009; Ussher 2012; Latour & Woolgar 2013) and to the positivistic approach which used to inform historical analyses of mental illness and

crime in the modern era (see, e.g., Napoli 1981; Scull 1981; Castel et al 1982; Miller & Rose 1986; Rose 1985, 1988, 1990, 1992, 1998, 2001; Foucault 1988; Smith 1981; Wiener 1994; Bartlett & Wright 1999; Capshew 1999; Moskowitz 2001; Porter 2004). Instead of reducing the complexity of human life and behaviour to simplistic categories or causes, as experts and lay actors in Texas proceedings tend to do, by deconstructing collective representations and practices through the analysis of individual discourses, the thesis has highlighted the existence of multiple (and often hidden) points of view, and celebrated diversity and complexity as opposed to universal truth (Valverde 2009). In so doing, the thesis has provided a more nuanced and multi-faceted understanding of reality, which takes into account the selective processes through which certain psycho-legal explanations and categories acquire authority and legitimacy as they further the professional interests of mental health experts and legal actors on the one hand, while mirroring society's moral frameworks on the other.

From an empirical point of view, the thesis provides historical support to an existing body of work which has highlighted the difficulty of harmonising psychiatry and the law's ontological and epistemological assumptions in court settings (see, e.g., Briggs 1923; Branham 1926; Morse 1978, 1982; Bonnie & Slobogin 1980; Lelling 1993; Sifferd 2006; Loughnan 2012). As the empirical chapters of this thesis have shown, throughout the 20<sup>th</sup> century, psychiatrists have described offenders as biological machines and/or psychological beings who engage in antisocial behaviour due to 'bad' genes, pathological psychosexual drives, and chemical imbalances, whereas Texas law has invariably depicted them as rational individuals who choose a certain course of action based on internal beliefs, intentions, and motivations. While the medical

approach has led psychiatrists to look for signs of insanity in defendants' bodies and minds, the folk psychological approach of the criminal law has prompted legal actors to look for it in defendants' behaviours.

This fundamental discrepancy has created a host of difficulties for clinicians asked to testify regarding defendants' ability to distinguish right from wrong at the time of the crime in insanity trials. As argued in chapters 5 and 6, when defendants' behaviour before, during, or after the commission of the offence suggests premeditation and/or an attempt at escaping punishment, the insanity defence is unlikely to be successful, no matter how strong the evidence of mental illness presented by the doctors. This finding advances the argument made by a number of medico-legal scholars who have suggested that the 'right and wrong' test fails to take into account the complexity of human feelings and behaviour highlighted by the medical sciences, creating an almost insuperable barrier for severely mentally ill defendants seeking exculpation (see, e.g., Ray 1838; Glueck 1928; s 1931; Menninger 1937; Zilboorg 1944; Gowers 1953; Guttmacher & Weihofen 1952). Similarly, the analysis of post-1976 capital punishment cases has confirmed previous research which has stressed the difficulty of reconciling the theories and methods of psychiatry with the future dangerousness question experts are asked to solve in Texas courts (see, e.g., Monahan 1981; Wiebusch et al 1995; APA 1974, 1983; APA 1978), with dramatic consequences for the sentencing of mentally ill and intellectually disabled defendants in this jurisdiction (see Dix 1976; Vartkessian 2011; Vartkessian et al 2017).

Finally, from a methodological perspective, the archival research conducted for this thesis has shed new light on the daily workings of local county courts and on lower-profile trials which traditionally escape the attention of legal scholars. In the United States, research on mental incapacity and the death penalty tends to focus on state and federal court opinions related to well-known cases which make news headlines for their striking characteristics and appellate histories (see, e.g., Dix 1976; Slobogin 2003; Denno 2003; Ghoshray 2006; Blume et al 2008; Winick 2009; Entzeroth 2011; Acker 2017). In contrast, studies of unpublicised death penalty cases based on a close reading of the trial records are comparatively rare (for exceptions in the US see Vartkessian 2011; Weisman 2008; in Europe see Smith 1981; Harris 1989; Loughnan 2012). Scholars' exclusive focus on court opinions and notorious cases is problematic for two reasons. Firstly, the focus on judicial opinions provides a necessarily partial account of the linguistic exchanges and courtroom dynamics occurring in death penalty cases raising mental incapacity issues, filtered by the institutional perspective of the appellate courts, and by the points of contention raised by the appellate lawyers. Secondly, as highlighted in Chapter 4, by focusing exclusively on notorious cases reversed by the higher courts for striking procedural irregularities and constitutional violations,<sup>611</sup> legal researchers have overlooked the daily practices of local county courts, where the destinies of mentally incapacitated defendants are ultimately decided. Indeed, most mentally incapacitated defendants tried in the lower courts will never reach the level of scrutiny dedicated to prominent cases, especially in Texas, where both the TCCA and the Fifth Circuit are reluctant to reverse lower court decisions, even when their

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<sup>611</sup> See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Buck v. Davis*, 137 S.Ct. 759 (2017).

practices deviate from the due process standards established by the US Supreme Court.<sup>612</sup> Instead, by looking at the original transcripts of trial court proceedings, it is possible to shed light on the arguments, narratives, and dynamics leading to the regular conviction of mentally incapacitated defendants in this jurisdictions, unfiltered by the institutional perspective of the appellate courts and unmodified by the notoriety of the cases involved.

### 3. What Questions Remain Unanswered?

As explained in Chapter 2, for practical reasons the sample only included cases of capital defendants who claimed insanity, or presented mitigating evidence of mental illness, but were found guilty and sentenced to death. As a result, the study could only elucidate the dynamics characterising unsuccessful insanity and mitigation claims, leaving the question of what distinguishes such cases from those ending in an acquittal by reason of insanity or in a life sentence largely unexplored. Similarly, since the sample only included cases of male offenders charged with capital crimes, the question of what distinguishes the treatment of mentally ill men and women in Texas courts remains unaddressed. Future research wishing to shed light on these important issues in death penalty proceedings should consider expanding the sample to include successful insanity and mitigation claims. A similar sample would likely include a number of women who, while charged with a capital offence, were either found not guilty by reason of insanity or sentenced to a life in prison.

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<sup>612</sup> See, e.g., *Hawkins v. State*, 613 S.W.2d 720 (Tex.Crim.App. 1981); *Lackey v. State*, 819 S.W.2d 111 (Tex.Crim.App. 1989).

Given the difficulty of collecting trial transcripts for successful insanity and mitigation claims in Texas (see Chapter 2: Section 1 [d]), this thesis could only speculate as to why the trials under analysis ended in a conviction and death sentence. However, this limitation did not undermine the thesis' ability to fulfil its central objectives: 1) highlighting the historical contingency of psychiatric and legal interpretations of mental incapacity in courtroom settings and 2) reconstructing the tragic histories of 'hidden' capital defendants, whose lives the Texas' legal system chose to bring to an end. By pursuing these aims, the thesis has offered a different perspective from which to analyse a 200-years-old philosophical controversy, while providing a deeper understanding of the human dimension of the psycho-legal dispute, which traditional legal scholarship, typically focused on lower and higher court opinions, is less suited to provide.

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