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Predictions of Dangerousness in Texas: Psychotherapists' Conflicting Duties, Their Potential Liability, and Possible Solutions.

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PREDICTIONS OF DANGEROUSNESS IN TEXAS: PHYCHOTHERAPISTS' CONFLICTING DUTIES, THEIR POTENTIAL LIABILITY, AND POSSIBLE SOLUTIONS

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Determination of dangerousness[1] is used as the standard in an increasing number of socio-legal decisions, such as civil commitment of the mentally ill, criminal commitments of defendants found not guilty by reason of insanity, and sentencing of convicted criminals.[2] Dangerousness is a legal concept that must be determined by judicial process.[3] Legal defini-

1. Dangerousness, as used here, refers to violent behavior directed against other persons rather than against property. Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224, 224 (1978). Dangerousness involves the estimation by a therapist that an individual will engage in future dangerous behavior. Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1087 (1976). Testimony by therapists has been used by the courts primarily in three areas: to determine past culpability, such as insanity; to determine present capacity, such as competency for trial; and to determine future dangerousness, such as civil and criminal commitment and sentencing. Dershowitz, *The Role of Psychiatry in the Sentencing Process*, 1 INT'L L.J. & PSYCH. 63, 76 (1978).

2. Shah, *Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 153 (1978). Some other areas in which determinations of dangerousness are important include granting of bail, release on probation, disposition of defendants found incompetent to stand trial, release of involuntarily committed mental patients, death penalty determinations, and commitments of drug addicts. *Id.* at 155.

3. *See* Humphrey v. Cady, 405 U.S. 504, 509 (1972) (although civil commitment based on medical judgment and legal judgment, the jury serves the crucial function); Hicks v.

tions of dangerousness, however, are frequently vague or nonexistant,[4] often leaving such determinations to the testimony of mental health experts.[5] Reliance by the courts on testimony of psychotherapists[6] may be misplaced since the ability to accurately predict dangerousness has not been demonstrated.[7]

Expert testimony concerning dangerousness, when used in lieu of legal criteria, represents problems for both the legal and mental health profes-

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United States, 511 F.2d 407, 422 (D.C. Cir. 1975) (Tamm, J., concurring) (commitment decision is a legal rather than a medical one); *In re* Noel, 601 P.2d 1152, 1166 (Kan. 1979) (determination of dangerousness is legal, not medical, decision); Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224, 225 (1978) (courts required to make legal determination of dangerousness).

4. *See, e.g.*, Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 450 (1974) ("Such definitions are either so vague or so all-inclusive that no reliance can be placed upon them in seeking to differentiate the harmless from the dangerous."); Montgomery, *Forensic Psychiatry-Friend of the Court*, 242 J. A.M.A. 125, 133 (1979) ("Legal definitions have been rare, circular, and often seemingly irrelevant."); Schwitzgebel, *Legal and Social Aspects of the Concept of Dangerousness*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 90 (1978) ("[T]he term 'dangerous' in statutes remains vaguely defined and is often used inconsistently.").

5. *See* Addington v. Texas, 441 U.S. 418, 429 (1979) (in civil commitment whether person is mentally ill and dangerous turns on meaning of facts interpreted by therapists); Moss v. State, 539 S.W.2d 936, 946 (Tex. Civ. App.—Dallas 1976, no writ) (public policy necessitates expert testimony in civil commitment proceedings); Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29, 31 (Feb./Mar. 1968) (decision on which harms justify commitment made by psychotherapists); Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychiatry*, 33 AM. PSYCHOLOGIST 224, 225 (1978) (legal determinations often made by experts in mental health).

6. "Psychotherapists," as used in this paper, includes psychiatrists, psychologists, and other mental health professionals called on to testify as expert witnesses by the courts. The term "therapist" will hereinafter be used to mean psychotherapist.

7. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 429 (1979) ("Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove . . . that an individual is both mentally ill and likely to be dangerous."); Smith v. Estelle, 445 F. Supp. 647, 656 (N.D. Tex. 1977) (due to unrealiability and invalidity, expert psychiatric testimony subject to increased judicial scrutiny), *aff'd*, 602 F.2d 694 (5th Cir. 1979); Moss v. State, 539 S.W.2d 936, 951 (Tex. Civ. App.—Dallas 1976, no writ) (no expert is sufficiently qualified to issue opinion that is sole determinant of person's dangerousness). Therapists admit their inability to predict dangerousness. *See, e.g.*, AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL, TASK FORCE REPORT 8, 28 (1974) ("Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or 'dangerousness' "); Breiner, *Psychological Factors in Violent Persons*, 44 PSYCHOLOGICAL REP. 91, 97 (1979) ("[I]t is impossible to predict who will be violent."); Usdin, *Broader Aspects of Dangerousness*, in THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL 43 (J. Rappeport ed. 1967) ("We cannot predict even with reasonable certainty that an individual will be dangerous to himself or to others.").

sions.[8] Whether an individual is dangerous is a social decision to be determined by legal procedures.[9] An individual's right to due process can be prejudiced by admitting predictions of therapists on the issue of dangerousness.[10] By failing to create clear legal definitions of dangerousness, the judicial system has, by default, allowed therapists to make determinations that are fundamentally legal.[11] Therapists, in turn, by offering opinions on dangerousness often find themselves acting not as mental health professionals but as agents of social control.[12] By holding themselves out as having the ability to predict dangerousness, therapists maybe inviting civil liability for their failure to warn potential victims of their dangerous patients.[13] This comment will explore some of the problems associated

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8. When the legal definitions for dangerousness are vague and give little guidance, courts rely heavily on conclusive opinions of therapists. Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 40 (1978).

9. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 752 (1974) ("Subject to constitutional limitations, the decision to deprive another human of liberty is not a psychiatric judgment but a social judgment."); Magnus, *Psychiatric Evidence in the Common Law Courts*, 17 BAYLOR L. REV. 1, 40 (1965) (the ultimate responsibility of the determination of mental condition rests not with therapist but with court); Rappeport, Lassen & Gruenwald, *Evaluation and Follow-up of State Hospital Patients Who Had Sanity Hearings*, in THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL 91 (J. Rappeport ed. 1967) (judicial determination is a sociological finding the person "would or would not be dangerous; or that the findings do or do not fall within the legal definition of 'insanity.' "). Karl Menninger is frequently quoted for his statement in this area: "I oppose courtroom appearances because I consider guilt, competence, and responsibility to be moral questions, not medical ones. The judge and the jury are the community's representatives in this area. It is for them to make the judgment and apply the sanctions deemed appropriate, not us psychiatrists." K. MENNINGER, THE CRIME OF PUNISHMENT 139 (1968).

10. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 743 (1974) ("Justifying the deprivation of an individual's liberty on the basis of judgments and opinions that have not been shown to be reliable and valid should be considered a violation of both substantive and procedural due process."); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932, 944 (1975) (patient may be committed on a basis of disclosures made to therapists prior to a warning—indeterminate sentences are forms of cruel and unusual punishment).

11. Shah, *Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 156 (1978).

12. Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 42 (1978). Therapists act as agents of social control when they assist in labeling and controlling members of the community who are perceived as disturbing or threatening. Shah, *Some Interactions of Law and Mental Health in the Handling of Social Deviance*, 23 CATH. U. L. REV. 674, 710 (1974).

13. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976) (prediction by therapists comparable to judgment doctors must regularly make under accepted rules of responsibility); McIntosh v. Milano, 403 A.2d 500, 508 (N.J. Super. Ct. Law Div. 1979) (therapists held to duty to warn unless they clearly disclaim ability to pre-

with the use of expert testimony in the determination of dangerousness, including the possibility of civil liability in Texas as a result of failure to warn, and some possible solutions for dealing with these problems.

I. THE DANGEROUSNESS STANDARD AND EXPERT TESTIMONY

There have been relatively few studies directly testing the accuracy of predictions of dangerousness by therapists.[14] Existing studies conclude therapists' predictions of dangerousness are inaccurate.[15] Additionally, studies have shown therapists are prone to overpredict dangerousness.[16] This tendency is reinforced because therapists do not receive feedback on individuals erroneously committed as dangerous, while strong media feedback is likely if individuals are erroneously predicted to be non-dangerous and later commit violent acts.[17] Finally, when experts' opinions are indiscriminately accepted by courts, there is a danger these opinions will be based on therapists' personal judgments.[18]

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dict dangerousness).

14. Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1094 (1976); *see, e.g.*, Rappeport, Lassen & Gruenwald, *Evaluation and Follow-up of State Hospital Patients Who Had Sanity Hearings*, in THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL 81 (J. Rappeport ed. 1967); Steadman, *Follow-up on Baxstrom Patients Returned to Hospitals for the Criminally Insane*, 130 AM. J. PSYCH. 317, 318-19 (1973); Zitrin, Hardesty, Burdock & Drossman, *Crime and Violence Among Mental Patients*, 133 AM. J. PSYCH. 142, 147 (1976).

15. *See, e.g.*, Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1098 (1976) (psychiatric predictors of dangerousness not accurate); Rappeport, *Evaluation and Follow-up of State Hospital Patients Who Had Sanity Hearings*, 118 AM. J. PSYCH. 1078, 1083 (1962) (predictive ability of court and hospital comparable—30 to 40 percent of released patients adjusted); Steadman & Halfton, *The Baxstrom Patients: Backgrounds and Outcomes*, 3 SEMINARS IN PSYCH. 376, 384 (1971) (follow-up of court-released patients from institution for criminally insane concluded dangerousness level very low).

16. *See, e.g.*, AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL, TASK FORCE REPORT 8, 25 (1974); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 445 (1974); Frederick, *An Overview of Dangerousness: Its Complexities and Consequences*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 3-4 (1978).

17. *See* Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29, 33 (Feb./Mar. 1968); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 447 (1974); Comment, *Tarasoff and the Psychotherapist's Duty To Warn*, 12 SAN DIEGO L. REV. 932, 943 (1975).

18. Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29, 31 (Feb./Mar. 1968). Since legislatures have failed to provide adequate legal definitions, the burden of defining dangerousness has devolved on therapists. There is no consensus in the mental health profession on the meaning of the term, so each expert has provided his own subjective definition, which often tends to reflect his own biases in the area.

Although there is little empirical support for the expertise of therapists in predicting dangerousness, courts continue to rely heavily on their conclusive opinions.[19] Courts share the widespread public belief that therapists have the ability to predict future dangerous behavior.[20] Therapists are placed in a dilemma when they respond to a request to predict dangerousness: they are called upon as experts in an area in which they have not demonstrated expertise.[21] By responding as if they could predict dangerousness, therapists could find they are precluded from denying this ability when sued for failure to warn potential victims of the dangerousness of their patients.[22]

II. Civil Liability for Failure to Warn

Determination of dangerousness has become critical for therapists in California by the decision to impose a duty to warn potential victims of possible dangerous acts threatened by patients undergoing therapy.[23] In

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Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in Dangerous Behavior: A Problem in Law and Mental Health 41 (1978).

19. *See, e.g.*, The Clinical Evaluation of the Dangerousness of the Mentally Ill 51 (J. Rappeport ed. 1967); Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in Dangerous Behavior: A Problem in Law and Mental Health 40 (1978); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. Pa. L. Rev. 439, 440 (1974). As a result of the lack of statutory definitions of dangerousness, therapists' judgments are read into the law and seldom challenged by the courts. Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Calif. L. Rev. 1025, 1037 (1974). A consequence of using mental health professionals in judicial procedures has been the gradual introduction of a "medical model" in lieu of legal standards. Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 Trial 29, 29 (Feb./Mar. 1968).

20. Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 Rutgers L. Rev. 1084, 1100 (1976); Steadman, *Employing Psychiatric Predictions of Dangerous Behavior: Policy vs. Fact*, in Dangerous Behavior: A Problem in Law and Mental Health 124 (1978). "I think it is critical in this whole area to consider that one of the things that keeps cropping up in all the areas in which psychiatrists testify . . . is that we are probably the only experts that are ever asked to answer a question of law." *Annual Judicial Conference, Second Judicial Circuit of the United States*, 82 F.R.D. 221, 304 (1978) (statement by Seymour L. Halleck).

21. *See* Montgomery, *Forensic Psychiatry—Friend of the Court*, 242 J. A.M.A. 125, 133 (1979); Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 Am. Psychologist 224, 227 (1978). "It is the courts and the legislatures who have decreed dangerousness as the standard. Psychiatrists are incompetent to tell you who is dangerous. Don't ask us to do something we cannot do, and then blame us for not doing it." *Annual Judicial Conference, Second Judicial Circuit of the United States*, 82 F.R.D. 221, 249 (1978) (statement by Alan A. Stone).

22. *See* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345, 131 Cal. Rptr. 14, 25 (1976); McIntosh v. Milano, 403 A.2d 500, 508 (N.J. Super. Ct. Law Div. 1979).

23. Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in Dangerous Behavior: A Problem in Law and Mental Health 38 (1978).

Tarasoff v. Regents of the University of California,[24] the California Supreme Court held a therapist who has determined, or should have determined, his patient is dangerous to another person has a legal duty to protect the potential victim.[25] This duty can be fulfilled by warning the intended victim, by notifying the police, or by taking other reasonable action, such as committing the patient.[26] In *Tarasoff* the therapist, a psychologist employed by the University of California, was treating a student, Posenjit Poddar, who had voiced his intention to kill his ex-girlfriend, Tatiana Tarasoff.[27] The therapist arranged for campus police to commit Poddar for observation, but the police subsequently released him after securing his promise to leave Tatiana alone.[28] Two months later Poddar murdered Tatiana.[29] Her parents sued both the therapist and the University of California for failure to confine Poddar and failure to warn of Poddar's threats.[30] The court held the therapist had a duty to protect the identifiable potential victim of his dangerous patient,[31] although the cause of action for failure to confine was barred by governmental immunity.[32] Objections that therapists are unable to predict dangerousness were rebutted by the finding that a perfect performance on prediction was not required: rather, therapists would be held only to a reasonable degree of skill exercised by other therapists in similar circumstances.[33] Inaccuracy in predicting dangerousness was not sufficient to negate the therapist's duty to protect an intended victim.[34] The privilege of confidential communication between therapist and patient did not outweigh the public's interest in protection from dangerous patients and did not relieve the therapist from his duty to disclose.[35] A California court of appeals, following *Tarasoff*, was careful to impose liability only in a situation when the defendant had a duty to warn.[36] Sovereign immunity pro-

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24. 551 P.2d 334, 131 Cal. Rptr. 14 (1976).
25. *Id.* at 340, 131 Cal. Rptr. at 20.
26. *Id.* at 340, 131 Cal. Rptr. at 20.
27. *Id.* at 341, 131 Cal. Rptr. at 21.
28. *Id.* at 341, 131 Cal. Rptr. at 21.
29. *Id.* at 341, 131 Cal. Rptr. at 21.
30. *Id.* at 340, 131 Cal. Rptr. at 20.
31. *Id.* at 345, 131 Cal. Rptr. at 25.
32. *Id.* at 341, 131 Cal. Rptr. at 21.
33. *Id.* at 345, 131 Cal. Rptr. at 25.
34. *Id.* at 346, 131 Cal. Rptr. at 26.
35. *Id.* at 346, 131 Cal. Rptr. at 26. Information on the effect of *Tarasoff* on therapists in California is scarce. One survey indicates the decision has not produced much change in therapeutic practice. No feedback was obtained on patient reactions. *See* Note, *Where the Public Peril Begins: A Survey of Psychotherapists To Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165, 190 (1978).
36. *See* Thompson v. County of Alameda, 152 Cal. Rptr. 226, 231 (Ct. App. 1979) (juvenile authorities had duty to warn mother of five year-old boy killed by released dangerous

tects state employees from suits for injury caused by a released dangerous mental patient[37] or for failure to commit a patient who subsequently injures another.[38] Although the *Tarasoff* decision has generated much commentary in mental health and legal literature,[39] only two other jurisdictions have recognized the duty to warn.[40]

Opponents of the duty argue that warning potential victims will violate the patient's right to confidentiality and increase the risk of violence in society by interfering with or preventing effective therapy.[41] Disclosing to the patient that the therapist has a duty to warn third parties might have a chilling effect on the therapeutic relationship.[42] The duty to warn has been attacked as the least desirable alternative offered to protect the potential victim.[43] Better alternatives include calling the police or committing the patient.[44]

Commentators favoring a duty to warn argue that many therapeutic techniques, such as group therapy, are conducted very effectively without the patient having assurances his disclosures will be confidential.[45] Even if the therapy were disturbed or interrupted by the therapist warning a potential victim, this would not outweigh society's interest in protecting its members from injury.[46] If the therapist were to eliminate the duty to

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juvenile delinquent).

37. Guess v. State, 157 Cal. Rptr. 618, 622 (Ct. App. 1979) (mental health center immune from suit for injuries caused by released outpatients).

38. McDowell v. County of Alameda, 151 Cal. Rptr. 779, 783 (Ct. App. 1979) (hospital protected by immunity statute in suit for wrongful death caused by escape of dangerous mental patient). *Tarasoff* does not apply to the failure to warn parents of a child's threats of suicide. Bellah v. Greenson, 141 Cal. Rptr. 92, 95 (Ct. App. 1977) (no liability for failure to restrain another for his own safety).

39. *See generally* Ayres & Holbrook, *Law, Psychotherapy and the Duty to Warn: A Tragic Trilogy?*, 27 BAYLOR L. REV. 677 (1975); Roth & Meisel, *Dangerousness, Confidentiality, and the Duty To Warn*, 134 AM. J. PSYCH. 508 (1977); Stone, *The Tarasoff Decisions: Suing Psychotherapists To Safeguard Society*, 90 HARV. L. REV. 358 (1976).

40. *See* Mangeris v. Gordon, 580 P.2d 481, 483 (Nev. 1978) (recognized but did not apply *Tarasoff* liability); McIntosh v. Milano, 403 A.2d 500, 511-12 (N.J. Super. Ct. Law Div. 1979) (therapist held liable for failure to warn).

41. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 358, 131 Cal. Rptr. 14, 38 (1976) (Clark, J., dissenting); Roth & Miesel, *Dangerousness, Confidentiality, and the Duty To Warn*, 134 AM. J. PSYCH. 508, 509 (1977); Stone, *The Tarasoff Decisions: Suing Psychotherapists To Safeguard Society*, 90 HARV. L. REV. 358, 368 (1976).

42. *See* Stone, *The Tarasoff Decisions: Suing Psychotherapists To Safeguard Society*, 90 HARV. L. REV. 358, 369 (1976).

43. *See id.* at 374.

44. *See id.* at 374.

45. *See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025, 1043 (1974).

46. *See id.* at 1043; Note, *Psychiatrist-Patient Privilege—A Need for the Retention of the Future Crime Exception*, 52 IOWA L. REV. 1170, 1185 (1967).

warn in favor of commitment or notifying the police, the victim's right to learn of the threats and to institute protective measures would be vitiated.[47] Proponents of *Tarasoff* liability argue that statistical validation of predictive accuracy for dangerousness is not necessary.[48] Therapists determine future dangerousness as a daily occurrence in making commitment and treatment decisions.[49] As a result, society looks to therapists as agents to control its potentially dangerous members.[50] By entering into a relationship with a dangerous patient, the therapist assumes a responsibility to protect members of society who can be identified as potential victims of that patient.[51]

III. Legal Predictions of Dangerousness in Texas and the Possibility of Civil Liability

A. *Civil and Criminal Commitment*

The United States Supreme Court in *O'Connor v. Donaldson*[52] held a state cannot constitutionally confine a non-dangerous person capable of safely surviving in society.[53] Such confinement violates a patient's constitutional right to freedom.[54] The Court made the determination of dangerousness crucial for commitment of the mentally ill.[55] Involuntary commit-

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47. *See* Ayres & Holbrook, *Law, Psychotherapy and the Duty to Warn: A Tragic Trilogy?*, 27 Baylor L. Rev. 677, 693-94 (1975).

48. *See id.* at 700.

49. *See id.* at 699 (1975); Rappeport, *The Problem of the Dangerousness of the Mentally Ill*, in The Clinical Evaluation of the Dangerousness of The Mentally Ill 4 (J. Rappeport ed. 1967); Note, *Untangling Tarasoff: Tarasoff v. Regents of the University of California*, 29 Hastings L.J. 179, 203 (1977).

50. *See* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Calif. L. Rev. 1025, 1068 (1974); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 San Diego L. Rev. 932, 943 (1975). Some commentators argue therapists have encouraged liability by accepting responsibility for making determinations of dangerousness in an effort to extend the influence of the mental health profession. *See Annual Judicial Conference, Second Judicial Circuit of the United States*, 82 F.R.D. 221, 291 (1978) (statement by Arthur Zitrin); Comment, *Tarasoff and the Psychotherapist's Duty To Warn*, 12 San Diego L. Rev. 932, 943 (1975). "Psychotherapists . . . are now called upon to meet the public responsibilities they have fostered." Note, *Untangling Tarasoff: Tarasoff v. Regents of the University of California*, 29 Hastings L.J. 179, 210 (1977).

51. *See* Ayres & Holbrook, *Law, Psychotherapy and the Duty To Warn: A Tragic Trilogy?*, 27 Baylor L. Rev. 677, 693 (1975); Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Calif. L. Rev. 1025, 1030 (1974); Note, *Untangling Tarasoff: Tarasoff v. Regents of the University of California*, 29 Hastings L.J. 179, 186 (1977).

52. 422 U.S. 563 (1975).

53. *Id.* at 576.

54. *Id.* at 570.

55. *See id.* at 576; Kress, *Evaluations of Dangerousness*, 5 Schizophrenia Bull. 211, 211 (1979).

ment, when no treatment is offered, must be based on a determination of dangerousness.[56] The Texas Bill of Rights mandates that no person will be committed except on the testimony of a doctor or psychiatrist.[57] Pursuant to the Mental Health Code,[58] the state will not commit an individual unless he has been found dangerous to himself or others.[59] Involuntary hospitalization procedures in Texas require a determination that the individual be likely to cause injury to himself or others before he may be detained in custody in an emergency commitment.[60] Temporary hospitalization procedures require filing of an application with a court stating the proposed patient requires observation for his own protection or the protection of others.[61] If no one opposes temporary hospitalization,[62] the patient may be committed on the basis of certificates of medical examination for mental illness at the hearing on the application.[63] If there is opposition, psychiatric testimony is needed in addition to the certificates.[64] Indefinite commitment procedures require a sworn petition be filed by any adult stating petitioner's belief that the proposed patient requires hospitalization for his own protection or the protection of others.[65] A hearing[66] on the petition is before a jury[67] unless waived in writing by

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56. *See* O'Conner v. Donaldson, 422 U.S. 563, 576 (1975).

57. *See* McGuffin v. State, 571 S.W.2d 56, 58 (Tex. Civ. App.—Austin 1978, no writ); Munoz v. State, 569 S.W.2d 642, 644 (Tex. Civ. App.—Corpus Christi 1978, no writ); Moss v. State, 539 S.W.2d 936, 946 (Tex. Civ. App.—Dallas 1976, no writ); TEX. CONST. art. I, § 15-a.

58. TEX. REV. CIV. STAT. ANN. arts. 5547-1 to 5547-104 (Vernon 1958 & Supp. 1980).

59. *See* Addington v. Texas, 441 U.S. 418, 426 (1979). *See generally* TEX. REV. CIV. STAT. ANN. arts. 5547-1 to 5547-104 (Vernon 1958 & Supp. 1980).

60. *See* TEX. REV. CIV. STAT. ANN. art. 5547-27 (Vernon Supp. 1980). The head of the facility may not detain a patient until a warrant from a magistrate ordering custody is obtained along with written opinion of a doctor that the patient is likely to cause injury to himself or to others. *Id.* art 5547-28; *see* Jones, *Emergency Restraint Under the Texas Mental Health Code*, 33 TEX. B.J. 31, 32 (1970). *See generally* Comment, *Texas Involuntary Commitment Laws—Unconstitutional?*, 25 BAYLOR L. REV. 273, 279 (1973); Note, *Involuntary Commitment in Texas*, 14 HOUS. L. REV. 474, 479 (1977).

61. *See* TEX. REV. CIV. STAT. ANN. art. 5547-31 (Vernon Supp. 1980).

62. *Id.* art. 5547-37 (Vernon 1958). The certificate contains the opinion of an examining physician whether the proposed patient is mentally ill and whether because of such illness he is likely to injure himself if not immediately restrained. *Id.* art. 5547-8(f).

63. *Id.* art. 5547-37; *see* McGuffin v. State, 571 S.W.2d 56, 58 (Tex. Civ. App.—Austin 1978, no writ); Munoz v. State, 569 S.W.2d 642, 644 (Tex. Civ. App.—Corpus Christi 1978, no writ); Moss v. State, 539 S.W.2d 936, 949 (Tex. Civ. App.—Dallas 1976, no writ).

64. Munoz v. State, 569 S.W.2d 642, 644 (Tex. Civ. App.—Corpus Christi 1978, no writ). Patient is committed for a period not exceeding 90 days. TEX. REV. CIV. STAT. ANN. art. 5547-38(b) (Vernon 1958).

65. *Id.* art. 5547-41 (Vernon Supp. 1980).

66. When the petition accompanied by the required certificate is filed, the county judge sets a date for the hearing and appoints an attorney ad litem. *Id.* art. 5547-43 (Vernon

the patient or his representative.[68] At least two physicians who have recently examined the proposed patient are required to testify at the hearing.[69] If the court or jury finds the proposed patient in need of hospitalization for his own protection or the protection of others, he will be indefinitely committed.[70] Opinion testimony by psychiatrists has been routinely and unquestioningly accepted in civil commitments of the mentally ill in Texas.[71]

Predictions of dangerousness are required in the commitment procedures of criminal defendants who have been found not guilty by reason of insanity.[72] If such a defendant is determined to be "manifestly dangerous" by a team of three psychiatrists, he will be detained in the state facility for the criminally insane or in a maximum security unit of another state hospital.[73] If the team decides the defendant is not manifestly dangerous, he is sent to a nonsecurity unit.[74] Here, if the head of the facility decides it best for the protection [75] of others, the defendant can be indefinitely committed.[76] Determinations of dangerousness by mental health personnel are instrumental in decisions about commitment of criminal defendants.[77]

B. *Death Penalty Determination*

The key factor used in deciding whether to impose the death sentence in Texas is the determination of a defendant's propensity for future dan-

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1958).

67. *Id.* art. 5547-48.

68. *Id.* art. 5547-45 (Vernon Supp. 1980).

69. *Id.* art. 5547-49.

70. *Id.* art. 5547-52 (Vernon 1958). The head of a mental hospital can discharge a patient at any time if after an examination he determines the patient no longer requires hospitalization. *Id.* art. 5547-80(a) (Vernon Supp. 1980).

71. *See, e.g.*, McGuffin v. State, 571 S.W.2d 56, 58 (Tex. Civ. App.—Austin 1978, no writ) ("a lay jury requires expert guidance on the subject of the patient's mental illness"); Banks v. State, 570 S.W.2d 121, 121-22 (Tex. Civ. App.—Austin 1978, no writ) (doctor's opinion that patient required hospitalization was sufficient); State *ex rel.* Ellenwood, 567 S.W.2d 251, 254 (Tex. Civ. App.—Amarillo 1978, no writ) (court disagreed that therapists must testify as to factual basis for opinions). *But see* Moss v. State, 539 S.W.2d 936, 951 (Tex. Civ. App.—Dallas 1976, no writ) (therapist's bare opinion of potential changes not sufficient and must be supported by factual information on which opinion is based).

72. TEX. CODE CRIM. PRO. ANN. art. 46.02, § 5 (Vernon 1979).

73. *Id.* § 8(a).

74. *Id.* § 8(a).

75. The term "protection" has been interpreted to be coextensive with dangerousness. Reynolds v. Sheldon, 404 F. Supp. 1004, 1009 (N.D. Tex. 1975) (Texas law applied).

76. TEX. CODE CRIM. PRO. ANN. art. 46.02, § 8(c) (Vernon 1979).

77. *See id.* §§ 7, 8.

gerousness.[78] In the sentencing phase of a capital murder trial the jury must affirmatively answer three special issues before the death penalty can be imposed.[79] One of these issues requires the jury to predict future dangerousness by determining "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[80] Although the statute does not require expert testimony on dangerousness, in practice the use of expert testimony has been widespread.[81] The Texas Court of Criminal Appeals, which reviews all death penalty cases,[82] has repeatedly held expert testimony is admissible.[83] Therapists' conclusive opinions on future dangerousness are usually accepted without question even though unsupported by factual bases and are likewise unchallenged on appellate review.[84]

The wisdom of employing psychiatric testimony in capital murder sentencing has been challenged recently by the Fifth Circuit in *Smith v. Estelle.*[85] The court, referring to studies showing psychiatrists have no special training or skill in predicting violence, concluded the special issue on

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78. *See, e.g.,* Hammett v. State, 578 S.W.2d 699, 720 (Tex. Crim. App. 1979) (Odom, J., concurring); Robinson v. State, 548 S.W.2d 63, 66 (Tex. Crim. App. 1977), *cert. denied,* 431 U.S. 933 (1979); Livingston v. State, 542 S.W.2d 655, 662 (Tex. Crim. App. 1976); TEX. CODE CRIM. PRO. ANN. art. 37.071(b)(2) (Vernon Supp. 1980). *See generally* Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing,* 1 INT'L J.L. & PSYCH. 283, 287 (1978).

79. TEX. CODE CRIM. PRO. ANN. art. 37.071(b) (Vernon Supp. 1980).

80. *Id.* art. 37.071(b)(2). The other two issues ask whether the defendant caused the death deliberately and knowingly, and, if raised by the evidence, whether the defendant acted in response to provocation by the deceased. *Id.* art. 37.071(b)(1), (3).

81. *See* Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing,* 1 INT'L J.L. & PSYCH. 283, 287 (1978).

82. *See* TEX. CODE CRIM. PRO. ANN. art. 37.071(f) (Vernon Supp. 1980).

83. *See, e.g.,* Gholson v. State, 542 S.W.2d 395, 400 (Tex. Crim. App. 1976); Moore v. State, 542 S.W.2d 664, 676 (Tex. Crim. App. 1976); Livingston v. State, 542 S.W.2d 655, 662 (Tex. Crim. App. 1976). In *Chambers v. State,* the court passed up an opportunity to rule on the issue of the discipline of psychiatry not being sufficiently advanced to predict future dangerousness. *See* Chambers v. State, 568 S.W.2d 313, 324 (Tex. Crim. App. 1978).

84. *See, e.g.,* Shippy v. State, 556 S.W.2d 246, 255 (Tex. Crim. App.) (defendant's psychiatrist can be subpoenaed to testify at punishment phase), *cert. denied,* 98 S. Ct. 422 (1977); Robinson v. State, 548 S.W.2d 63, 66 (Tex. Crim. App. 1977) (reversed trial court for failure to admit testimony of defendant's therapist); Collins v. State, 548 S.W.2d 368, 377 (Tex. Crim. App. 1976) (psychiatrist's testimony on dangerousness would not invade province of jury), *cert. denied,* 430 U.S. 959 (1977). "In this jurisdiction the use of the expert opinion testimony of those in the behavorial sciences has frequently been resorted to by the prosecution, and this Court has consistently approved such use, often basing the sufficiency of the evidence to support a death-producing verdict on that evidence." Hammett v. State, 578 S.W.2d 699, 720 (Tex. Crim. App. 1979) (Odom, J., concurring).

85. 602 F.2d 694 (5th Cir. 1979). The Texas Court of Criminal Appeals had affirmed the death penalty. *See* Smith v. State, 540 S.W.2d 693, 700 (Tex. Crim. App. 1976), *cert. denied,* 430 U.S. 922 (1977).

dangerousness was not obviously a matter for expert testimony.[86] Whether this decision will influence state courts to reevaluate expert testimony on dangerousness for capital murder sentencing remains to be seen.

C. *Civil Liability for Failure to Warn*

Therapists in Texas are called on to testify on future dangerousness in civil and criminal commitment procedures and in capital murder sentencing.[87] Expert testimony on this issue is generally offered in the form of a conclusive opinion, as if the expert had the ability to predict dangerousness.[88] It is unclear whether this practice will result in *Tarasoff* liability in Texas. In the only other jurisdiction to apply *Tarasoff*, the court reasoned such a duty would be found unless therapists clearly denied an ability to predict dangerousness when called upon to testify.[89]

Should Texas decide to recognize a duty to warn, it could find a basis in several analogous theories of negligence.[90] Even if no legal duty to warn is found, it is well settled that a person is not entitled to "close his eyes" to ascertainable hazards.[91] Furthermore, an individual could not escape liability for failing to exercise ordinary care if he has voluntarily under-

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86. Smith v. Estelle, 602 F.2d 694, 705 (5th Cir. 1979). The court held the state could not use expert testimony based on psychiatric examination of the defendant unless he was warned he had the right to remain silent, could terminate the examination at will, and had assistance of counsel in deciding whether to submit to the examination. *Id.* at 709.

87. TEX. REV. CIV. STAT. ANN. arts. 5547-27 to -49 (Vernon 1958 & Supp. 1980) (civil commitment); TEX. CODE CRIM. PRO. ANN. art. 37.071(b)(2) (Vernon Supp. 1980) (dangerousness-capital murder); *see, e.g.*, Hammett v. State, 578 S.W.2d 699, 720 (Tex. Crim. App. 1979) (capital murder); McGuffin v. State, 571 S.W.2d 56, 58 (Tex. Civ. App.—Austin 1978, no writ) (civil commitment); Moss v. State, 539 S.W.2d 936, 949 (Tex. Civ. App.—Dallas 1976, no writ) (civil commitment).

88. *See, e.g.*, Robinson v. State, 548 S.W.2d 63, 66 (Tex. Crim. App. 1977); Livingston v. State, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976); Banks v. State, 570 S.W.2d 121, 122 (Tex. Civ. App.—Austin 1978, no writ).

89. McIntosh v. Milano, 403 A.2d 500, 508 (N.J. Super. Ct. Law Div. 1979). The therapist was treating a 17 year old patient who had voiced threats to the therapist about injuring his neighbor's daughter. Patient murdered the victim, and parents had a cause of action against therapist for failure to warn. *Id.* at 506.

90. *See, e.g.*, Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 225, 66 S.W. 449, 450-51 (1902) (once defendant undertakes a duty he must exercise ordinary care not to injure others); Morris v. Barnette, 553 S.W.2d 648, 650 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (owner of public building has duty to warn customers of dangerous third parties); Arlington Heights Sanitarium v. Deaderick, 272 S.W. 497, 499 (Tex. Civ. App.—San Antonio 1925, no writ) (hospital liable for damages caused by permitting mental patient to escape).

91. *See, e.g.*, Lynch v. Ricketts, 158 Tex. 487, 492, 314 S.W.2d 273, 275 (1958); Dewinne v. Allen, 154 Tex. 316, 322, 277 S.W.2d 95, 98 (1955); Browning v. Paiz, 586 S.W.2d 670, 674 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

taken a duty that might be injurious to others if negligently performed.[92] Even if an individual could have foreseen the possibility of harm, he could not escape liability because of his inability to foresee the exact event causing injury.[93]

In a fact situation comparable to *Tarasoff*, the Fifth Circuit imposed liability on military doctors for failing to warn a nurse and her guards of the release of a dangerous patient.[94] The patient had previously threatened the nurse, and the doctors had promised to warn her before his release.[95] The nurse and her guards were murdered by the patient shortly after his release.[96] Hospitals also have been held liable for negligently permitting a mental patient to escape and for any damages arising from that escape.[97]

In Texas a duty to disclose information has been recognized in different situations. Doctors are held to an affirmative duty to disclose to their patients the risks involved in medical diagnosis and treatment.[98] Any person who believes a child has been or may be abused is under a statutory duty to disclose such belief to authorities.[99] The proprietor of a public business is under a duty to protect his patrons from intentional injuries by third parties if he has reason to know such acts were likely to occur.[100]

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92. *See* Western Hills Bowling Center, Inc. v. Hartford Fire Ins. Co., 412 F.2d 563, 565 (5th Cir. 1969) (once insurance company undertook duty to inspect they were liable for additional fire loss caused by vandals); Ivey v. Phillips Petroleum Co., 36 F. Supp. 811, 817 (S.D. Tex. 1941) (once defendant undertook job of killing oil well he owed duty to plaintiff not to injure his property); Fox v. Dallas Hotel Co., 111 Tex. 461, 464, 240 S.W. 517, 520 (1922) (defendant who took over control and repair of elevators had duty to maintain them in safe condition); Missouri, K. & T. Ry. v. Wood, 95 Tex. 223, 225, 66 S.W. 449, 450-51 (1902) (when defendant undertook duty of controlling smallpox patient, it was liable to plaintiff for spread of contagion when patient escaped).

93. Lumpkins v. Thompson, 553 S.W.2d 949, 956 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); Westbrook v. Reed, 531 S.W.2d 890, 893 (Tex. Civ. App.—Amarillo 1975, writ ref'd n.r.e.); Martinez v. Hernandez, 394 S.W.2d 667, 670 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

94. *See* Fair v. United States, 234 F.2d 288, 293 (5th Cir. 1956).

95. *Id.* at 290.

96. *Id.* at 290. Liability centered on breach of duty to warn after defendants had undertaken the duty. Once the duty was assumed, the doctors had to perform it with due care. *Id.* at 294.

97. *See* Bornmann v. Great Southwest Gen. Hosp., Inc., 453 F.2d 616, 621 (5th Cir. 1971) (recognized but did not apply duty to protect mental patient from suicide); Arlington Heights Sanitarium v. Deaderick, 272 S.W. 497, 499 (Tex. Civ. App.—San Antonio 1925, no writ) (hospital liable for damages proximately caused by original negligence in permitting escape of mental patient who was subsequently hit by a train).

98. *See, e.g.*, Hood v. Phillips, 554 S.W.2d 160, 166 (Tex. 1977); Jacobs v. Theimer, 519 S.W.2d 846, 848 (Tex. 1975); Wilson v. Scott, 412 S.W.2d 299, 301 (Tex. 1967).

99. *See* TEX. FAM. CODE ANN. § 34.01 (Vernon 1975).

100. *See* Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623, 625-26 (Tex. Civ.

A possible impediment, however, to the adoption of *Tarasoff* liability in Texas is found in the new confidentiality provisions of the Mental Health Code.[101] Mental health professionals are under a duty not to disclose any communication with a client unless it falls under a special exception.[102] In one exception to the privilege of confidentiality, a professional who determines there is a probability of imminent physical injury by his patient to others is only allowed to disclose this information "to medical or law enforcement personnel."[103] It is not clear if a literal reading of the statute would preclude informing potential victims of a dangerous patient.

There are both advantages and disadvantages to imposing civil liability for failure to warn potential victims of dangerous patients.[104] Whether Texas will choose to adopt *Tarasoff* liability is unclear at this time. The adoption of this duty to warn seems more likely to occur when therapists offer expert testimony without qualifying their ability to predict and when the courts uncritically accept such testimony in commitments and sentencing procedures.

IV. Possible Solutions to Problems Caused by Expert Predictions of Dangerousness

Suggested short-term solutions for addressing these problems focus on clarifying the roles of legal and mental health professionals in the com-

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App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (hotel is liable for injury to patron robbed and beaten in hotel parking lot); Morris v. Barnette, 553 S.W.2d 648, 650 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.) (washateria customer had a cause of action against owner for injuries sustained when she was raped and assaulted); Eastep v. Jack-in-the-Box, Inc., 546 S.W.2d 116, 119 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (restaurant held liable for injuries to plaintiffs who were attacked by other customers); Adams, *Security Against Criminal Acts: The Landlord's New Liability*, 42 Tex. B.J. 201, 207 (1979) (discusses *Walkoviak*, *Morris*, and *Eastep*).

101. *See* Tex. Rev. Civ. Stat. Ann. art. 5561h (Vernon Supp. 1980).

102. *Id.* § 2(a).

103. *Id.* § 4(b)(2). The statute lists four exceptions to the privilege of confidentiality in court proceedings and six exceptions in nonjudicial proceedings. *Id.* § 4.

104. See notes 41-51 *supra* and accompanying text. *Compare* Ayres & Holbrook, *Law, Psychotherapy and the Duty To Warn: A Tragic Trilogy?*, 27 Baylor L. Rev. 677, 695 (1975) ("The duty to warn is . . . a necessary common sense ingredient in the process of meaningful pschotherapy.") *and* Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 Calif. L. Rev. 1025, 1067 (1974) ("In sum, the therapist owes a legal duty not only to his patient, but also to his patient's would-be victim . . . .") *with* Stone, *The Tarasoff Decisions: Suing Psychotherapists To Safeguard Society*, 90 Harv. L. Rev. 358, 377 (1976) ("The duty it would impose is self-defeating, increasing, rather than reducing, the overall risk.") *and* Comment, *Torts—Psychiatry and the Law—Duty To Warn Potential Victim of a Homicidal Patient*, 22 N.Y.L. Sch. L. Rev. 1011, 1022 (1977) ("Overwhelming policy considerations mandate against sacrificing fundamental patient interests without gaining a corresponding increase in public benefit.").

mitment and sentencing processes. Courts should no longer ask therapists to give conclusive opinions on dangerousness but should limit their testimony to descriptive factual statements.[105] Therapists, on the other hand, should refuse to give conclusive opinions when asked to do so by the courts.[106] They should avoid answering open-ended questions on dangerousness.[107] As a basis for refusing to give conclusive opinions, therapists must acknowledge their inability to predict dangerousness.[108] When asked to give an opinion, the therapist should insist on adequate time and opportunity to observe the subject and should refuse to testify if the examination is inadequate.[109] Single "one-shot" examinations should be avoided even when the role of the therapist is merely that of a consultant.[110] Mental illness is the realm of expertise of the therapist, and he should limit his testimony to information in only that area.[111] After the

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105. *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693, 696 (1974); Sharpe, *The Death Penalty Punishment Hearing: Preserving the Constitutional Questions Relating to Self-Incrimination and Lack of Standing in Psychiatric Testing,* 41 TEX. B.J. 253, 363 (1978). Trial courts should retain discretion to exclude testimony of therapists when it is not based on scientific facts, or when the jury may be misled. Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness,* 55 TEXAS L. REV. 1343, 1396 (1977).

106. *See* AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL, TASK FORCE REPORT 33 (1974); Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence,* 29 RUTGERS L. REV. 1084, 1100 (1976).

107. *See* Shah, *Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas,* in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 176 (1978).

108. *See* Diamond, *The Psychiatric Prediction of Dangerousness* 123 U. PA. L. REV. 439, 452 (1974); Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics,* 5 AM. J. CRIM. L. 151, 192 (1977); Sharpe, *The Death Penalty Punishment Hearing: Preserving the Constitutional Questions Relating to Self-Incrimination and Lack of Standing in Psychiatric Testing,* 41 TEX. B.J. 253, 362 (1978).

> Unless the psychiatric community wishes to completely surrender its role in the process of determining who would or should not be institutionalized for treatment, significant efforts must be generated in the direction of discouraging the myth of an accurate ability to predict future violent or suicidal behavior while preserving the positive benefits of psychiatric opinion presented to the legal trier of fact.

Smith & English, *Alternatives in Psychiatric Testimony on Dangerousness,* 23 J. FOR. SCI. 588, 589 (1978).

109. *See* THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL 52 (J. Rappeport ed. 1967).

110. *See* AMERICAN PSYCHIATRIC ASSOCIATION, CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL, TASK FORCE REPORT 8, 32 (1974).

111. *See* THE CLINICAL EVALUATION OF THE MENTALLY ILL 56 (J. Rappeport ed. 1967).

> [T]he real role of the psychiatrist in the court should be to tell the court . . . whether he considers the patient to be suffering from a mental disease, what the general char-

legal determination of dangerousness has been made, the expert can give his opinion on whether the dangerous behavior was caused by mental illness and whether treatment can correct such behavior.[112] Any opinion testimony offered should include the facts on which the opinion is based.[113]

A therapist would be well-advised to follow the rules of evidence for expert witnesses by providing explanations of facts that form the basis of his opinion and would aid the jury or court in making a decision on dangerousness.[114] The therapist can more easily avoid having to give conclusive testimony by requiring the attorney for whom he testifies to educate him on the role of the expert as limited by the rules of evidence.[115] Likewise, therapists can educate courts through position statements or memorandum supporting the view that although therapists are not able to predict dangerousness, they can offer nonconclusive factual information on mental illness to aid the jury in making such determinations.[116]

One commentator proposes that mental health professionals should formulate standards for dangerousness testimony on death penalty and commitment determinations.[117] Experts should maintain familiarity with new developments in the literature on dangerousness,[118] express opinions in

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acteristics of such a mental disease are, how they generally affect the judgment, the emotional life, the control of individuals, and how . . . the mental disease has affected this particular individual.

Id. at 56. *See also* Brown, *Lawyers and Psychiatrists in the Court: Afterword*, 32 MD. L. REV. 36, 41 (1972).

112. *See* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 452 (1974).

113. *See* Shah, *Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 178 (1978). Some considerations for factual background include taking a thorough history of the patient, diagnostic testing, and clinical observation and examination. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 177 (1977).

114. *See* Magnus, *Psychiatric Evidence in the Common Law Courts*, 17 BAYLOR L. REV. 1, 10-11 (1965); Smith & English, *Alternatives in Psychiatric Testimony on Dangerousness*, 23 J. FOR. SCI. 588, 591 (1978); *cf.* Lewis v. Southmore Sav. Ass'n, 480 S.W.2d 180, 186 (Tex. 1972) (economist must relate sources on which his opinion is based); Loper v. Andrews, 404 S.W.2d 300, 305 (Tex. 1966) (physician's opinion must be based on facts within his knowledge); Commercial Standard Ins. Co. v. Cisco Independent School Dist., 435 S.W.2d 565, 568 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) (accountant can give opinion when based on his own work).

115. Smith & English, *Alternatives in Psychiatric Testimony on Dangerousness*, 23 J. FOR. SCI. 588, 591 (1978).

116. *Id.* at 592.

117. *See* Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 174 (1977).

118. *Id.* at 175.

terms of comparative group probability,[119] and refrain from expressing an opinion when they have an incomplete understanding of the legal implications involved.[120]

Formulating legal standards for dangerousness is the focus of many long-term solutions. One way of clarifying the definition is to require that no person be found dangerous unless he has committed a recent violent act.[121] Statutes should be phrased in legal rather than medical terms.[122] Legislators should take into consideration the magnitude of harm, whether to person or property, and whether the harm is physical or psychological; the degree of probability of injury; the frequency of likely harm; and the imminence of danger.[123] Dangerous behavior should include an analysis not only of the individual in isolation but also of his patterns, settings, and situational contexts.[124]

Finally, one commentator has suggested the problems of defining and predicting dangerousness could best be solved by creating an interdisciplinary subfield of dangerology.[125] Dangerology would include aspects of fields such as psychiatry, psychology, sociology, law, and biology.[126] Creation of such a subspecialty becomes more likely as long as dangerousness is a key concept of social control for the mental health and civil and criminal justice systems.[127]

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119. *Id.* at 197. An example of such an actuarial approach would be to classify a defendant as belonging to a group that has a 70 percent probability of serious criminal recidivism. Shah, *Dangerousness and Mental Illness: Some Conceptual, Prediction, and Policy Dilemmas*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 167 (1978).

120. Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethnics*, 5 AM. J. CRIM. L. 151, 192 (1977).

121. *See, e.g., Annual Judicial Conference, Second Judicial Circuit of the United States*, 82 F.R.D. 221, 264, 289 (1978) (statements by Bruce J. Ennis); Kress, *Evaluations of Dangerousness*, 5 SCHIZOPHRENIA BULL. 211, 217 (1979); Roth, *Clinical and Legal Considerations in the Therapy of Violence—Prone Patients*, 1978 CURRENT PSYCH. THERAPIES 55, 59.

122. Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29, 33 (Feb./Mar. 1968).

123. Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 54 (1978).

124. Schwitzgebel, *Legal and Social Aspects of the Concept of Dangerousness*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 160 (1978); Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 AM. PSYCHOLOGIST 224, 227 (1978).

125. Steadman, *Employing Psychiatric Predictions of Dangerous Behavior: Policy vs. Fact*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 132-33 (1978).

126. *Id.* at 133.

127. *Id.* at 133.

V. Conclusion

Use of expert testimony for determination of dangerousness presents problems for both the mental health and legal professions. Dangerousness, a legal concept, is used as a standard in civil and criminal commitment and in sentencing. Courts, having no clear legal definitions, accept opinion testimony of mental health experts, frequently without requiring the factual bases on which these opinions are based. By such reliance the courts are abdicating responsibility for legal decisions and possibly jeopardizing individual rights. Furthermore, mental health experts find themselves acting as agents of social control rather than as therapists. A potential consequence for the therapists acting as experts in predicting dangerousness is the possibility of civil liability for failure to warn potential victims of their dangerous patients. This comment suggests some possible solutions for both professions to avoid the problems inherent in using opinion testimony on dangerousness.