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THE SUPREME COURT, THE MENTALLY DISABLED CRIMINAL DEFENDANT, AND SYMBOLIC VALUES: RANDOM DECISIONS, HIDDEN RATIONALES, OR "DOCTRINAL ABYSS?"*

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INTRODUCTION

Prior to 1972, the United States Supreme Court never appeared terribly interested in mentally disabled criminal defendants. Putting aside cases such as *Baxstrom v. Herold*,[1] which dealt with the status of prisoners, the Court seemed to limit its decisions about criminal defendants almost exclusively to cases involving the constitutional and statutory problems associated with an

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1. 383 U.S. 107 (1966). In *Baxstrom*, the court held—on equal protection grounds—that a state prisoner civilly committed at the end of his prison sentence was denied equal protection when he was denied a jury trial that the state made available to all other individuals facing involuntary civil commitment. *Id.* at 111-112.

The *Baxstrom* literature is legion. *See, e.g.*, H. STEADMAN & J. COCOZZA, CAREERS OF THE CRIMINALLY INSANE (1974); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the* Baxstrom *Patients: 1966-1970*, 129 AM. J. PSYCHIATRY 80 (1972); Steadman, *Follow-Up On* Baxstrom *Patients Returned to Hospitals for the Criminally Insane*, 130 AM. J. PSYCHIATRY 317 (1973).

incompetency to stand trial determination.[2]

Following Mr. Justice Blackmun's famous 'cue bid' observation in the 1972 case of *Jackson v. Indiana*,[3] however—where he noted, "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the commitment] power have not been more frequently litigated"[4]—the Court began to take notice of the full range of cases involving mentally disabled individuals.[5] While most of these dealt with the *civil* commitment process,[6] more recent cases have considered a full range of issues affecting mentally disabled individuals facing *criminal* trials.[7]

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2. *See, e.g.*, Greenwood v. United States, 350 U.S. 366 (1956) (construing federal statute, 18 U.S.C. §§ 4244-4246 (1949) (*cf.* 18 U.S.C. §§ 4244-4246 (1985)), providing for commitment of individuals found incompetent to stand trial on federal charges); Dusky v. United States, 362 U.S. 402 (1960) (constitutional test for competency to stand trial is whether defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him"); Pate v. Robinson, 383 U.S. 375 (1966) (conviction of an accused who is mentally incompetent violates due process). *See also*, Westbrook v. Arizona, 384 U.S. 150 (1966) (where hearing held on defendant's competence to stand trial, further hearing required on his competence to waive constitutional right to counsel). For a recent opinion synthesizing relevant doctrine, see Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986); *see generally* R. ROESCH & S. GOLDING, COMPETENCY TO STAND TRIAL 10-45 (1980); Silten & Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053 (1977).

But see Specht v. Patterson, 386 U.S. 605, 608-09 (1967) (procedural due process protections apply to proceedings under state sex offender's law, where defendant subject to "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm"). The continuing vitality of *Specht* is questionable following Allen v. Illinois, 106 S. Ct. 2988 (1986). *See infra* text accompanying notes 407-56.

Cf. United States *ex rel.* Smith v. Baldi, 344 U.S. 561 (1953) (indigent had no constitutional right to psychiatric assistance at state expense to aid in presentation of insanity defense), *rejected as not controlling* in Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (discussed extensively *infra* at text accompanying notes 125-201); Solesbee v. Balkcom, 339 U.S. 9 (1950) (state statute vesting discretionary authority in governor to determine whether condemned, mentally ill convict was competent to be executed did not violate due process claus), *rejected in* Ford v. Wainwright, 106 S. Ct. 2595 (1986) (similar statute violates eighth amendment; *Ford* is discussed extensively *infra* at text accompanying notes 507-622).

3. 406 U.S. 715 (1972). *Jackson* was the Supreme Court's first decision applying the due process clause to the involuntary commitment process.

4. *Id.* at 737.

5. In 1972, the Court also decided Humphrey v. Cady, 405 U.S. 504 (1972) (evidentiary hearing required to resolve constitutional claim that renewal of defendant's commitment under state sex offender statute violated equal protection clause, where defendant denied jury trial otherwise available to those facing civil commitment, relying on *Baxstrom* and *Specht*), and McNeil v. Director, Patuxent Institution, 407 U.S. 205 (1972) (denial of due process to continue to confine patient at institution for "defective delinquents" without procedural safeguards mandated in *Jackson*); *see also*, Murel v. Baltimore County Criminal Court, 407 U.S. 355 (1972), dismissing *cert.* as improvidently granted in Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971) (habeas corpus challenge to constitutionality of Maryland's Defective Delinquency Law); *see also, id.* at 358 (Douglas J., dissenting).

6. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563 (1975) (right to liberty); Addington v. Texas, 441 U.S. 418 (1979) (burden of proof); Parham v. J.R., 442 U.S. 584 (1979) (juvenile commitments); *cf.* Vitek v. Jones, 445 U.S. 480 (1980). *See generally* Perlin, *State Constitutions and Statutes as a Source of Rights for the Mentally Disabled: The Last Frontier?* LOYOLA L.A. L. REV. (1987) (in press).

Vitek dealt with a prison-hospital transfer; although the patient in *Addington* had originally been charged with a criminal offense ("assault by threat" against his mother, 441 U.S. at 420), his case was processed as a civil commitment. Both *O'Connor* and *Parham* dealt solely with civil commitment questions.

7. In addition to those cases cited *infra* notes 32-33, *see also* Drope v. Missouri, 420 U.S. 162, 171-72 (1975) (prohibition against trying presently-incompetent defendant is "fundamental to an adversary system of justice"); Maggio v. Fulford, 462 U.S. 112 (1983) (establishing appropriate standard for review of trial court determination of competency to stand trial).

Like the moth to the flame,[8] the Court remains irresistably drawn to these cases, *especially* when they arise in the capital punishment context.[9] Why this is so is not clear—it may be that it is merely a vestigial remain of the Chief Justice's well-documented preoccupation[10] with the entire question of the significance of mental disability in the criminal trial process from the days of his wars on the District of Columbia Circuit with Judge Bazelon.[11] It may be an unconscious, anticipatory response to the no-longer accurate assumption of several decades ago that mental disability defenses were raised solely (or, at the least, primarily) so as to "cheat the death penalty."[12] It may be that it is a reflection of the creative ways counsel has been

8. After this Article was written the Court heard argument in Colorado v. Connelly, 702 P.2d 722 (Colo. 1985), *cert. granted* 106 S. Ct. 785 (1986), on the question of whether defendant's severe mental disability rendered his *Miranda* waiver ineffective. As discussed more fully *infra* at note 206, the Court's decision, at 107 S. Ct. 515 (1986), held that the defendant's mental instability did not invalidate his confession. *Connelly* is discussed in Parry, *Involuntary Confession Based on Mental Impairment*, 11 MENTAL & PHYSICAL DISABILITY L. RPTR. 2 (1987).

9. For an empirical study, concluding that support for the death penalty springs mainly from a "symbolic perspective" reflecting society's "basic values," see Tyler & Weber, *Support for the Death Penalty: Instrumental Response to Crime or Symbolic Attitude*? 17 LAW & SOC'Y REV. 21, 43 (1982). *See also*, Mello & Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 31, 45-47 (1985), discussing significance of passage in opinion in Gregg v. Georgia, 428 U.S. 153, 183-84 (1976) (opinion of Stewart, Powell & Stevens, JJ) characterizing capital punishment as "an expression of society's moral outrage." On the specific question of whether "death-qualified" jurors are more likely to reject the insanity defense, see Ellsworth, Bukaty, Cowan & Thompson, *The Death Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81, 91 (1984) (in controlled, simulated study, such jurors estimated that only 31% of defendants who pled insanity "really are" insane). *Cf.* Rodriguez, LeWinn & Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 404 (1983) (in 138 of 141 patients found not guilty by reason of insanity in New Jersey over a seven year period, there was no question as to the presence of severe mental illness).

See Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the* Ake *in* Barefoot's *Achilles Heel*, 3 N.Y.L.S. HUM. RTS. ANN. 91-93 (1985):

> For centuries, the symbol of the insanity defense and the symbol of capital punishment have been linked—symbolically and empirically—in a dance of death. It was taken as common wisdom that the insanity defense developed as a procedural shield primarily, if not solely, to thwart the use of the death penalty. While this was not the sole rationale for pleading the defense, the connection appeared inextricable: if capital punishment were to be abolished, as seemed likely less than fifteen years ago, the use of the defense would fade into obscurity.

(footnotes omitted). *See also, id.* at 92 n.4, 96-97 nn.27-34.

For the most recent additions to the voluminous death penalty literature, see van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986); Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670 (1986). According to Professor Greenberg, our system of capital punishment "results in infrequent, random, and erratic executions, [and] is structured to inflict death neither on those who have committed the worst offenses nor on defendants of the worst character." *Id.* at 1675.

10. *See, e.g.*, Burger, *Psychiatrists, Lawyers and the Courts*, 28 FED. PROB. 3 (1964).

11. *See* Perlin, *supra* note 9, at 168. Judge Bazelon has been described as having "invited the world of mental health professionals and criminologists into his courtroom and [as having] extended his courtroom back into the world." Wales, *The Rise, the Fall, and the Resurrection of the Medical Model*, 63 GEO. L.J. 87, 104 (1974).

12. *See* Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the 'Boiler Plate': Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757, 810 (1978) (insanity defense "grew out of perception that abnormal mentality tempers the justification for criminal punishment because the individual's responsibility for the crime is diminished or removed") (footnote omitted). *See also*, Perlin, *supra* note 9, at 96 (quoting Dr. Karl Menninger: "Were capital punishment to be removed, with it would go automatically the absurd insanity defense and the perennial nonsense about sufficient responsibility, sufficient mentality and sufficient mental health to properly profit from the vastly expensive hanging or electrocution ritual"). *See also, infra* text accompanying notes 861-73.

able to successfully articulate new and original claims on behalf of this class of clientele.[13] It may be that it is yet another example of the Court's obsessiveness with *narrowing* the universe of potential new issues which could be raised in death penalty appeals.[14] It may be an expression of the historic fear[15] of punishing—especially in the context of a capital case—a person who is "genuinely insane."[16] Finally, it may simply be that "members of the [Supreme] Court—like the rest of us—are beset by ambiguous and ambivalent feelings in need of self-rationalization: unconscious feelings of awe, of fear, of revulsion, of wonder" towards the mentally ill individual charged with crime.[17]

While it is *not* clear *which* (if any) of these reasons explains the Court's interest in the area, what *does* appear clear is the fact that, at first—and second—reading, the cases appear to defy categorization, and seem to reflect, rather, a "doctrinal abyss,"[18] an idiosyncratic, result-oriented jurisprudence, or, even worse, simply random decision-making, with no doctrinal cohesiveness whatsoever[19] in an area where commentators have, generally

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13. *See, e.g.*, Malmquist, *United States Supreme Court and Psychiatry: A Critical Look*, 13 J. PSYCHIATRY & L. 137, 138 (1986) ("Some have suggested that a new generation of lawyers was primarily responsible, a generation which had been exposed to courses in some of the best law schools dealing with sophisticated issues in the area of mental health law"). *But see* M. PESZKE, INVOLUNTARY TREATMENT OF THE MENTALLY ILL 105 n.8 (1975) (lawyers exhibiting anti-psychiatric bias may have been taught psychology as college students "by young, often quite radical faculty who are very venemous in their condemnation of society in general and medicine in particular"), and *id.* at 136 (law students' interest in law and psychiatry "is to learn how to pick holes and to show the psychiatrist up in court").

14. *See, e.g.*, Rodriguez, Perlin & Apicella, *Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process*, 15 RUTGERS L.J. 399, 417 n.121 (1983) ("With each Supreme Court decision denying a challenge to a particular state's death penalty statute, the universe of federal issues shrinks dramatically," referring to Greenhouse, *As Appeals Hit Final Stage, Life on Death Row Runs Out*, New York Times (Dec. 18, 1983), § E, at 5. *See also* Perlin, *supra* note 9, at 101-02 n.57.

15. See sources cited in Perlin, *supra* note 9, at 92-93 n.4; *see generally* Ford v. Wainwright, 106 S. Ct. 2595, 2600-02 (1986); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980).

16. For a clinical discussion of this population, see Rachlin, Halpern & Portnow, *The Volitional Rule, Personality Disorders and the Insanity Defense*, 14 PSYCHIATRIC ANNALS 139, 147 (1984). For a discussion of the concept of the "totally crazy" in a related area, see Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 654 (1978), discussed *infra* at text accompanying notes 808-10.

17. Perlin, *supra* note 9, at 168. The classic expression of this argument is found in Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?* 72 YALE L.J. 853, 868-69 (1963). *See also* sources cited in Perlin, *supra* note 9, at 168 n.504.

18. Project, *Civil Commitment of the Mentally Ill*, 14 UCLA L. REV. 822, 829 n.35 (1967) [hereinafter UCLA Project] *quoted in* Note, 6 WHITTIER L. REV. 519, 543 (1984).

Interestingly, the student author immediately rejected this notion, concluding: "however, scientific observation of mental patients over many generations has established the accuracy of psychiatric theory and the psychiatrist's understanding of the functions of the mind." UCLA Project, *supra*. *But see* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974) (psychiatric judgments neither highly reliable nor significantly valid); O'Connor v. Donaldson, 422 U.S. 563, 578, 584 (1975) (Burger, C.J., concurring) ("Despite many recent advances in medical knowledge, it remins a stubborn fact that there are many forms of mental illness which are not understood [;] there can be little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment,' " *quoting* Greenwood v. United States, 350 U.S. 366, 375 (1966)).

19. See, for a devastating attack on the Burger Court's jurisprudence in general, *Empty Robe*, NEW REPUBLIC (July 14 & 21, 1986), at 4. *See also* Nagel, *A Plague of Judges: The Burger Court's Secret Plan for America*, WASHINGTON MONTHLY (Nov. 1980), at 20, 21: "[T]he zig-zagging of the justices tempt litigants of all types to try their hand at constitutional argument. On any given Mon-

unsuccessfully, tried to decipher some decision-making motif or common thread which might indicate principled and predictable decision-making.[20] Dr. Paul Appelbaum, for instance, sees the Court's "tortuous"[21] reasoning as purely outcome-determinative, and as a reflection of its "unwillingness to confront directly the problems of psychiatric testimony at death penalty hearings,"[22] serving only to further a set of specific "transcedent ideological goal[s]."[23]

It is also necessary to consider the relationship between the Court's attitude towards these issues and its concomitant message—in *civil* cases—"that it does not view the federal courts as an appropriate forum in which involuntarily committed individuals may assert their rights."[24] Dr. Carl Malmquist, for example, has suggested that Appelbaum's analysis should be "extend[ed]" to reflect the Court's desire "to restore an era in which federal courts played almost no role in overseeing institutions such as mental hospitals."[25] While none of the criminal cases under consideration in this paper involve the sorts of broad institutional reform[26] that were before the Court in such cases as *Mills v. Rogers*,[27] *Youngberg v. Romeo*,[28] or *Pennhurst State School & Hospital v. Halderman*,[29] a climate of hostility to "judicial activism"[30] evidenced in such cases might well "spill over" to decision-making in constitutional criminal procedure cases as well.

Although Appelbaum's and Malmquist's analyses are appealing—and

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day, if you catch the brethren in the right frame of mind, you might win." *See generally*, Nagel, *A Comment on the Burger Court and "Judicial Activism,"* 52 U. COLO. L. REV. 223 (1981) [hereinafter *Burger Comment*].

20. Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 LOYOLA U. L.J. 405, 407 (1982). *See id.* n.12, *comparing* Chase, *The Burger Court, the Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518 (1977), *with* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980). See also Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977); Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980).

21. *Dr. Appelbaum Replies*, 142 AM. J. PSYCHIATRY 387, 388 (1985) [hereinafter Appelbaum].

22. Appelbaum, *Death, the Expert Witness, and the Dangers of Going* Barefoot, 34 HOSP. & COMMUN. PSYCHIATRY 1003, 1004 (1983).

23. Appelbaum, *The Supreme Court Looks at Psychiatry*, 141 AM. J. PSYCH. 827, 831 (1984), discussed in Perlin, *supra* note 9, at 111, *id.* n.121, and *id.* at 167.

24. Note, *Involuntary Civil Commitment: The Inadequacy of Existing Procedural and Substantive Protections*, 28 U.C.L.A. L. REV. 906, 951 (1981); *see generally* Perlin, *supra* note 6, mscpt. at 6-9.

25. Malmquist, *supra* note 13, at 156.

26. On the Burger Court's attitude towards such cases, *see, e.g.*, Perlin, *supra* note 6, mscpt. at 78-79 nn.41-43, citing, *inter alia*, Rudenstine, Pennhurst *and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71 (1984) [hereinafter Rudenstine I]; Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate Over Political Structure*, 59 SO. CAL. L. REV. 449 (1986) [hereinafter Rudenstine II]; Sherry, *Issue Manipulation by the Burger Court: Saving the Community From Itself*, 70 MINN. L. REV. 611 (1986); Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After* Pennhurst, 12 HASTINGS CONST. L. Q. 643 (1985).

27. 451 U.S. 291 (1982) (right to refuse treatment).

28. 457 U.S. 307 (1982) (right to training).

29. *Penhurst I*, 451 U.S. 1 (1981); *Penhurst II*, 104 S. Ct. 900 (1984) (right to community services in the least restrictive alternative).

30. Malmquist, *supra* note 13, at 156; *cf. Burger Comment, supra* note 19, at 245 (Burger Court's style and rhetoric are "pushing the nation toward *more* pervasive reliance on judicial decision-making") (emphasis added).

may well be accurate[31]—it is possible that when examined more closely these decisions *do* reveal *some* doctrinal consistency that transcends the more narrow area of mental disability law. Since four of the cases in question have been decided in the Court's most recent term,[32] it is perhaps timely to examine anew the eight important cases of the past five years,[33] in an effort to determine whether such consistency exists.

First, I will discuss the eight cases, looking at the more recent four in greater depth than the earlier ones. Next, I will briefly consider existing critical commentary on the cases as well as subsequent judicial interpretations, in an effort to determine the responsiveness of state and lower federal courts to Supreme Court "signals." Then, I will attempt to determine whether there are, in reality, important and consistent doctrinal threads running through the cases or whether they reflect simply a "doctrinal abyss."

THE CASES

I have arbitrarily categorized the key cases for purposes of analysis into three[34] groupings which cover an important spectrum of the procedural issues relevant to the criminal trial process: 1) role and weight of expert testimony;[35] 2) privilege against self-incrimination including the interplay between *Miranda* and mental disability;[36] and 3) competence to be executed.[37]

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31. *See* Perlin, *supra* note 9, at 167.

32. *See* Wainwright v. Greenfield, 106 S. Ct. 634 (1986); Allen v. Illinois, 106 S. Ct. 2988 (1986); Ford v. Wainwright, 106 S. Ct. 2595 (1986); Smith v. Murray, 106 S. Ct. 2678 (1986).

33. The five year time period is chosen arbitrarily so as to begin with Estelle v. Smith, 451 U.S. 454 (1982), which discussed many of the pertinent issues for the first time in a Supreme Court opinion. Other cases to be discussed include Barefoot v. Estelle, 463 U.S. 880 (1983); Jones v. United States, 463 U.S. 354 (1983); Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

Because the earlier cases have generally been considered closely by commentators—*see, e.g.*, Geimer, *Death at Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985) (*Barefoot*); Perlin, *supra* note 9; Margulies, *The "Pandemonium Between the Mad and the Bad:" Procedures for the Commitment and Release of Insanity Acquittees After* Jones v. United States, 36 RUTGERS L. REV. 793 (1984); Slobogin, Estelle v. Smith: *The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71 (1982)—they will be discussed somewhat more briefly than the four cases decided in the Supreme Court's most recent term. *See supra* note 32.

While *Ake* has been discussed in some depth, *see* Perlin, *supra* note 9, the range of commentary has been somewhat limited, *see infra* notes 665-86, so that case will receive, to use a favorite phrase of the Supreme Court's, "intermediate scrutiny."

34. In addition, some consideration must be paid to what I will call a "shadow grouping": cases dealing with an area of the law—competence of counsel—which appears to be neutral with regard to mental disability issues, but which, in reality, may prove to be as important as any cases dealing frontally with such questions. *See, e.g.*, Strickland v. Washington, 104 S. Ct. 2052 (1984), discussed *infra* note 721.

35. *Barefoot; Jones; Ake.*

36. *Estelle; Greenfield; Smith; Allen.*

37. *Ford.* While one case probably does not make a "grouping," the legal and symbolic significance of this case demands separate consideration. *See* Perlin, *supra* note 9, at 91-92 n.3. *See also*, Alvord v. Wainwright, 105 S. Ct. 355-60 (1984) (Marshall & Brennan, JJ., dissenting from denial of *certiora*). The facts of the *Alvord* case are discussed in Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 42, 44-45 (1986); Radelet & Barnard, *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 52-53 n.38 (1986).

(A) *Role and Weight of Expert Testimony*

The Court's three cases—*Barefoot v. Estelle*,[38] *Jones v. United States*[39] and *Ake v. Oklahoma*[40]—which focus on the role of the expert witness in the criminal trial process, the weight to be given to such testimony, and the constitutional implications of such expert testimony are the most perplexing, apparently-inconsistent and seemingly-irreconcilable of all of the decisions under consideration.[41] They seem, on the surface, to be utterly idiosyncratic, and the first two of the decisions—*Barefoot* and *Jones*—seem to share no common constitutional or social values with the third (*Ake*). While deeper analysis may reveal some commonality in doctrines, the cases, when read together, appear to deserve Dr. Appelbaum's characterization of "tortous reasoning."[42]

(1) Barefoot v. Estelle

After Thomas Barefoot was convicted of murdering a Texas police officer,[43] two psychiatrists[44] testified in response to hypothetical questions[45] at the penalty phase[46] that defendant "would probably commit further acts of violence and represent a continuing threat to society."[47] The jury subsequently accepted this testimony[48] and the death penalty was imposed.[49]

The defendant's conviction was affirmed in the state courts,[50] and his

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38. 463 U.S. 880 (1983).
39. 463 U.S. 354 (1983).
40. 105 S. Ct. 1087 (1985).
41. *See* Perlin, *supra* note 9, at 164-69.
42. Appelbaum, *supra* note 22.
43. 463 U.S. at 883.
44. One of the psychiatrists testifying on the state's behalf, Dr. James Grigson, has been characterized as "Dr. Death." *See, e.g.*, Ewing, *"Dr. Death" and the Case for an Ethical Ban on Psychological Predictions of Dangerousness in Capital Sentencing Proceedings*, 8 AM. J. L. & MED. 407, 410 (1983). For an analysis of other cases in which Dr. Grigson has participated, see Dix, *Participation by Mental Health Professionals in Capital Murder Sentencing*, 1 INT'L J. L. & PSYCHIATRY 283 (1978); Dix, *Expert Prediction Testimony in Capital Sentencing Evidentiary and Constitutional Considerations*, 19 AM. CRIM. L. REV. 47 (1981) [hereinafter *Expert Prediction*]. Professor Dix has suggested that Dr. Grigson operates "at the brink of quackery." Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 172 (1977) [hereinafter Dix I].
45. Neither doctor examined the defendant prior to testifying. *Barefoot*, 463 U.S. at 885.
According to Dr. Paul Appelbaum, the decision to pose hypothetical questions to experts who did not personally examine the defendant may have resulted from the Supreme Court's opinion in Estelle v. Smith, 451 U.S. 484 (1981), holding that it was a constitutional violation not to warn a defendant at the outset of such a pretrial psychiatric examination that the information he revealed might be used against him; *see infra* text accompanying notes 207-55. Appelbaum, *Hypotheticals, Psychiatric Testimony, and the Death Sentence*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 169, 170-171 (1984). *Cf.* Holloway v. State, 691 S.W.2d 608, 617 n.3 (Tex. Ct. Crim. App. 1984) (expert witness testified half the time in response to hypotheticals "*when we are not allowed to*" examine defendants) (emphasis in original).
46. *See* TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981).
47. *Barefoot*, 463 U.S. at 884.
48. Under Texas procedures, special questions are submitted to the jury as part of the penalty phase. *Id.* at 883-84.
49. *Id.* at 884-85.
50. Barefoot v. State, 596 S.W.2d 875 (Tex. Ct. Crim. App. 1980). On state appeal, defendant had urged unsuccessfully (1) that the use of psychiatrists to make predictions at the punishment hearing as to his future conduct was unconstitutional because psychiatrists "individually, and as a class," are not competent to predict future dangerousness, and (2) that permitting answers to hy-

application in federal district court for a writ of habeas corpus was denied,[51] a denial that was affirmed by the Fifth Circuit.[52] The Supreme Court then agreed to hear the case.[53]

In affirming the denial of habeas corpus, the Supreme Court first dealt with an important procedural issue that, while not appearing particularly relevant to the issues of mental disability and expert testimony, casts a clear light on the court's attitude towards death penalty litigation in general.[54] It held that a habeas corpus petitioner must make a "substantial showing of the denial of [a] federal right,"[55] and that, while a circuit court, "where necessary to prevent the case from becoming moot by the petitioner's execution, should grant a stay of execution" pending appellate disposition,"[56] even "when a condemned prisoner obtains a certificate of probable cause on his initial appeal,"[57] the court of appeals "may adopt *expedited procedures* in resolving the merits of habeas appeals."[58]

On the psychiatric issue, the Court summarized defendant's claim:

> First, it is urged that psychiatrists, individually and as a group, are incompetent to predict with an acceptable degree of reliability that a particular criminal will commit other crimes in the future, and so represent a danger to the community. Second, it is said that in any event, psychiatrists should not be permitted to testify about future dangerousness in response to hypothetical questions and without having examined the defendant personally. Third, it is argued that in the particular circumstances in this case the testimony of the psychiatrists was so unreliable that the sentence should be set aside.[59]

The Court first rejected the argument that psychiatrists could not reliably predict future dangerousness in this context,[60] noting that it made "little sense" to exclude *only* psychiatrists from the "entire universe of persons who might have an opinion on this issue,"[61] and that defendant's argument would also "call into question those other contexts in which predictions of

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potheticals by psychiatrists who had not examined defendant was similarly constitutionally forbidden. *Barefoot*, 463 U.S. at 884-885.

For a critical, pre-*Barefoot* analysis of the administration of death penalty cases in Texas, see Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343, 1396, 1399 (1977) (failure of majority of Texas Supreme Court to "scrutinize more diligently" expert psychiatric testimony on dangerousness issue in similar cases "discouraging"; trial courts use expert testimony in "woefully inadequate" way at penalty phase). *See also* Dix I, *supra* note 44.

51. *Barefoot*, 463 U.S. at 885.

52. 697 F.2d 593 (5th Cir. 1983). *See Barefoot*, 463 U.S. at 885-87, for the full procedural history below.

53. 459 U.S. 1169 (1983).

54. For a sampling of the literature on *this* aspect of *Barefoot*, see Note, 32 U. KAN. L. REV. 869 (1984); Note, *Habeas Corpus—Expedited Appellate Review of Habeas Corpus Petitions by Death Sentenced State Prisoners*, 74 J. CRIM. L. & CRIMINOLOGY 1404 (1983); Young, *Guidelines Issued for Death Sentence Review*, 69 A.B.A. J. 1532 (1983).

55. *Barefoot*, 463 U.S. at 893, quoting Stewart v. Beto, 454 F.2d 268, 170 n.2 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972).

56. *Barefoot*, 463 U.S. at 893-94.

57. *Id.* at 894.

58. *Id.* (emphasis added).

59. *Id.* at 896.

60. *Id.*

61. *Id.* On this point, the Court relied heavily upon its opinion in Jurek v. Texas, 428 U.S. 262

future behavior are constantly made."[62]

In the course of this argument, the Court rejected the views presented by the American Psychiatric Association as *amicus* that (1) such testimony was invalid due to "fundamentally low reliability,"[63] and (2) that long-term predictions of future dangerousness were essentially lay determinations that should be based on "predictive statistical or actuarial information that is fundamentally nonmedical in nature."[64]

(1976), rejecting the claim that it was impossible to predict future behavior and that dangerousness was thus an invalid consideration in death penalty imposition decisionmaking. *Id.*

62. *Id.* at 898. On this point, the court relied on O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (nondangerous mentally ill person could not be institutionalized against his will), and Addington v. Texas, 441 U.S. 418, 429 (1979) (commitment determination turns on "*meaning* of the facts which must be interpreted by expert[s]") (emphasis in original).

Also, under the rules of evidence, such testimony is ordinarily admitted, with the fact-finder—who would have the benefit of cross-examination and contrary evidence by the opposing party, *Barefoot*, 463 U.S. at 898;—determining the appropriate weight to be allocated. *Barefoot*, 463 U.S. at 898. While such evidence may be opposed as erroneous on either a case-by-case or global basis, the jury should have the benefit of all of the available evidence. *Id.* at 898-99.

The Court stressed that no evidence was offered by defendant at trial to contradict the testimony in question. *Id.* at 899 n.5. *See also, id.* n.7 (no contradiction of state's expert testimony that psychiatrists could predict future dangerousness of individuals "if given enough information"); *but see* Appelbaum, *supra* note 45, at 173-75 (experts in *Barefoot* had "inadequate information" and were "[lacking] crucial data" needed in order to appropriately make the diagnoses offered).

63. Amicus Brief of American Psychiatric Association, Barefoot v. Estelle, 463 U.S. 880 (1983), at 14.

64. *Id. See Barefoot*, 463 U.S. at 916, 920-23 (Blackmun, J., dissenting), sources cited at nn.1-5. See, for the most recent addition to this voluminous literature, Miller & Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J. L., ETHICS & PUB. POL. 393 (1986). The definitive work remains J. MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981), *reprinted as* THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981).

The specific predictivity problems raised in cases involving defendants such as Barefoot—diagnosed as a "criminal sociopath" and suffering from a "classical, typical, sociopathic personality disorder," *Barefoot*, 463 U.S. at 917-19—are discussed comprehensively in Dix, *Clinical Evaluation of the "Dangerousness" of "Normal" Criminal Defendants*, 66 VA. L. REV. 525, 532-50 (1980) [hereinafter Dix II]; Dix I, *supra* note 44, at 175-92; *Expert Prediction, supra* note 44, at 44 n.219 (danger of undue prejudice arising from the use of this diagnosis may be "exceptionally great"); *see also* Davis, *Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert*, 69 J. CRIM. L. & CRIMINOLOGY 300 (1978). *See infra* note 215.

In one of his analyses of the *Barefoot* case, Dr. Appelbaum points out that, assuming the "sociopathic personality disorder" language used by the *Barefoot* experts meant roughly what is now classified as "antisocial personality disorder" (A-SPD), see *Diagnostic and Statistical Manual III* 320-21 (1980) (DSM-III), it was "clear" that the expert had inadequate information upon which to base such a diagnosis, Appelbaum, *supra* note 45, at 173:

> DSM-III requires onset of symptoms before age of 15 for a diagnosis of A-SPD to be made. The hypothetical question that was presented to [the witness] began when the defendant was age 24. DSM-III requires that four of eight specified behaviors be manifested after the age of 18. There was information in the hypothetical dealing with only two of these behaviors.
>
> The diagnostic criteria for A-SPD also require "a pattern of continuous anti-social behavior in which the rights of others are violated with no intervening period of at least five years without anti-social behavior between age 15 and the present time." Since information about the defendant's functioning between age 15 and 24 was completely lacking, it would be impossible to say whether the defendant met this criterion.
>
> Finally, the criteria require that the individual's anti-social behavior not be due either to severe mental retardation, schizophrenia, or manic episodes. The information in the hypothetical contained no information about any of these diagnoses being present or absent. Thus, [the witness] could not have reasonably concluded that the pattern of behavior was not attributable to [such a disorder]. Of course, this is precisely the kind of information that would be available from a personal examination. It is, therefore, clear that [the

It construed its decision in *Estelle v. Smith*[65] to in "no sense disapprov[e of] the use of psychiatric testimony on future dangerousness."[66] On the hypotheticals issue, the Court simply held that expert testimony "is commonly admitted as evidence where it might help the fact finder do its assigned job,"[67] and that the fact that the witnesses had not examined the defendant "went to the weight of their testimony, not to its admissibility."[68]

Justice Blackmun dissented (for himself, and Justices Brennan and Marshall),[69] rejecting the Court's views on the psychiatric issue:

> The Court holds that psychiatric testimony about a defendant's

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witness] could not have reached the conclusion that the defendant was suffering from an anti-social personality disorder, at least using the generally accepted criteria of DSM-III. *Id.* at 173-74.

65. 451 U.S. 454 (1981). *See infra* text accompanying notes 207-55.

66. *Id.* at 473, *quoted* in *Barefoot*, 463 U.S. at 898. The Court was unpersuaded that the American Psychiatric Association, as *amicus*, sought to bar such expert testimony:

> The *amicus* does not suggest that there are not other views held by members of the Association or of the profession in general. Indeed, as this case and others indicate, there are doctors who are quite willing to testify at the sentencing hearing; who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view.

Barefoot, 463 U.S. at 899. *But see* Dix I, *supra* note 44, at 172 (*Barefoot* witness Grigson operated "at the brink of quackery").

Further, the Court added that it was "unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinions about future dangerousness," *Barefoot*, 463 U.S. at 901, adding that this was so "particularly when the convicted felon has the opportunity to present his own side of the case." *Id. Cf.* Ake v. Oklahoma, 105 S. Ct. 1087 (1985). It specifically rejected what it characterized as Justice Blackmun's charge in his dissenting opinion (*see Barefoot*, 463 U.S. at 920-23, (Blackmun, J., dissenting)), that a jury would not be able to separate "the wheat from the chaff," *id.* at 899-900, answering that "[w]e do not share in this low evaluation of the adversary process," *id.*

67. *Barefoot*, 463 U.S. at 903.

68. *Id.* at 904, quoting Barefoot v. State, 596 S.W.2d at 887. *See generally*, on this point, Perlin, *supra* note 9, at 118, text accompanying nn.156-60. *See also*, Bonner, *Death Penalty*, [1984] ANN. SURVEY AM. L. 493, 507-08. ("Expert testimony predicated on hypotheticals and speculation has no place in a death sentencing system that claims to value fairness and reliability.") *Cf.* Hypotheticals, *supra* note 45, at 176 (while hypotheticals ought not necessarily to be entirely excluded from capital sentencing process, "they ought to be inadmissible as the *sole* basis for a psychiatric opinion") (emphasis in original).

On the application of these rules to the case before it, the Court concluded that there was no error, noting that the defendant could have put forth his *own* hypothetical, (*Barefoot*, 463 U.S. at 905 n.10) and that, when an expert witness is as positive about his predictions as were the witnesses in *Barefoot*—Dr. Grigson, for instance, asserted that he was "100% sure" that an individual with the characteristics described in the hypothetical would commit violent acts in the future—the easier it should be to impeach him. *Id.* n.11. For the full colloquy on this point, *see* Appelbaum, *supra* note 45 at 169.

Noted the Court:

> Dr. Fason [defendant's witness] testified at the habeas hearing that if a doctor claimed to be 100% sure of something without examining the patient, "we would kick him off the staff of the hospital for his arrogance." H. Tr. 48. Similar testimony could have been presented at Barefoot's trial, but was not.

Barefoot, 463 U.S. at 905 n.11.

Time has not made Dr. Grigson more modest. *See* Nethery v. State, 692 S.W.2d 686, 709 (Tex. Ct. Crim. App. 1985) (Grigson said he was "probably the best authority in the area," and stated he was "100% accurate in his predictions of future violence").

69. *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting). Justices Brennan and Marshall would have vacated the death penalty as violative of the cruel and unusual punishment clause, *id.* (Marshall, J., dissenting). Justice Blackmun, on the other hand, would have vacated and remanded "for further proceedings," *id.* at 938 (Blackmun, J., dissenting).

Justice Stevens concurred, reasoning that, while he agreed with that aspect of Justice Marshall's dissent which found "serious procedural error" in the way the Fifth Circuit handled the case, he

> future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result—even in a capital case—because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages,[70] but when a person's life is at stake—no matter how heinous his offense—a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.[71]

Relying on the American Psychiatric Association's *amicus* brief, Justice Blackmun made four main points: 1) no "single, reputable source" was cited by the majority to contradict the proposition that psychiatric predictions of long-term violence "are wrong more often than they are right;"[72] 2) laymen can do "at least as well and possibly better" than psychiatrists in predicting violence;[73] 3) it is "crystal-clear" from the literature that the state's witnesses "had no expertise whatever,"[74] and 4) such "baseless testimony" cannot be reconciled "with the Constitution's paramount concern for reliability in capital sentencing."[75]

Because such purportedly scientific testimony—"unreliable [and] prejudicial"[76]—was imbued with an " 'aura of scientific infallibility,' "[77] it was capable of "shroud[ing] the evidence [thus leading] the jury to accept it without critical scrutiny."[78] Justice Blackmun charged: "when the court knows full well that psychiatrists' predictions of dangerousness are specious, there can be no excuse for imposing on the defendant, on pain of his life, the heavy

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agreed with the majority's ultimate conclusion that the District Court's judgment should be affirmed, *id.* at 906.

Justice Marshall dissented (for himself and Justice Brennan), arguing that 1) the procedures followed by the Court of Appeals were inconsistent with prior Supreme Court caselaw, (*see id.* at 908-912, discussing Garrison v. Patterson, 391 U.S. 464 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968), and Nowakowski v. Maroney, 386 U.S. 542 (1967)), and 2) the Court's adoption of summary procedures was "grossly improper," *Barefoot*, 463 U.S. at 915 (Marshall, J., dissenting).

70. *Cf.* Addington v. Texas, 441 U.S. 418, 423 (1979) (rejecting preponderance of evidence standard—used in the "typical civil case involving a monetary dispute between private parties"—because the person facing such commitment "should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state," *id.* at 427).

71. *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting).

72. *Id.* at 921.

73. *Id.* at 922.

74. *Id.*

75. *Id.* at 919.

76. *Id.*

77. *Id.*, quoting Gianelli, *The Inadmissibility of Novel Scientific Evidence*: Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980). *See generally* sources cited in *Barefoot*, 463 U.S. at 919 n.8 (Blackmun, J., dissenting); Note, People v. Murtishaw: *Applying the* Frye *Test to Psychiatric Predictions of Dangerousness in Capital Cases*, 70 CALIF. L. REV. 1069, 1075-77 (1982) (on prejudicial impact of expert predictions of dangerousness).

Barefoot is considered in the light of *Frye* in Perlin, *supra* note 9, at 111-13 (concluding that, under both the majority and minority *Frye* positions, "the testimony in *Barefoot* would still fail to pass muster," *id.* at 113). *See also, id.* at 115-16 n.147 (discussing Note, *supra* at 1087, quoting Dr. Bernard Diamond for proposition that *Frye* should be applied to *all* psychiatric predictions of dangerousness).

78. *Barefoot*, 463 U.S. at 919.

burden of convincing a jury of laymen of the fraud."[79]

(2) Jones v. United States

Jones v. United States,[80] on the other hand, presented a fact pattern as diametrically opposed to that before the court in *Barefoot* as one could imagine. The underlying criminal charge in *Jones* involved the attempted petit larceny of a piece of clothing (a jacket) from a department store,[81] or, as it is more commonly known, shoplifting, a misdemeanor under District of Columbia law, punishable by a maximum one-year prison sentence.[82] After Michael Jones was found not guilty by reason of insanity (NGRI)[83] following a bench trial,[84] pursuant to local statute,[85] he was ordered committed to a mental hospital.[86]

At his first hearing[87] he was denied release.[88] At his second hearing—held more than a year after he was initially hospitalized—he argued that 1) he was entitled to unconditional release, since he had been hospitalized for a longer period of time than the maximum to which he could have been sentenced, and 2) he was entitled to full civil commitment safeguards at such a hearing, including a jury determination as to whether the hospital had proven, by clear and convincing evidence, that he was still mentally ill and dangerous.[89] The trial court rejected these arguments.[90]

Jones then appealed to the District of Columbia Court of Appeals which first affirmed,[91] then, on rehearing, reversed,[92] and finally, on an *en banc* rehearing, again affirmed the trial court's decision.[93] It reasoned that abbreviated post-commitment procedures were appropriate because of the predictive value of the initial determination of insanity and dangerousness at the criminal trial.[94]

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79. *Id.* at 935-36. *Cf.* Note, Estelle v. Smith *and Psychiatric Testimony: New Limits on Predicting Future Dangerousness*, 33 BAYLOR L. REV. 1015, 1033 (1981) ("When the decision of whether a criminal defendant shall live or die is put to the jury, only the *most credible* evidence should be used in the determination") (emphasis added).

80. 463 U.S. 354 (1983).

81. *Id.* at 359.

82. D.C. CODE §§ 22-103, 22-2202 (1981).

83. Under District of Columbia law, an insanity acquittal shall only be entered where the defendant's insanity is "affirmatively established by a preponderance of the evidence." D.C. CODE § 24-301(j) (1981). *See Jones*, 463 U.S. at 360.

84. *Jones*, 463 U.S. at 360.

85. D.C. CODE § 24-301(d)(1) (1981).

86. *Jones*, 463 U.S. at 360.

87. Under District of Columbia law, an NGRI acquittee is entitled to a hearing 50 days after commitment, at which the patient may demonstrate—by a preponderance of the evidence—that he either is no longer mentally ill or no longer dangerous to himself, and thus entitled to release. D.C. CODE § 24-301(d)(2) (1981).

88. *Jones*, 463 U.S. at 460.

89. *Id.* at 360-61.

Nineteen states currently commit insanity acquittees under the same procedures used to commit persons subject to involuntary civil commitment. Note, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in* Jones v. United States, 34 AM. U. L. REV. 4769, 480-81 n.7 (1985).

90. *Jones*, 463 U.S. at 360-61.

91. Jones v. United States, 396 A.2d 183 (D.C. Ct. App. 1978).

92. Jones v. United States, 411 A.2d 624 (D.C. Ct. App. 1980).

93. Jones v. United States, 432 A.2d 364 (D.C. Ct. App. 1981).

94. *Id.* at 373, *citing Jones*, 396 A.2d at 189. In addition, the court stated that tying the duration of confinement to a hypothetical maximum sentence that an individual could have received for

The Supreme Court, in a sharply-split decision,[95] affirmed.[96] First, it sanctioned automatic commitment based upon an insanity acquittal.[97] Writing for a five-judge majority, Justice Powell reasoned that, since an insanity acquittal establishes beyond a reasonable doubt the fact that the defendant committed a criminal act,[98] this provides "concrete evidence" as to the patient's dangerousness that is generally as persuasive as any predictions about dangerousness made regularly in involuntary civil commitment proceedings.[99]

Rejecting Jones' arguments based on the lack of predictive value of prior dangerous acts as an indication of future dangerousness,[100] the court concluded that it was appropriate to "pay particular deference to reasonable legislative judgments" made by Congress in the context.[101] Significantly, the Court refused to distinguish between acts of violence and crimes such as the one with which Jones was charged,[102] quoting from a District of Columbia Court of Appeals opinion written by the Chief Justice when he sat on that court: "[t]o describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both."[103]

The Court clearly distinguished *Addington v. Texas*[104] on the question of the appropriate standard of proof. To equate the NGRI and involuntary civil commitment process "ignores important differences between the [classes of patients,]"[105] reasoned the Court, concluding that "insanity acquittees constitute a special class that should be treated differently from other candidates for commitment."[106]

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the underlying criminal act, ignored the "most basic precepts of medicine and psychiatry." 432 A.2d at 370.

95. Justice Powell wrote for a five-judge majority; Justice Brennan (for himself, Justices Marshall andBlackmun) and Justice Stevens filed separate dissenting opinions. *Jones*, 463 U.S. at 371 (Brennan, J., dissenting); *id.* at 387 (Stevens, J., dissenting).

96. *Id.* at 371.

97. The Court analyzed the statute in light of the rational basis equal protection test. *Id.* at 362 n.10. For a sharp criticism of the use of this test, see Margulies, *supra* note 33, at 814-18.

98. *Jones*, 463 U.S. at 363-64.

99. *Id.* This also served to distinguish the case from the fact pattern in Jackson v. Indiana, 406 U.S. 715 (1972), which dealt with persons incompetent to stand trial and who were thus never judged culpable of the underlying offense. *Jones*, 463 U.S. at 364 n.12.

100. *Id.* at 362.

101. *Id.* at 364-65 n.13.

102. *Id.* at 365 n.14. *But see* Gelwan, *Civil Commitment and Commitment of Insanity Acquittees*, 11 N. ENG. J. CRIM. & CIV. CONFINEMENT 328, 353 (1985) (legislatures should be permitted to retain the presumption of continuing dangerousness only as to defndants acquitted of violent crimes).

103. *Jones*, 463 U.S. at 365, quoting Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1961).

104. Addington v. Texas, 441 U.S. 418 (1979). In *Addington*, the Court mandates a standard of "clear and convincing evidence" as the appropriate burden of proof in involuntary civil commitment cases. *Id.* at 433.

105. *Jones*, 463 U.S. at 367.

106. *Id.* at 370.

On the question of whether the patient's mental illness continued, the court found that it was reasonable "to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." *Id.* at 366. A de novo commitment hearing would merely "relitigate much of the criminal trial" without "focusing on the critical question [of] whether the acquittee has recovered." *Id.*

Further, the concerns motivating the Court's opinion in *Addington*—the risk of error in non-judicial commitment decisions, and the possibility of stigma occasioned by an involuntary commitment—were absent in the present case.[107] Finally, the Court rejected the patient's argument that his release was compelled because he had already been institutionalized for a longer period of time than had he received the maximum sentence for the misdemeanor involved.[108]

Dissenting for himself, Justices Marshall and Blackmun, Justice Brennan[109] charged that the Court "pos[ed] the wrong question." Justice Brennan restated the issue as: "whether the fact that an individual has been found 'not guilty by reason of insanity,' by itself, provides a constitutionally adequate basis for involuntary, indefinite commitment to psychiatric hospitalization."[110]

Noting that the Court had previously held that the state "may not impose psychiatric commitment as an alternative to penal sentencing for longer than the maximum period of incarceration the legislature has authorized as punishment for the crime committed,"[111] Justice Brennan listed four major arguments which he saw as rejecting the majority's thesis that "the Government may be excused from carrying the *Addington* burden of proof with respect to each of the *O'Connor*[112] elements of mental illness and dangerousness in committing [the patient] for an indefinite period."[113]

1. The argument that the "mere facts of past criminal behavior and mental illness justify indefinite commitment without the benefits of the minimum due process standards associated with civil commitment, most impor-

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107. *Id.* at 367.

First, the commission of a criminal act by the NGRI acquittee was seen as persuasive evidence of activity not within a "range of conduct that is generally acceptable," on the part of an individual who, by the *entry* of his NGRI plea, conceded that his actions were produced by mental illness, *id.*, quoting *Addington*, 441 U.S. at 426-27. Second, given the stigma resulting from the NGRI verdict itself, there is "little additional harm" which can result from civil commitment. *Id.* at 367 n.16.

108. *Id.* at 368-69.

Construing the test that the court had articulated in Jackson v. Indiana, 406 U.S. 715, 738 (1972)—that the nature and duration of commitment must "bear some reasonable relationship to the purpose for which the individual is committed"—it found that the basis for the patient's confinement rested "on his continuing illness and dangerousness," *Jones*, 463 U.S. at 369. The severity of the underlying criminal act bore no necessary correlation to the amount of time needed to treat a patient for mental illness or render him nondangerous. Thus, the maximum hypothetical sentence had no necessary relationship to the permissible purposes of commitment following an insanity acquittal, and the patient was thus not entitled to release. *Id.*

Contrarily, the court noted that punishment of an insanity acquittee would contradict the essentially exculpatory nature of the insanity defense. "As he was not convicted, he may not be punished." *Id.*

109. The three dissenting Justices in *Barefoot*. *See supra* text accompanying note 69.

110. *Jones*, 463 U.S. at 371 (Brennan, J., dissenting).

111. *Id.* at 374, *citing* Humphrey v. Cady, 405 U.S. 504, 510-11 (1972). (Brennan, J., dissenting). In *Humphrey*, the patient had been first convicted of contributing to the delinquency of a minor, and then, under state law, was found at a special hearing to be in need of psychiatric treatment, was then committed for treatment for the maximum period for which he could have been punished for the underlying crime, and was then recommitted for another five years pursuant to a subsequent hearing after a judicial hearing on mental illness and dangerousness. Humphrey v. Cady, 405 U.S. at 506-07.

112. In O'Connor v. Donaldson, 422 U.S. 563, 576 (1975), the Court found that a "State cannot confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

113. *Jones*, 463 U.S. at 374 (Brennan, J., dissenting).

tantly proof of present mental illness and dangerousness by clear and convincing evidence" was inconsistent with the Court's precedents in other commitment contexts.[114]

2. "An acquittal by reason of insanity of a single, nonviolent misdemeanor is not a constitutionally adequate substitute for the due process protections of *Addington* and *O'Connor, i.e.* proof by clear and convincing evidence of present mental illness or dangerousness, with the government bearing the burden of persuasion."[115]

3. The due process calculus of *Mathews v. Eldridge*[116] could be satisfied by taking into account criminal behavior and past mental condition, without depriving insanity acquittees of the *Addington* protections; while commitment of insanity acquittees "for a reasonably limited period without requiring the Government to meet its *Addington* burden" might be justifiable, "at some point the Government must be required to justify further commitment" under *Addington*.[117]

4. The Court's dual arguments that the "risk of error" in this sort of case is diminished—because the defendant has admitted to the commission of a criminal act outside the generally acceptable "range of conduct";[118] because the successful use of the insanity defense itself necessarily stigmatizes

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114. *Id.* at 375 (Brennan, J., dissenting). While Justice Brennan conceded that *Addington* and Jackson v. Indiana, 406 U.S. 715 (1972), might be distinguishable because, in those cases, there was never proof that a crime had been committed, he argued that such an objection could not be leveled at Baxstrom v. Herold, 383 U.S. 107 (1966) or *Humphrey*, in both of which cases the patient had been originally convicted of a criminal act. *Jones*, 463 U.S. at 375-76 (Brennan, J., dissenting). He added:

> Under today's ruling, . . . it is difficult to see how a constitutional claim like the one made in *Humphrey* could conceivably have merit, unless there is somehow a constitutional difference between Colorado's pre-1972 "mentally disordered sex offenders" statute and the District of Columbia's "not guilty by reason of insanity" statute. Both statutes were designed to authorize involuntary commitment for psychiatric treatment of persons who have committed crimes upon a finding by a preponderance of the evidence that the crime was the product of a mental condition appropriate for psychiatric therapy.

463 U.S. at 376-77 n.6 (Brennan, J., dissenting).

115. *Id.* at 377 (Brennan, J., dissenting).

A "not guilty by reason of insanity" verdict is "backward-looking, focusing on one moment in the past, while commitment requires a judgment as to the present and future," Justice Brennan continued, citing to the near-unanimous clinical literature that "even the best attempts to identify dangerous individuals on the basis of specified facts have been inaccurate roughly two-thirds of the time, almost always on the side of overprediction," *id.* at 378. See sources cited *id.* at 378-81 nn.8-15. Justice Brennan continued that such research "is practically nonexistent on the relationship of *nonviolent* criminal behavior . . . to future dangerousness," *id.* at 379 (emphasis in original).

While Justice Brennan conceded that *Jones* might overrule *Humphrey* "by implication," he pointed out that it could not be so read to overrule *Baxstrom* or [*Baxstrom's* progeny, including Jackson v. Indiana, 406 U.S. 715 (1972)], *id.* at 380. Under *Baxstrom*, "the separate facts of criminality and mental illness cannot support indefinite psychiatric commitment," *id.* On this point, he concluded:

> Given the close similarity of the governmental interests at issue in this case and those at issue in *Addington*, and the highly imperfect "fit" between the findings required for an insanity acquittal and those required under *O'Connor* to support an indefinite commitment, I cannot agree that the Government should be excused from the burden that *Addington* held was required by due process.

Id. at 381 (Brennan, J., dissenting) (footnote omitted).

116. 424 U.S. 319 (1976).

117. *Jones*, 463 U.S. at 382 (Brennan, J., dissenting).

118. *Id.* at 367.

the defendant[119]—are incorrect. First, under *O'Connor*, there must be proof of "dangerous" behavior,[120] not merely "unacceptable" behavior.[121] Second, there are reasons beyond the avoidance of stigma in support of the argument that there is a recognizable liberty interest in the avoidance of involuntary commitment; in many respects, confinement in a mental institution "is even more intrusive than incarceration in a prison."[122]

He thus concluded that indefinite commitment "without the due process protections adopted in *Addington* and *O'Connor* is not reasonably related to any of the Government's purported interests in continuing insanity acquittees for psychiatric treatment."[123]

Justice Stevens also dissented, finding that the patient was "presumptively entitled to his freedom after he had been incarcerated for a period of one year."[124]

(3) Ake v. Oklahoma[125]

Less than two years after the *Barefoot* and *Jones* decisions, the Court looked at an entirely different aspect of expert witness issues in *Ake v. Oklahoma*. In *Ake* the Court considered the question of the scope of a criminal defendant's right to expert assistance in the context of an insanity defense trial.[126]

a. *Experts in Insanity Defense Cases*

Although the Court had held in *United States ex rel. Smith v. Baldi*[127] in 1953 that there was no such right of expert assistance, in the intervening three decades that doctrine had been "progressively eroded"[128] by develop-

119. *Id.* at 367 n.16.

120. *See* O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975).

121. *Jones*, 463 U.S. at 383 (Brennan, J., dissenting).

122. *Id.* at 384:

> Inmates of mental institutions, like prisoners, are deprived of unrestricted association with friends, family, and community; they must contend with locks, guards, and detailed regulation of their daily activities. In addition, a person who has been hospitalized involuntarily may to a significant extent lose the right enjoyed by others to withhold consent to medical treatment.

Id. at 384-85.

Cf. Allen v. Illinois, 106 S. Ct. 2988 (1986), discussed *infra* at text accompanying notes 407-56.

123. *Jones*, 463 U.S. at 386 (Brennan, J., dissenting).

124. *Id.* at 387 (Stevens, J., dissenting).

See, e.g., Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 329 (1982) (endorsing "hypothetical sentencing approach" as "reasonable, and, in the absence of any alternative, necessary under equal protection").

125. 105 S. Ct. 1087 (1985). *See generally* Perlin, *supra* note 9, at 121-39.

126. For helpful analyses of relevant issues, *see, e.g.*, Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U. CINN. L. REV. 574 (1982); Margolin & Wagner, *The Indigent Criminal Defendant and Defense Services: A Search for Constitutional Standards*, 24 HASTINGS L.J. 647 (1973); Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632 (1970); Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054 (1963); Kwall, *The Use of Expert Services by Privately Retained Criminal Defense Attorneys*, 13 LOYOLA U. L. REV. 1 (1981).

127. 344 U.S. 561 (1953).

128. Perlin, *supra* note 9, at 122.

ments in constitutional doctrine applying both the due process[129] and equal protection clauses[130] to claims made by indigent criminal defendants in such areas as right to transcripts of trials[131] and of preliminary hearings,[132] right to counsel at trial[133] and appeal,[134] right to effective counsel,[135] and the right of prisoners to adequate legal assistance in certain habeas corpus proceedings.[136] Commentators had articulated at least *seven* distinct policy rationales in support of the extension of necessary defense services to indigents.[137]

Partisan defense experts had been used in insanity cases for over three centuries,[138] and other medical experts have testified in criminal matters at least as far back as 1345.[139] According to Dr. Seymour Halleck, such testimony in insanity defense cases serves at least three purposes:

> [F]irst, it supplies the court with facts concerning the offender's illness; second, it presents informed opinion concerning the nature of that illness; and third, it furnishes a basis for deciding whether the illness made the patient legally insane at the time of the crime under that jurisdiction's standard of insanity.[140]

The ante is increased even further in an insanity case because of the nature of psychiatric expert testimony,[141] which demands "adversarial testing."[142] This in an area where, while certainties are "render[ed] virtually meaningless,"[143] the Court has endorsed the validity of such testimony on

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129. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

130. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (right to trial transcript).

131. *Id.*

132. Roberts v. LaVallee, 389 U.S. 40 (1967).

133. *Gideon*, 372 U.S. 335.

134. Douglas v. California, 372 U.S. 353 (1963).

135. McMann v. Richardson, 397 U.S. 759 (1970); *see generally* Strickland v. Washington, 104 S. Ct. 2052 (1984), discussed *infra* at text accompanying note 721.

136. Bounds v. Smith, 430 U.S. 817 (1977).

137. *See* Margolin & Wagner, *supra* note 126, at 652:

> (1) establishment of the defendant's innocence; (2) equality of access to justice as between the poor and the rich; (3) equality of access to justice as between the indigent defendant and the prosecutor; (4) access to that which is fundamental for a "fair trial"; (5) access to that which assures an "adequate defense"; (6) access to that which "assists counsel," and (7) access to that which assures an "effective defense."

138. Simon, *The Defense of Insanity*, 11 J. PSYCHIATRY & L. 183, 193 (1983).

139. *See, e.g.*, M. GUTTMACHER, THE MIND OF THE MURDERER 109 (1960), *citing* Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40 (1901). *See generally* Perlin, *supra* note 9, at 124 n.197.

140. Halleck, *The Role of the Psychiatrist in the Criminal Justice System*, PSYCHOLOGY 1982 ANN. REV. 386, 391 (1982).

141. On the role of expert witnesses in this context, *see generally* United States v. Byers, 740 F.2d 1104, 1138, 1167-70, and nn.177-90 (D.C. Cir. 1984) (Bazelon, C.J., dissenting); Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1344-45 (1963); Diamond, *The Psychiatrist as Advocate*, 1 J. PSYCHIATRY & L. 5 (1973); Reisner & Semmel, *Abolishing the Insanity Defense: A Look at the Proposed Federal Criminal Code in Light of the Swedish Experience*, 62 CALIF. L. REV. 753, 769-88 (1974). On the question of the ethical obligations of the psychiatric expert witness in an analogous situation, *see* Perlin & Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 45 LAW & CONTEMP. PROBS. 161 (1982).

142. *See, e.g.*, Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984).

143. Addington v. Texas, 441 U.S. 418, 430 (1979). *But see Barefoot*, 463 U.S. at 905 n.11 (discussing, and refusing to reject, expert testimony suggesting that psychiatrist can be "100% sure" of predictions). *See supra* note 68.

the question of future dangerousness in capital cases, assuming that the adversary system can expose such testimony's deficiencies.[144]

In reality, however, a defense attorney, in order to realistically fulfill his or her role of adducing evidence in support of a mental disability claim or to appropriately challenge state-adduced testimony, must acquire some measure of requisite psychiatric expertise to accomplish such an end.[145] While this role might be partially fulfilled by rigorous cross-examination,[146] "calling to the stand a psychiatrist who disagrees with the opposing psychiatrist is an even better way of forcing judges and juries to use their common sense."[147] Independent psychiatric expertise thus becomes a necessity (rather than a luxury),[148] as the absence of such a witness "goes to the very trustworthiness of the criminal justice process."[149]

The *Ake* case set the stage for the Supreme Court to reconsider the *Baldi* doctrine in the light of two conflicting trends: on one hand, the general *expansion* of constitutional rights in the cases of indigent criminal defendants asserting such rights in the context of assistance of trial counsel and the actual trial process;[150] on the other, the severe *contraction* of such rights in *Barefoot* and *Jones*.

b. *The* Ake[151] *Case*

Glenn Barton Ake was charged with two counts of murder and two counts of shooting with intent to kill.[152] Prior to trial, he was institutionalized to determine his competency to stand trial,[153] in accord with a recommendation rendered by a court-appointed psychiatrist who characterized Ake as "frankly delusional"[154] and a "probable paranoid schizophrenic."[155] That Ake had serious mental problems cannot be seriously disputed: in a remarkable colloquy with the judge, trial counsel had characterized the defendant as "goofier than hell."[156]

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144. *See Barefoot*, 463 U.S. at 898-99.

145. *See* Brief of Amicus the N.J. Dep't of the Public Advocate, Ake v. Oklahoma, 105 S. Ct. 1087 (1985), at 43. *See generally*, Poythress, *Psychiatric Expertise in Civil Commitment: Training Attorneys to Cope With Expert Testimony*, 2 LAW & HUM. BEHAV. 1, 18 (1978) [hereinafter Poythress I]; Poythress, *Mental Health Expert Testimony: Current Problems*, 5 J. PSYCHIATRY & L. 201, 204 (1977) [hereinafter Poythress II].

146. *See* Perlin & Sadoff, *supra* note 141, at 166; Poythress I, *supra* note 145, at 15; Poythress II, *supra* note 145, at 214.

147. Ennis & Litwack, *supra* note 18, at 746.

148. *Cf.* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (describing right to counsel).

149. *See* United States v. Theriault, 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), *cert. denied* 411 U.S. 984 (1973).

150. *See supra* text accompanying notes 129-36.

151. Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

152. *Id.* at 1091.

153. Because of the defendant's behavior at the arraignment, *see* Brief of Petitioner, Ake v. Oklahoma, 105 S. Ct. 1087 (1985) [hereinafter *Ake* Petitioner's Brief], at 2, *quoting* Joint Appendix at 2 (arraigning judge characterized defendant's behavior as "bizarre"), the trial judge *sua sponte* ordered an evaluation to determine if the defendant needed an "extended period of mental observation." *Ake*, 105 S. Ct. at 1090.

154. *Ake*, 105 S. Ct. at 1090-91.

155. *Id.* at 1091.

156. *See Ake* Petitioner's Brief, *supra* note 153, at 10, quoting Joint Appendix at 27:

> We waive presence of our—he ain't going to talk to us anyway. He doesn't know what is going on. *He is goofier than hell.* We don't need him, and he can't assist us. We

After being initially found incompetent to stand trial by the chief forensic psychiatrist at the state hospital,[157] a hearing was held, as a result of which[158] the defendant was committed to the state hospital.[159] Within six weeks, a hospital psychiatrist found that he had regained his competency,[160] following the regular daily administration of Thorazine.[161]

When criminal proceedings were resumed, defense counsel notified the court that he would raise the insanity defense,[162] and asked the trial judge to either arrange for a psychiatric examination of the defendant so as to evaluate his responsibility at the time of the offense, or to make funds available (in light of the defendant's indigency) to allow him to arrange for his own evaluation.[163] This request was denied on the basis of what the judge characterized as the "almost cripplingly restrictive"[164] state law, and on the authority of *Baldi*,[165] that there was no such constitutional right.[166]

At trial, the sole defense raised was insanity.[167] Although the defendant called each of the psychiatrists who had examined him while he was at the state hospital, none could testify as to his mental state at the time of the offense, because none had examined him for that purpose.[168] As a result, there was "*no expert testimony for either side on Ake's sanity at the time of the offense.*"[169] Ake's insanity defense was rejected,[170] and the defendant was convicted on all counts.[171]

At sentencing,[172] the prosecutor relied on prior psychiatric testimony to establish that defendant was mentally ill and dangerous,[173] and that it was highly probable that he would again commit violent acts.[174] There was no defense witness to rebut this testimony.[175] Ake was sentenced to death on

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have already told the court that he doesn't possess the ability to aid and assist in a jury trial. . . .

(emphasis added).

157. *Id.*

158. A consulting psychiatrist was unequivocal as to Ake's mental state: "[Ake] is a psychotic . . . his psychiatric diagnosis was that of paranoid schizophrenia—chronic, with exacerbation, that is with current upset, and that in addition to the psychiatric diagnosis, that he is dangerous." *Ake* Petitioner's Brief, *supra* note 152, at 2-3.

The psychiatrist was never asked about defendant's mental condition at the time of the offense. *Id.* at 3-4.

159. *Ake*, 105 S. Ct. at 1091.

160. *Id.*

161. *Id.* For a discussion of the properties of Thorazine, see sources cited in Perlin, *supra* note 9, at 129 n.231, 131-32 n.248.

162. *Ake* Petitioner's Brief, *supra* note 152, at 5, *quoting* Joint Appendix at 20.

163. *Id.*

164. *Ake*, 105 S. Ct. at 1091.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id. See* Perlin, *supra* note 9, at 130 n.237, *quoting Ake* Petitioner's Brief, *supra* note 152, at 7, *quoting* Joint Appendix at 46.

169. *Ake*, 105 S. Ct. at 1091 (emphasis in original).

170. On the impact of Ake's mental disability on the decision that he would not testify, *see* Perlin, *supra* note 9, at 130 n.239, *quoting Ake* Petitioner's Brief, *supra* note 152, at 193, *quoting* Joint Appendix at 54-55.

171. *Ake*, 105 S. Ct. at 1092.

172. *See* 21 OKLA. STAT. § 701.13 (Supp. 1985).

173. *Ake* Petitioner's Brief, *supra* note 152, at 12, *quoting* Tr. 714-717.

174. *Id.*

175. *Id.*

each of the murder charges, and to 500 years in prison on each of the lesser offenses.[176]

After the Oklahoma state courts affirmed Ake's convictions, rejecting his constitutional plea that he was entitled to an expert witness "as incident to his constitutional rights to effective assistance of counsel and availability of compulsory process for obtaining witnesses,"[177] and surmising that perhaps the interposition of the defense of insanity possibly fostered his mute behavior at trial,[178] the United States Supreme Court granted certiorari.[179]

The Supreme Court then reversed,[180] holding that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one."[181]

After disposing of a collateral procedural issue,[182] the Court, per Justice Marshall,[183] reviewed prior decisions which held that the state "must take steps to assure that the defendant has a fair opportunity to present his defense,"[184] noting that the due process clause's "fundamental fairness" guarantee bars the denial to a defendant of "the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[185] After employing a *Mathews v. Eldridge*[186] balancing test, the Court found that access to a psychiatrist is one of the "basic tools of an adequate defense."[187]

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176. *Id.*

177. Ake v. State, 663 P.2d 1, 6 (Okla. Crim. App. 1983). The state court found that there was no responsibility upon the state to provide such services to an indigent accused facing the death penalty. *Id.*

178. *Id.* at 7 n.4.

179. Ake v. Oklahoma, 104 S. Ct. 1591 (1984).

180. *Ake*, 105 S. Ct. at 1092.

181. *Id.*

182. The Court rejected the state's claim that defendant had waived his claim—on the theory that he had not repeated his request for expert assistance in his new trial motion filed below as was required by state law, *see Ake*, 663 P.2d at 6, citing Hawkins v. State, 569 P.2d 490 (Okla. Crim. App. 1977)—reasoning that, since the error in question was a "fundamental" one (*Ake*, 105 S. Ct. at 1092), the state law prong was not independent of federal law, and jurisdiction was thus not "precluded," *id.* at 1093.

At least one commentator has seen this aspect of *Ake* as a significant exception to the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977), if under a specific state's law, fundamental error negates procedural default—*see, e.g.*, Buchanan v. State, 523 P.2d 1134, 1137 (Okla. Crim. App. 1974) (under Oklahoma law, violation of constitutional right constitutes fundamental error)—and federal constitutional error is deemed "fundamental error." Note, Ake v. Oklahoma: *The New "Fundamental Error" Exception to* Wainwright v. Sykes, [1985] B.Y.U. L. REV. 559, 570. For a discussion of *Sykes, see infra* note 338.

Sykes is not cited in any of the *Ake* opinions.

183. Justice Marshall's wrote on behalf of himself and six others; the Chief Justice concurred, and Justice Rehnquist dissented.

184. *Ake*, 105 S. Ct. at 1093.

185. *Id.*

"Meaningful access to justice," *id.* at 1094—the theme of earlier cases—means more than "mere access to the courthouse door"; a criminal trial is "fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Id.*

186. 424 U.S. 319 (1976).

187. *See* Britt v. North Carolina, 404 U.S. 226, 227 (1971).

First, in assessing the relevant factors to be considered in such a due process inquiry, the Court

The Court thus set out what it perceived as the role of the psychiatrist[188] in such cases:

> Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the medical condition of the defendant at the time of the offense.[189]

When jurors determine such issues as responsibility and future dangerousness, "the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success.' "[190] The Court concluded "inexorably"[191] that, without the assistance of a psychiatrist to conduct a professional examination on relevant issues, "to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high."[192] With access to such information, however, the defendant should be "fairly able to present at least enough information to the jury in a meaningful manner, as to permit it to make a sensible determination."[193]

Finally, the Court held that if the defendant were to make an "ex parte threshold showing . . . that his sanity is likely to be a significant factor in his defense,"[194] the state must assure him access to a "competent psychiatrist

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found the private interest in accuracy of the criminal proceeding to be "almost uniquely compelling." *Ake*, 105 S. Ct. at 1094. Second, it foresaw minimal burden to the states as over 40 states and the federal government (*see* 18 U.S.C. § 3006A(e) (1985)), had already made such services available. *Ake*, 105 S. Ct. at 1094-95, and *id.* nn.4-6. Third, other than economy, the Court could not point to any significant countervailing state interest. *Id.* at 1095.

The Court focused on the "pivotal role" of psychiatry in criminal proceedings, as a reflection of the reality that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshall his defense." *Id.*

188. [P]sychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers.

Id. at 1095 (citations omitted).

189. *Id.* at 1095-96.

190. *Id.* at 1096, *quoting*, in part, Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 LAW & PSYCHOLOGY REV. 99, 113-14 (1976).

191. *Ake*, 105 S. Ct. at 1096.

192. *Id. See generally* Note, *supra* note 77, at 1080.

193. *Ake*, 105 S. Ct. at 1096.

194. *Id.* at 1097.

who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense."[195]

Similarly, a defendant has a right of access to a psychiatrist for assistance in the preparation of the sentencing phase so as to rebut the prosecution's testimony as to future dangerousness.[196] The Court's prior holding in *Barefoot*, it reasoned, was premised in part on the assumption that the factfinder would have the views of both the prosecutor's psychiatrist and opposing doctors, and would therefore be competent to " 'uncover, recognize, and take due account of . . . shortcomings' in predictions on this point."[197] Since, on the facts of the case before it, the Court found it "clear"[198] that the defendant's mental state at the time of his offense "was a substantial factor in his defense"[199] and that his future dangerousness was a "significant factor" at the sentencing phase,[200] it reversed and remanded for a new trial.[201]

(B) *Privilege against self-incrimination and interplay between* Miranda *and mental disability*

The Supreme Court's decisions involving mentally disabled criminal defendants and the scope of the privilege against self-incrimination[202] have focused on three unrelated questions: 1) the privilege's applicability to statements made to psychiatrists in the course of court-ordered pretrial evaluations of criminal defendants,[203] 2) its applicability to statements made to police officers in the course of police arrest and/or investigation procedures,[204] and 3) its applicability *vel non* to proceedings involving allegedly mentally ill individuals facing commitment following proceedings brought

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195. *Id.*

196. *Id.*

197. *Id., quoting Barefoot*, 463 U.S. at 899. *See*, for a prescient post-*Barefoot*, pre-*Ake* analysis of this issue, Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 160-65 (1984).

Professor Dix has predicted that, as a result of this aspect of the *Ake* holding, "the availability of capital sentencing diminished responsibility is likely to attract increasing attention and will therefore assume increasing importance in American capital litigation." Dix, *Psychological Abnormality and Capital Sentencing: The New Diminished Responsibility*, 7 INT'L J. L. & PSYCHIATRY 249, 267 (1984).

The Court also finally disposed of its prior holding in *Baldi*, pointing out (1) the defendant in that case *had* been examined by neutral psychiatrists, and (2) that decision predated the "extraordinarily enhanced role of psychiatry in criminal law today," as well as the court's recognition of certain elemental constitutional rights . . . [signalling] our increased commitment to assuring meaningful access to the judicial process," *Ake*, 105 S. Ct. at 1098.

198. *Ake*, 105 S. Ct. at 1098.

199. *Id.*

200. *Id.* at 1099.

201. *Id.*

Chief Justice Burger concurred, suggesting that nothing in the majority's opinion could be read to extend to non-capital cases, *id.* at 1099 (Burger, C.J., concurring). *See* Note, *An Indigent's Constitutional Right to Expert Psychiatric Assistance: Ake v. Oklahoma, 39* SW. L.J. 957, 973 (1985) (predicting that most states will follow the Chief Justice's limitation suggestion).

Justice Rehnquist dissented, criticizing the majority for announcing a "far too broad" constitutional rule, *Ake*, 105 S. Ct. at 1099 (Rehnquist, J., dissenting), and indicating that he would limit any entitlement to "an independent psychiatric evaluation, and not a defense consultant," *id.* at 1101-02.

202. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964); Minnesota v. Murphy, 465 U.S. 420 (1984); Lefkowitz v. Turley, 414 U.S. 70 (1973); United States v. Ward, 448 U.S. 242 (1980).

203. *E.g.*, Estelle v. Smith, 451 U.S. 454 (1982).

204. *E.g.*, Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

under state sex offender statutes.[205] Yet another decision is expected later this term on the question of the impact of severe mental disability on *Miranda* waivers.[206] Different sets of interests, principles and precedents are relevant to each of these sets of cases, and these differences are of some significance in attempting to analyze and harmonize the court's decisions.

(1) Estelle v. Smith[207]

Ernest Smith was indicted for murder stemming from his participation in the armed robbery of a grocery store during which a cashier was fatally shot by Smith's accomplice.[208] The trial court then ordered the state to arrange a psychiatric evaluation[209] to determine Smith's competency to stand trial,[210] even though defense counsel had raised neither Smith's competency to stand trial nor his sanity at the time of the offense as an issue.[211] Dr.

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205. *E.g.*, Allen v. Illinois, 106 S. Ct. 2988 (1986). *Cf.* Humphrey v. Cady, 405 U.S. 504 (1972).

206. Colorado v. Connelly, 107 S. Ct. 515 (1986). In a decision reached after this Article was written the Court, per Chief Justice Rehnquist, held that the defendant's mental state would not affect the question of a waiver of *Miranda* rights. In reversing the Colorado Supreme Court (People v. Connelly, 702 P.2d 722 (Colo. 1985)) the Court held that coercive policy activity was a necessary predicate to a finding that a confession was not voluntary. The Court also held that the defendant's state of mind, which went to the issue of "free-will" and voluntariness, was not the proper measure of the validity of a waiver of fifth amendment protections.

In *Connelly*, the defendant, a chronic paranoid schizophrenic with a significant history of psychiatric hospitalizations, confessed to a murder in response to auditory hallucinations. Unrefuted psychiatric testimony attested that the defendant's "command" hallucinations, described as the "voice of God," usurped his ability to make free and rational choices. Following "God's command," the defendant had travelled from Boston to Denver where he confronted a uniformed police officer with his confession; as part of the hallucination, "God" had commanded that he either confess or kill himself.

See also, e.g., State v. Perry, 508 A.2d 683, 688 (R.I. 1986) (defendant who seeks to suppress statements made to police on grounds that he was functionally unable to understand the *Miranda* warnings by reason of retardation or mental illness or incapacity should, in most instances, be referred for a competency examination prior to the determination of the motion to suppress a statement). On the special issues raised in cases involving mentally *retarded* defendants, *see* Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985).

207. 451 U.S. 454 (1981).

208. 451 U.S. at 456. After Smith held a gun on the cashier, saying "This is a holdup," the cashier moved suddenly, and Smith yelled to his confederate either "Get him, Howie," or "Look out Howie." After the latter fatally shot the cashier, the two then took the money from the register and departed. Smith v. Estelle, 445 F. Supp. 647, 650 (N.D. Tex. 1977), *aff'd* 602 F.2d 694 (5th Cir. 694), *aff'd* 451 U.S. 454 (1981).

209. By Dr. Grigson, the same doctor who testified for the state in Barefoot v. Estelle, 463 U.S. 880 (1983). *See supra* note 44; *see generally Expert Predictions, supra* note 44, at 42-46. For a list of other similar cases in which Dr. Grigson testified on behalf of the state, *see Smith*, 445 F. Supp. at 653 n.7; *see generally* Ewing, *supra* note 44, at 410 (as of 1983, Dr. Grigson had testified in 70 cases in all of which but one the jury returned the death penalty); Nethery v. State, 692 S.W.2d 686, 708 (Tex. Crim. App. 1985) (Grigson had testified in 120 capital murder cases, *always* in the affirmative on the question of future dangerousness).

See also Dix I, *supra* note 44, at 172 (Grigson stood on the "brink of quackery"); Note, *supra* note 79, at 1029.

Extensive excerpts from Dr. Grigson's testimony in *Estelle* are found in Dix I, *supra* note 44, at 155-65.

210. *Estelle*, 451 U.S. at 456-57.

211. *Id.* at 457 n.1. Explained the trial judge:

> In all cases where the State has sought the death penalty, I have ordered a mental evaluation of the defendant to determine his competency to stand trial. I have done this for my own benefit because I do not intend to be a participant in a case where the defendant receives the death penalty and his mental competency remains in doubt.

Id.

At the habeas hearing, the district court judge noted that this practice "cannot be faulted in the

Grigson examined the defendant, concluded that he was competent, and, in his letter to the court, added that it was also his opinion that the defendant "knew right from wrong."[212] "Inexplicably,"[213] defense counsel was never notified that this examination was to take place.

After the jury convicted Smith of murder,[214] the State called Dr. Grigson to testify at the penalty hearing.[215] Following *voir dire,*[216] he testified:

(a) that Smith "is a very severe sociopath"; that his sociopathic

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least," given the court's "authority to protect the integrity of the judicial system by making certain only mentally competent defendants stand trial." *Smith,* 445 F. Supp. at 651.

212. *Estelle,* 451 U.S. at 457.

213. *Smith,* 445 F. Supp. at 651.

214. *Estelle,* 451 U.S. at 457.

215. At the beginning of the sentencing hearing, *see* TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981), the state rested, subject to the "right to reopen." *Estelle,* 451 U.S. at 458. Defense counsel then called lay witnesses to testify (as to defendant's character and to his preexisting knowledge that the gun he wielded had a mechanical defect, and was thus inoperable). *Id.*

Defense counsel was aware by this time that Dr. Grigson had submitted a psychiatric report finding Smith competent and characterizing him as a "severe sociopath." *Id.* at 458-59. The report, however, made no other reference to Smith's future dangerousness. *Id.* at 459.

Professor Dix has noted the "special problems" which arise when a defendant is diagnosed as a "sociopath" or "psychopath", since there is no agreement within the psychiatric profession as to term's meaning. *Expert Prediction, supra* note 44, at 44 n.219. Subsequently, the American Psychiatric Association's Task Force on the Role of Psychiatry in the Sentencing Process has recommended that the diagnosis not be used "to justify or support predictions of future conduct." *Barefoot,* 463 U.S. at 932 (Blackmun, J., dissenting), *quoting* AM. PSYCHIATRIC ASS'N, DRAFT REPORT OF THE TASK FORCE ON THE ROLE OF PSYCHIATRY IN THE SENTENCING PROCESS 30 (1983).

As early as 1930, it was suggested that the diagnosis of "psychopathic personality" was a "waste basket category," Bursten, *What if Antisocial Personality is an Illness?* 10 BULL. AM. ACAD. PSYCHIATRY & L. 97, 98 (1982) [hereinafter Bursten I], *quoting* Partridge, *Current Conceptions of Psychopathic Personality,* 10 AM. J. PSYCHIATRY 53 (1930). The confusion that has surrounded the use of this diagnosis has never fully abated; *see generally* B. BURSTEN, BEYOND PSYCHIATRIC EXPERTISE 23-26 (1984) [hereinafter Bursten II]; J. ROBITSCHER, THE POWERS OF PSYCHIATRY 169-70 (1980). In a well-publicized series of cases in the mid-to-late 1950's—characterized by Bursten as a "fiasco," *see* Bursten II, *supra,* at 25—the administrative staff at St. Elizabeth's Hospital in Washington, D.C., declared, as a matter of "administrative fiat" (Campbell v. United States, 307 F.2d 597, 611 (D.C. Cir. 1962) (Burger, J., dissenting)), first, that persons with sociopathic personalities would be considered to be *without mental disorder,* and then, three years later, that the condition *was* a mental disorder, (Bursten I, *supra,* at 98) a decision which turned out to have an "enormous *legal* consequence," (*Campbell,* 307 F.2d at 611) (emphasis in original) when individuals with such a diagnosis pled the insanity defense in the District of Columbia, since the disposition of such cases in that jurisdiction were controlled by the "product test" of Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). *See, e.g.,* Blocker v. United States,a 274 F.2d 572, 573 (D.C. Cir. 1959).

The clinical literature on the treatment of sociopathy continues unabated, with researchers considering the effects of such radical interventions as castration, (Sturup, *The Treatment of Criminal Psychopaths at Herstedvester,* 25 BRIT. J. MED. PSYCHOLOGY 31 (1952)) and psychosurgery, (Narabayashi, *Stereotaxic Operations for Behavior Disorders,* 5 PROGRESS IN NEUROL. SURG. 113 (1973)), such controversial interventions as the pharmacologically reduced induction of male hormones (Persky, Smith & Basu, *Relation of Psychologic Measures of Aggression and Hostility to Testosterone Production in Man,* 33 PSYCHOSOMAT. MED. 265 (1971)), and such commonly-used therapies as psychotropic medication (Dale, *Lithium Therapy in Aggressive Mentally Subnormal Patients,* 137 BRIT. J. PSYCHIATRY 469 (1980)), and behavior modification (Brown & Gutsch, *Cognitions Associated With a Delay of Gratification Task: A Study With Psychopaths and Normal Prisoners,* 12 CRIM. JUST. & BEHAV. 453 (1985)). The most recent literature suggests that violent psychopathic behavior is associated with the organic malfunction of the left temporal brain lobe. Weller, *Medical Concepts in Psychopathy and Violence,* 26 MED. SCI. & L. 131 (1986); *accord,* Mungas, *An Empirical Analysis of Specific Syndromes of Violent Behavior,* 171 J. NERVOUS & MENTAL DISORDERS 354 (1983).

216. At the hearing, Grigson stated that a) he had not obtained permission from defense counsel to examine Smith, b) he discussed his diagnosis and conclusion with the state's attorney, and c) the prosecutor had given him approximately five days notice prior to the hearing. *Estelle,* 451 U.S. at 458. Defendant's motion to exclude (based on the grounds that Dr. Grigson's name was not on the state's witness list) was denied. *Id.*

> condition will "only get worse"; (d) that he has no "regard for another human being's property or for their life, regardless of who it may be"; (e) that "[t]here is no treatment, no medicine that in any way at all modifies or changes this behavior"; (f) that he is "going to go ahead and commit other similar or same criminal acts if given the opportunity to do so"; and (g) that he "has no remorse or sorrow for what he had done."[217]

After answering the requisite questions[218] in the affirmative, the jury returned the "mandatory"[219] death penalty.

After Smith's conviction and sentence were affirmed in the state courts,[220] and his application for state post-conviction relief was denied,[221] Smith petitioned for habeas corpus in federal district court.[222] That court vacated his death sentence,[223] finding that it was constitutional error to admit Dr. Grigson's testimony at the penalty phase.[224] The Fifth Circuit affirmed,[225] holding that the "devastating" consequences of the "surprise" use of Dr. Grigson as a penalty phase witness denied Smith due process.[226]

The Supreme Court granted certiorari[227] and affirmed.[228] Speaking for the majority, the Chief Justice turned first to the fifth amendment question of whether Dr. Grigson's testimony violated Smith's privilege against self-incrimination,[229] and rejected the state's contention of inapplicability on the

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217. *Id.* at 459-60.

On cross-examination, Dr. Grigson testified, *inter alia*, 1) that it is not known what causes a person to be a sociopath, 2) that he did not speak to any of Smith's relatives or friends (except the other defendant charged with the same crime), 3) that the was "certain" Smith was a "severe sociopath," and 4) this diagnosis was based on Smith's "failure to show any guilt feelings or remorse" with respect to the underlying offense. *Smith*, 445 F. Supp. at 653.

218. *See* TEX. CRIM. PROC. CODE ANN. § 37.071(b)(1)-(3) (Vernon 1981).

219. *Estelle*, 454 U.S. at 460.

220. Smith v. State, 540 S.W.2d 693 (Tex. Ct. Crim. App. 1976), *cert. denied*, 430 U.S. 922 (1977).

221. *Smith*, 445 F. Supp. at 654.

222. *Id.*

223. *Id.*

224. *Id.* at 658.

The failure 1) to advise Smith to remain silent at the pretrial psychiatric examination and 2) to notify defense counsel that Dr. Grigson would testify violated Smith's fifth and fourteenth amendment rights to due process and privilege against self-incrimination, his sixth amendment right to effective assistance of counsel, and his eighth amendment right to present complete evidence of mitigating circumstances in a death penalty case. *Id.* at 664.

225. *Smith*, 602 F.2d 694 (5th Cir. 1979).

226. *Id.* at 699.

Also, the court found that, under the fifth and sixth amendments, "Texas may not use evidence based on a psychiatric examination of the defendant unless the defendant was warned, before the examination, that he had a right to remain silent; was allowed to terminate the examination when he wished; and was assisted by counsel in deciding whether to submit to the examination." *Id.* at 709.

227. 445 U.S. 926 (1980).

228. The Chief Justice was joined by five of his colleagues in the majority opinion, although one of the justices, Justice Marshall, declined to join in that aspect of the opinion which implied that there were circumstances under which the death penalty might ever be constitutionally imposed, *Estelle*, 454 U.S. at 474 (Marshall, J., concurring in part); see also, *id.* (separate statement of Brennan, J., adhering to similar position). Justices Stewart and Powell concurred in a brief statement, and Justice Rehnquist concurred as well, *id.* at 474-76; *see infra* text accompanying notes 251-55.

229. This argument was based on the theory that Smith was not advised prior to the pretrial psychiatric examination that he could remain silent and that any statement made could be used against him at a sentencing proceeding. *Estelle*, 454 U.S. at 461.

theory that Dr. Grigson's testimony went to punishment, not to guilt.[230] The fifth amendment, the Court found, extended to "any criminal case"[231] and forbade the state from producing evidence "to convict *and punish*"[232] an individual "by the simple, cruel expedient of forcing it from his own lips."[233]

Because the privilege's availability turns on "the exposure it invites,"[234] just as it prevents a defendant from being made "the deluded instrument of his own conviction,"[235] so does it protect him as well "from being made the 'deluded instrument' of his own execution."[236] There was thus "no basis to distinguish" between the guilt and penalty phases of a capital trial for Fifth Amendment privilege purposes,"[237] given the "gravity of the decision to be made at the penalty phase."[238]

Focusing specifically on the *Miranda* issue, the Court then ruled that that case applied "with no less force to the pretrial psychiatric examination at issue here."[239] When Dr. Grigson went beyond "simply reporting to the court on the issue of competency" and instead testified for the prosecution, "his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting,"[240] thus violating the defendant's fifth amendment rights.[241] Stressed the Court: "a criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to re-

230. *Id.* at 462.

231. *Id.* (emphasis added).

232. *Id.* (emphasis in original).

233. *Id., quoting* Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (opinion announcing judgment); *see also* Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964); E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955). *See* United States v. Chitty, 760 F.2d 425, 431 (2d Cir. 1985) (applying *Estelle* where psychiatrist recounted "statements rather than just medical conclusions").

234. *Estelle*, 454 U.S. at 462, *quoting In re* Gault, 387 U.S. 1, 49 (1967). *But see* Allen v. Illinois, 106 S. Ct. 2988, 2994 (1986), suggesting that *Gault* may no longer be good law on this sort of inquiry. *See infra* text accompanying notes 440-46.

235. *Estelle*, 454 U.S. at 462, *quoting Culombe*, 367 U.S. at 581, *quoting* 2 HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824).

236. *Estelle*, 454 U.S. at 462.

237. *Id.* at 462-63.

238. *Id.* at 463.

The Court also rejected the state's argument that Smith's communications to Dr. Grigson were "nontestimonial in nature," drawing on prior doctrine that had so found in cases dealing with voice exemplars, *e.g.*, United States v. Dionisio, 410 U.S. 1 (1973); blood samples, *e.g.*, Schmerber v. California, 384 U.S. 757 (1966); handwriting exemplars, *e.g.*, Gilbert v. California, 388 U.S. 263 (1967), and lineups, *e.g.*, United States v. Wade, 388 U.S. 218 (1967). Grigson's diagnosis was not based solely on observations, it reasoned, but on Smith's "account of the crime" and his perceptions of Smith's "lack of remorse." *Estelle*, 454 U.S. at 464; *see also, id.* n.9 (Grigson's explanation of his findings).

The mere fact that the statements were uttered in the context of a pretrial psychiatric examination did not remove them from the privilege's protection, the Court found, where the state used the results of the inquiry for "a much broader objective that was plainly adverse" to the defendant, *id.* at 465. The interview could thus not be classified as a "routine competency examination," nor was it analogous to a sanity examination following on the heels of the entry of an NGRI plea by a defendant, *id. See, e.g.*, United States v. Cohen, 530 F.2d 43, 47-48 (5th Cir. 1976), *cert. denied* 429 U.S. 855 (1976) (permissible to compel defendant to submit to state-conducted sanity examination after defendant enters such a plea). The state's use of the defendant's statements—"unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty"—thus implicated the fifth amendment, *Estelle*, 454 U.S. at 466.

239. *Id.* at 467.

240. *Id.*

241. *Id.* at 468.

spond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding."[242]

In addition, the defendant's sixth amendment right to assistance of counsel was also violated by the State's failure to notify Smith's lawyer of the pretrial psychiatric examination.[243] Defendant's right "clearly had attached" when Dr. Grigson examined him, and the interview was thus a "critical stage" of the proceedings.[244] As the evaluation was a "life or death matter,"[245] the defendant should not have been forced to resolve such an important issue without "the guiding hand of counsel."[246]

This ruling, the Court added, "will not prevent the State in capital cases from proving the defendant's future dangerousness as required by statute."[247] The Court noted that that inquiry "is in no sense confined to the province of psychiatric experts."[248] It added, in a sentence which in no way hinted at its ultimate disposition two years later of the *Barefoot* case: "[i]ndeed, some in the psychiatric community are of the view that clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability' and that psychiatrists possess no special qualifications for making such forecasts."[249]

Justices Brennan and Marshall filed brief separate statements, adhering to their position that the death penalty was in all aspects unconstitutional.[250] Justice Stewart also concurred, indicating he would limit the decision to the

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242. *Id.* The Court added, however, that it was *not* holding that the same fifth amendment concerns were necessarily presented by "all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination." *Id.* at 469 n.13.

243. *Id.* at 469-71.

244. *Id.* at 470; *see, e.g.*, Coleman v. Alabama, 499 U.S. 1, 7-10 (1970) (plurality opinion).

The Court noted that defendant did not assert a right to have counsel present during the examination, noting that the Fifth Circuit had observed that "an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination." *Estelle*, 454 U.S. at 470 n.14, *quoting Smith*, 602 F.2d at 708. *Cf.* Lessard v. Schmidt, 349 F. Supp. 1078, 1101 (E.D. Wis. 1972), *vacated and remanded* 414 U.S. 473 (1974), *on remand* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded* 421 U.S. 957 (1975), *reinstated* 413 F. Supp. 1318 (E.D. Wis. 1976) (although privilege applies in civil commitment context, "the safeguards of the privilege may be obtained without the presence of counsel at the psychiatric interview"). *But see* Allen v. Illinois, 106 S. Ct. 2988 (1986), discussed *infra* at text accompanying notes 406-56.

245. *Estelle*, 454 U.S. at 471, *quoting Smith*, 602 F.2d at 708.

246. *Estelle*, 454 U.S. at 471, *quoting* Powell v. Alabama, 287 U.S. 45, 69 (1932).

247. *Estelle*, 454 U.S. at 472. Justice Marshall declined to join in this portion of the opinion. *Id.* at 474 (Marshall, J., concurring in part).

248. *Id.*

249. *Id.* at 472. Ironically, one of the three sources cited by the Court on this point—REPORT OF THE AMERICAN PSYCHIATRIC ASSOCIATION TASK FORCE ON CLINICAL ASPECTS OF THE VIOLENT INDIVIDUAL (1974)—was cited in Justice Blackmun's dissent in *Barefoot*, 463 U.S. at 920-23 (*see also supra* text accompanying notes 69-79) in support of the position that the quoted sentence appears to urge: that psychiatric expertise in long-term dangerousness prediction is inadequate to allow such testimony. Justice Blackmun similarly relied on an updating of a second source: the American Psychiatric Association's (APA) *amicus* brief. *See also* Jones v. United States, 463 U.S. 354, 378-80 (1983) (Brennan, J., dissenting) (relying on an update of the APA's brief).

After concluding that psychiatrists lack special qualifications, the Court continued by explaining that, while its decision in Jurek v. Texas, 428 U.S. 262 (1976), upholding the constitutionality of the Texas statute in no way disapproved of the use of psychiatric testimony on the issue of future dangerousness, its holding "was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts." *Estelle*, 454 U.S. at 473.

The Court declined to reach the question of whether the failure to give defendant advance notice of Dr. Grigson's appearance as a trial witness violated the due process clause. *Id.* n.17.

250. *Id.* at 474 (separate opinion of Brennan, J.); *id.* at 474 (Marshall, J., concurring in part).

grounds that the sixth amendment mandated notice to Smith's lawyer prior to the interview in question.[251]

Justice Rehnquist also concurred, agreeing *sub silentio* with Justice Stewart that defendant's sixth amendment rights were so violated.[252] He added that, while he did not feel it was necessary to consider the other issues in order to decide the case, that he was "not convinced that any Fifth Amendment rights were implicated by Dr. Grigson's examination of [defendant]."[253] Even if such rights were implicated, however, the defendant "never invoked these rights when confronted with Dr. Grigson's questions."[254] Justice Rehnquist concluded:

> The *Miranda* requirements were certainly not designed by this Court with psychiatric examinations in mind. [Defendant] was simply not in the inherently coercive situation considered in *Miranda*. He had already been indicted and counsel had been appointed to represent him. No claim is raised that [defendant's] answers to Dr. Grigson's questions were "involuntary" in the normal sense of the word. Unlike the police officers in *Miranda*, Dr. Grigson was not questioning respondent in order to ascertain his guilt or innocence. Particularly since it's not necessary to decide this case, I would not extend the *Miranda* requirements to cover psychiatric examinations such as the one involved here.[255]

(2) Wainwright v. Greenfield[256]

An entirely different aspect of the privilege against self-incrimination was before the court in *Wainwright v. Greenfield*. Focusing on police behavior rather than psychiatric behavior, the case concerned the question of whether silence in the face of *Miranda* warnings can be used as evidence of a defendant's sanity.[257]

a. *Silence and* Miranda

A decade ago, the Supreme Court ruled, in *Doyle v. Ohio*,[258] that the use of defendant's silence in the face of the receipt of *Miranda* warnings (in an attempt to impeach his exculpatory storm through cross examination) violated due process.

The Court reasoned that while the *Miranda* warnings "contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warning,"[259] and it would thus be "fundamentally unfair" to allow the defendant's silence to be used to impeach subsequently offered trial testimony.[260] In short, according to Professor Stone,

251. *Id.* at 474 (Stewart, J., concurring).
252. *Id.* at 474-75 (Rehnquist, J., concurring).
253. *Id.* at 475.
254. *Id.*
255. *Id.* at 475-76.
256. 106 S. Ct. 634 (1986).
257. *Id.* at 636.
258. 426 U.S. 610 (1976).
259. *Id.* at 618.
260. *Id.* at 617 n.7, 618.

"it violates due process for the government to inform an individual that he may do something free of any adverse consequences and then later penalize him for doing the very thing."[261]

Post-*Doyle* Supreme Court cases consistently referred back to *Doyle* "as a case where the government has induced silence by implicitly assuring the defendant that his silence would not be used against him,"[262] and then attempted to use his silence to impeach an explanation subsequently offered at trial.[263] Such references to *Doyle* can be found even in those opinions which chose to distinguish *Doyle*. The limits on the *Doyle* doctrine have been made in cases involving post-conviction, pre-sentencing silence,[264] pre-arrest, pre-custody silence,[265] or statements uttered after post-*Miranda* warnings were given.[266]

Two circuits, however, had distinguished *Doyle* in cases where the government offered defendant's silence as evidence of sanity so as to rebut an insanity defense. In one case, the Tenth Circuit Court of Appeals had reasoned that, since the defendant did not choose to testify, "the [police] agent's testimony had no impeaching purpose."[267] In the other case, the Seventh Circuit held that, given the difficulty of determining insanity the relevance of the testimony outweighed any potential prejudice, especially in this sort of case where any "deterrent effect [of suppression of the testimony] is more tenuous."[268]

b. *The* Greenfield *case*

In June 1975, David Wayne Greenfield was walking on a wooded path towards a bench area when he grabbed a passerby, choked her, dragged her into the woods and forced her to engage in oral sex.[269] Subsequently, he made several inconsistent statements to the victim, including, "I don't know why I did this/I know why I did this."[270] After smoking one of the victim's cigarettes, he located her car keys (which had apparently fallen loose during the assault), and released her.[271]

The victim went immediately to police headquarters and described her assailant.[272] Approximately two hours later an officer came to the beach area, located the defendant, and arrested him.[273] After being given his *Miranda* warnings, defendant indicated that he wished to speak to a lawyer and

261. Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 144.
262. Fletcher v. Weir, 455 U.S. 603, 606 (1982).
263. South Dakota v. Neville, 459 U.S. 553, 565 (1985).
264. Roberts v. United States, 445 U.S. 552, 561 (1980).
265. Jenkins v. Anderson, 447 U.S. 231, 239-40 (1980).
266. Anderson v. Charles, 447 U.S. 404, 407-08 (1980).
267. United States v. Trujillo, 578 F.2d 285, 288 (10th Cir. 1978), *cert. denied*, 439 U.S. 858 (1978). In addition, the court added that post-arrest silence "may be probative to a claim of insanity." *Id.*
268. Sulie v. Duckworth, 689 F.2d 128, 130 (7th Cir. 1982), *cert. denied*, 460 U.S. 1043 (1983). The court also took note of what it referred to as psychiatry's inability "to defeat every effort to feign insanity." *Id. See infra* note 946.
269. Brief of Petitioner, Wainwright v. Greenfield, 106 S. Ct. 634 (1986), at 3-6.
270. *Greenfield*, 106 S. Ct. at 636.
271. *Id.*
272. *Id.*
273. *Id.*

further thanked the policeman for giving him the warnings.[274]

Defendant was charged in Florida state court with the crime of "sexual battery committed with force likely to cause serious personal injury,"[275] and pled not guilty by reason of insanity.[276] As part of the state's case, the prosecution introduced police testimony indicating the defendant's silence and request for a lawyer at the time he was given his *Miranda* warnings.[277]

Defendant did not take the stand, but did call two psychiatrists both of whom testified that defendant demonstrated "classic symptoms of paranoid schizophrenia,"[278] and that he did not know right from wrong (the insanity test in Florida)[279] at the time of the alleged crime. On rebuttal, the state called a psychiatrist who disagreed sharply with each of the defense psychiatrists' conclusions.[280]

In his summation and over defense counsel's objections,[281] the prosecutor focused sharply on defendant's behavior after apprehension:

> This is supposedly an insane person under the [throes] of an acute condition of schizophrenia paranoia at the time. He goes to the car and the officer reads him his [Miranda] rights. Does he say he doesn't understand them? Does he say, "What's going on?" No. He says, "I understand my rights. I do not want to speak to you. I want to speak to an attorney." Again an occasion of a person who knows what's going on around his surroundings, and knows the consequences of his acts. . . . [Later, defendant] said "I appreciate that, thanks a lot for telling me that." And here we are to believe that this person didn't know what he was doing at the time of the act. . . . And after [defendant] talked to the attorney again he will not speak. Again another physical overt indication by the defendant. . . . So here again we must take this in consideration as to his guilt or innocence, in regards to sanity or insanity.[282]

The jury found defendant guilty and sentenced him to life imprisonment.[283] After his motion for a new trial or acquittal N.O.V. (based on the prosecutor's comments on his post-arrest silence) was denied,[284] defendant appealed to the state courts which affirmed his conviction.[285] He then filed a

274. At trial, the arresting officer testified Greenfield said: "I appreciate that, thanks a lot for telling me that." *Greenfield*, 106 S. Ct. at 636-37 n.2.

275. FLA. STAT. ANN. § 794.011 (West Supp. 1986).

276. *Greenfield*, 106 S. Ct. at 636.

277. *Id.* At this time, defendant made no objection to the testimony. *Id.* at 637.

278. Brief of Respondent, Wainwright v. Greenfield, 106 S. Ct. 634 (1986), at 12-13 n.5 [hereinafter *Greenfield* Respondent's Brief].

279. *See* Hall v. State, 78 Fla. 420, 83 So. 513 (1919).

280. *Greenfield*, 106 S. Ct. at 636. That psychiatrist, who found that defendant was not a paranoid schizophrenic, conducted his examination while the defendant was "under the influence of Thorazine" (*see supra* note 160), a drug which, he testified, made defendant's symptoms "worse rather than better." Greenfield v. Wainwright, 741 F.2d 329, 331 (11th Cir. 1984).

281. *Id.*

282. *Greenfield*, 741 F.2d at 331.

283. *Greenfield*, 106 S. Ct. at 636-37.

284. *Greenfield*, 741 F.2d at 331-32.

285. After the Florida District Court of Appeal affirmed (Greenfield v. State, 337 So. 2d 1021 (Fla. Dist. Ct. App. 1976)), the state Supreme Court remanded to that court for further consideration in light of its intervening decision in Clark v. State, 363 So. 2d 331 (Fla. 1978), holding that, while a prosecutor's comment on a defendant's silence was not "fundamental error," it was "consti-

petition for a writ of habeas corpus in federal district court,[286] which was denied.[287]

On appeal, the Eleventh Circuit reversed,[288] holding that (1) defendant's failure to contemporaneously object to the key testimony did not preclude his right to seek appellate review (in light of his strenuous objections to the prosecutor's summation on that point),[289] and (2) defendant's post-*Miranda* silence was *inadmissible* as substantive evidence to rebut his insanity defense.[290]

Relying primarily on *Doyle v. Ohio*,[291] the court first found that defendant's silence was not prohibitive of sanity.[292] The court also found that because defendant did not testify (but, rather, raised the defense through expert testimony), the testimony as to silence was not admissible as a rebuttal of perjury.[293] "Petitioner's assertion of insanity, through psychiatric testimony, made no reference to his conduct at the time of the arrest, did not constitute perjury, and therefore did not open the door to the prosecutor's use of post-*Miranda* silence as permitted by *Doyle*."[294] The state sought, and was granted, *certiorari*.[295]

Writing for a seven justice majority[296] Justice Stevens drew on a line of cases traced to *Doyle*.[297] Based on these cases the *Greenfield* court held that,

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tutional error" (thus requiring a contemporaneous objection at trial to preserve the issue for appeal). Greenfield v. State, 364 So. 2d 885 (Fla. 1978). On remand, the District Court of Appeal reaffirmed its earlier decision.

286. *Greenfield*, 106 S. Ct. at 637.

287. After hearing evidence regarding the question of whether Wainwright v. Sykes, 433 U.S. 72, 85-86 (1977)—which precludes habeas consideration of claims not raised at trial or on direct appeal in accordance with state trial procedures—barred consideration of his claim, the magistrate recommended that the issue *not* be considered barred (because the state appellate court *did* reach the merits), but recommended dismissal on the merits. *Greenfield*, 106 S. Ct. at 637. The District Court accepted that recommendation. *Id.* The *Sykes* doctrine is dissussed *infra* note 338.

288. *Greenfield*, 741 F.2d at 330.

289. *Id.* at 331 n.1.

290. *Id.* at 333-34.

291. 426 U.S. 910 (1976).

292. The court stressed the difficulties inherent in interpreting the silence of a mentally disabled person: "the probative value of a person's post-arrest, post-*Miranda* warning silence in determining his sanity at the time of the crime will vary markedly with the disease he has, the symptoms he tends to exhibit, and the closeness in time between the arrest and warning and the crime." 741 F.2d at 333. In this case, it concluded, "the evidence was probative only of petitioner's ability to understand English and to remain calm, *which would* [based on the expert testimony before it,] *be consistent with the mental disease of paranoid schizophrenia.*" *Id.* at 334 (emphasis added).

293. *Id.* at 334.

294. *Id.*

The Eleventh Circuit's position disagreed with that taken by two other circuits—*see* Sulie v. Duckworth, 689 F.2d 128 (7th Cir. 1982), *cert. denied*, 460 U.S. 1043 (1983); United States v. Trujillo, 578 F.2d 285 (10th Cir. 1978), *cert. denied*, 439 U.S. 858 (1978)—but was consistent with a Florida Supreme Court decision rendered after Greenfield exhausted his state remedies, State v. Burwick, 442 So. 2d 944 (Fla. 1983), *cert. denied*, 466 U.S. 931 (1984).

295. 105 S. Ct. 2319 (1985).

296. Chief Justice Burger and Justice Rehnquist concurred.

297. *See, e.g.*, Fletcher v. Weir, 455 U.S. 603, 606 (1982); Jenkins v. Anderson, 447 U.S. 231 (1980); Anderson v. Charles, 447 U.S. 404 (1980); Roberts v. United States, 445 U.S. 552 (1980). *See supra* notes 261-265; *see generally Greenfield*, 106 S. Ct. at 638. Justice Stevens first disposed of the procedural default issue: because the Florida appellate court "clearly addressed the issue on the merits," the default argument must fall, even where trial counsel failed to make an appropriate objection at trial. *Greenfield*, 106 S. Ct. at 637 n.3; *see also* Ulster County Court v. Allen, 442 U.S. 140, 149 (1979); Mullaney v. Wilbur, 421 U.S. 684, 704 n.* (1975) (Rehnquist, J., concurring).

in response to *Miranda* warnings, "silence will carry no penalty,"[298] and that "breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires."[299] The Court specifically rejected the state's argument that, since "proof of sanity is significantly different from proof of the commission of the underlying offense," *Doyle* and its progeny were distinguishable in an insanity defense case such as *Greenfield*.[300]

The Court found "no warrant" for this "claimed distinction":[301]

> The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of those rights in obtaining his conviction. The implicit promise, the breach and the consequent penalty are identical in both situations.[302]

Further, the Court rejected the state's argument that a suspect's comprehension of *Miranda* warnings, as evidenced by his silence, "is far more probative of sanity than of commission of the underlying offenses."[303] The Court characterized the argument as "fail[ing] entirely to meet the problem of fundamental unfairness that flows from the state's breach of implied assurances."[304] On this point, the Court quoted from an intervening Florida Supreme Court decision: "[s]ilence in the face of an accusation is an enigma and should not be determinative of one's mental condition just as it is not determinative of one's guilt."[305]

Justice Rehnquist concurred,[306] arguing that, in his view, *only* that aspect of the prosecutor's summation which commented on defendant's silence was constitutionally objectionable as a breach of *Miranda*.[307] He differed sharply with the majority on the question of the significance of request for counsel:

> But a request for a lawyer may be highly relevant where the plea is based on insanity. There is no "insoluble ambiguity" in the request; it is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not *incoherent or obviously confused or unbalanced.* While plainly not conclusive proof of sanity, the request for a lawyer, like other coherent and responsive statements

298. *Greenfield*, 106 S. Ct. at 638, *quoting Doyle*, 426 U.S. at 618-19.
299. *Greenfield*, 106 S. Ct. at 639.
300. *Id.*
301. *Id.*
302. *Id.* at 639.
303. *Id.* at 640; on the "psychiatric realities" of the significance of silence in such a context, *see Greenfield* Respondent's Brief, *supra* note 278, at 17-20.
304. *Id.*
305. *Greenfield*, 106 S. Ct. at 640 n.11, *quoting Burwick*, 442 So. 2d at 948.
306. *Greenfield*, 106 S. Ct. at 641 (Rehnquist, J., concurring). The Chief Justice joined in this concurrence.
307. *Id.* at 641, 643.

made near the time of the crime, is certainly relevant.[308]

(3) Smith v. Murray[309]

While the constitutional principles which the Court had articulated initially in *Estelle*[310] were philosophically and jurisprudentially important,[311] in practice, they had little direct bearing on the great majority of pretrial evaluations, which are usually sought either by the defense or by the prosecution (in response to an indication by the defendant that he intends to put his mental state into issue).[312] Thus, it appeared that the court's decision to hear *Smith v. Murray* would both clarify and elaborate upon the principles first articulated in *Estelle*.

Smith posed an important substantive question: when a criminal defendant facing the death penalty seeks a pretrial psychiatric evaluation to explore the possibility of the insanity defense or potentially to be used in mitigation of punishment, can the prosecutor use incriminating statements made by the defendant to the psychiatrist at such an evaluation to prove the state's "case-in-aggravation" at the sentencing phase?[313]

The facts were relatively uncontested: upon being arrested, Michael Marnell Smith confessed that he sexually assaulted, stabbed, strangled and drowned a young woman.[314] Upon being appointed, trial counsel (Pugh) immediately asked that Smith be examined to determine if he were competent to stand trial.[315] The examiner concluded that he was.[316] Because of the seriousness of the offense and the possibility of a death sentence, trial counsel sought more comprehensive psychiatric evaluations, and asked that defendant be committed to a state hospital for testing, where he was examined by Dr. Dimitris.[317]

Dissatisfied with the hospital evaluation, counsel asked the trial court to appoint a private psychiatrist (Dr. Pile) to evaluate defendant.[318] Counsel had warned the defendant not to discuss the offense with which he had been charged (or any prior offense) with anyone other than counsel and co-counsel.[319] Dr. Pile told defendant nothing about either the purposes of the eval-

308. *Id.* at 642 (footnote omitted; emphasis added).
309. 106 S. Ct. 2678 (1986).
310. *See supra* text accompanying notes 207-55.
311. *See infra* text accompanying notes 627-42.
312. *See* White, *The Psychiatric Examination and the Fifth Amendment Privilege in Capital Cases*, 74 J. CRIM. L. & CRIMINOLOGY 943 (1983); Slobogin, *supra* note 33. *See also supra* note 45 (on the use of hypotheticals to "end run" *Estelle* decision).
313. Perlin, *Another "Incredible Dilemma:" Psychiatric Assistance and Self-Incrimination*, [1985-1986] ABA PREVIEW, Issue No. 10 (March 14, 1986), at 288.
314. *Smith*, 106 S. Ct. at 2663.
315. Brief of Petitioner, Smith v. Sielaff (decided by the Supreme Court *sub.nom.* Smith v. Murray), 106 S. Ct. 2661 (1986), at 4 [hereinafter *Smith* Petitioner's Brief].
316. *Id.*
317. *Id.*
318. *Id.*
319. *Smith*, 106 S. Ct. at 2664.
While Dr. Dimitris warned defendant that anything he said could "be used one day against [him] in a court of law," *Smith* Petitioner's Brief, *supra* note 315, at 5, he nevertheless inquired about the defendant's criminal behavior, telling defendant it would be "helpful" if he discussed these matters, defendant complied, *id.*

uation or the uses to which the information revealed could be put.[320]

Specifically, Dr. Pile did not tell defendant that a copy of his report would be sent to the prosecutor[321] and that it could be used against him at trial as part of the state's affirmative case.[322] This practice conformed with what was then Virginia law.[323]

In his letter to the court and counsel, Dr. Pile reported that the defendant told him that thirteen years earlier, when he had been a teenager, he had "come close" to raping a girl on a school bus that he had been driving, but that, after he tore her clothes off "he thought better of it and did not do so."[324] Defendant had never been charged with this crime; neither defense counsel nor the prosecutor had any knowledge of it prior to Dr. Pile's report.[325] Dr. Pile concluded that defendant was a "sociopathic personality; sexual deviation (rape)."[326]

At the sentencing hearing which followed defendant's murder conviction, Dr. Pile was called by the state, and testified about the "school bus incident," the court overruling defense counsel's objection, on the grounds that the evidence was relevant and that the witness had examined the defendant at defense counsel's request.[327] On cross-examination, defense counsel asked Dr. Pile for his diagnosis.[328] After the witness stated the diagnosis, counsel asked, "What is that?" In response, Dr. Pile said, "They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong."[329]

The jury returned a death sentence,[330] finding two statutory aggravating circumstances: that there was a "probability" that the defendant "would

320. *Smith*, 106 S. Ct. at 2664.

321. *Smith* Petitioner's Brief, *supra* note 338, at 5.

322. *Id.*

323. Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975), *but see* Gibson v. Zahradnick, 581 F.2d 75 (4th Cir. 1979), *cert. denied* 439 U.S. 996 (1978), discussed *infra* note 334.

324. *Smith* Petitioner's Brief, *supra* note 315, at 5.

325. *Id.*

326. *Smith*, 106 S. Ct. at 2664.

Although there is no consideration of the possibility in the opinion, the question as to whether the "school bus incident" ever happened must be broached. According to Dr. Andrew Watson, the psychological defense of "undoing"—a mechanism in which the individual attempts to neutralize something "which in his imagination or in reality was done before, and which he feels was objectionable," A. WATSON, PSYCHIATRY FOR LAWYERS 126 (1968)—is revealed during the so-called "false confession." Individuals who employ the unconscious defense mechanism of undoing will "attempt to get themselves punished to remove their guilt," *id.* at 127. *"They will confess even at the risk of capital punishment. The need for punishment is so great that possible death does not deflect the defensive maneuver."* *Id.* (emphasis added).

Cf. Michigan v. Jackson, 106 S. Ct. 1401, 1411 (1986) (Burger, C.J., dissenting): "At times, it seems, the judicial mind is in conflict with what behavioral—and theological—specialists have long recognized as a natural human urge of people to confess wrongdoing. *See, e.g.*, T. REIK, THE COMPULSION TO CONFESS (1959)." Reik's work in this context is discussed in Brief for *Amicus* Coalition for The Fundamental Rights and Equality of Ex-Patients, Colorado v. Connelly, 107 S. Ct. 515 (1986), at 53 n.51.

327. *Smith* Petitioner's Brief, *supra* note 315, at 6.

328. *Id.*

329. *Id.* at 7. See *supra* notes 64, 215.

330. In urging the imposition of the death penalty in his closing argument, the prosecutor relied on Dr. Pile's description of the school bus incident as well as his diagnosis of defendant. *Smith* Petitioner's Brief, *supra* note 315, at 7-8.

commit criminal acts of violence that would constitute a continuing serious threat to society," *and* that his conduct in committing the underlying offense was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture and aggravated battery to the victim."[331]

On direct appeal—at which trial counsel did *not* assign the admission of Dr. Pile's testimony as error[332]—the Virginia Supreme Court affirmed.[333] Although the issue was discussed in an *amicus* brief filed by a law school clinical program (the Post-Conviction Assistance Project), the court expressly refused to consider it because it was not raised by either party as an assignment of error.[334]

On state habeas (alleging ineffective assistance of counsel),[335] appellate counsel called trial counsel (Pugh) to testify. Pugh stated that he did not assign Dr. Pile's testimony as error because he thought the claim was without merit under Virginia law.[336] He admitted that he had not personally researched the question of the claim's possible merit under *federal* law, and did not know the extent of research his student assistant had performed on the issue.[337] The trial court found that the claim was forfeited on the grounds of "procedural default," under *Wainwright v. Sykes*,[338] rejecting de-

331. *Id.* at 8.

332. *Id.*

333. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

334. *Smith*, 248 S.E.2d at 139.

Following the submission of trial briefs, but *prior* to oral argument before the Virginia Supreme Court in Smith's case, the Fourth Circuit had decided Gibson v. Zahardnick, 581 F.2d 75 (4th Cir. 1979), *cert. denied* 439 U.S. 996 (1978) finding that a criminal defendant's privilege against self-incrimination was violated when the state trial court allowed a state-employed psychiatrist who had examined the defendant to testify that, during the course of the examination, the defendant had admitted the commission of the crime, *id.* at 78.

335. *See generally infra* note 720; Perlin & Sadoff, *supra* note 141; Perlin, *supra* note 9.

336. *Smith* Petitioner's Brief, *supra* note 315, at 9.

337. *Id.*

338. 433 U.S. 72 (1977). One of the most important developments in the Burger Court's jurisprudence has been the articulation and expansion of the procedural default doctrine—a federal habeas petitioner who has failed to comply with state procedural rules at trial must show *cause* for the procedural default and *prejudice* resulting from it in order to obtain federal review of the defaulted constitutional claim. *Sykes*, 433 U.S. at 87. For helpful analyses of pre-*Sykes* federal habeas corpus jurisprudence, see Rosenberg, *Constricting Federal Habeas Corpus: From Great Writ to Exceptional Remedy*, 23 HASTINGS CONST'L L.Q. 597 n.3 (1985). It is now clear that this applies at the state appellate stage as well. Murray v. Carrier, 106 S. Ct. 2639, 2647-48 (1986).

This doctrine "explicitly rejected" the "deliberate by-pass" doctrine which had been articulated in Fay v. Noia, 372 U.S. 458, 464 (1938). *Carrier*, 106 S. Ct. at 2644. Under *Fay v. Noia* a federal habeas corpus court could refuse to review a defaulted claim only where the defendant had deliberately by-passed the orderly procedure of the state courts. This standard had been assessed by the "intentional relinquishment or abandonment" waiver test first enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 (1938). After *Sykes*, at a minimum, absent "extraordinary circumstances," *Carrier*, 106 S. Ct. at 2644, default by counsel pursuant to trial strategy or tactics would bind the habeas petitioner even if he did not personally waive the claim. *Sykes*, 433 U.S. at 91.

Sykes was embellished upon in a trio of subsequent cases. *See* Note, *Procedural Default at the Appellate Stage and Federal Habeas Corpus Review*, 38 STANFORD L. REV. 463, 464 n.5 (1986) [hereinafter Stanford Note]. In Engle v. Isaac, 456 U.S. 107, 129 (1982), the court refused to limit the doctrine to cases "in which the constitutional error did not affect the truthfinding function of the trial." *See generally* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1093 (1977) ("most constitutional truths do not fit neatly into the category of truth-furthering or truth-obstructing"). In United States v. Frady, 456 U.S. 152 (1982), in extending the doctrine to cases that involved *federal* trials, the Court added that the applicant must prove "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual

fendant's claim that trial counsel's failure to raise the issue on appeal was due to "ignorance or neglect" rather than "informed professional deliberation."[339] Both the Virginia Supreme Court and the United States Supreme Court denied defendant's petitions for review.[340]

Defendant's collateral habeas attack was then dismissed by the District Court, and that dismissal was affirmed by the Fourth Circuit, which addressed the question of Dr. Pile's testimony without explicitly dealing with the issue of procedural default.[341] Although the Circuit assumed without deciding that Dr. Pile's testimony was inadmissible, and that it tainted the jury's finding of future dangerousness, it ruled that the death sentence was still valid because the testimony did not taint the jury's *other* finding that the offense was "outrageously or wantonly vile, horrible or inhuman."[342]

The question posed by *Smith* for the Supreme Court thus appeared to draw into focus one of the persistent problems of criminal procedure: can a defendant be forced to give up *one* right (in this case, the privilege against self-incrimination) to exercise *another* right (here, clinical evaluation and assistance by a trained mental health professional)?[343] Because the case followed so closely on the heels of the Court's decision in *Ake*, entitling a defendant to such expert help in both consultative *and* evaluative functions,[344] it appeared that the Court was willing to come to grips with the question of whether this problem created an "incredible dilemma":[345] forcing a defendant to abandon one constitutional right in order to assert another one.[346]

The Court, however, never reached the merits of the psychiatric issue.

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and substantial disadvantage, infecting his entire trial with errors of constitutional dimension." *Id.* at 170. In Reed v. Ross, 104 S. Ct. 2901 (1984), the Court held that the novelty of an unraised claim might constitute cause if its "legal base [was] not reasonably available to counsel." *Id.* at 2910.

The *Sykes* rule has been criticized by commentators as "too restrictive," Note, *supra*, at 490 (specifically regarding appellate default), "too stringent," Rosenberg, *supra*, at 625, "draconian," Note, *Habeas Corpus—The Supreme Court Defines the* Wainwright v. Sykes *"Cause" and "Prejudice" Standard*, 19 WAKE FOREST L. REV. 441, 469 (1983) and as putting habeas corpus "virtually out of reach of state prisoners" Rosenberg, *supra* at 627. According to Justice Brennan, as interpreted in *Engle*, *Sykes* reflects "unvarnished hostility to the assertion of federal constitutional claims." *Engle*, 456 U.S. at 137, 148 (Brennan, J., dissenting). *But see* Note, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981, 1012 (1982) (*Sykes*, though perceived as "harsh," expresses "legitimate concerns"; curbing deliberate use of habeas corpus to bypass state courts, and promoting state's right to "protect its system of orderly administration.)"

339. *See* Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc* 754 F.2d 520 (4th Cir. 1985), *cert. granted sub. nom.* Sielaff v. Carrier, 105 S. Ct. 3523 (1985), *rev'd sub. nom.* Murray v. Carrier, 106 S. Ct. 2639 (1986).

In *Carrier*, the Supreme Court specifically applied the procedural default test where the substantive claim was inadvertent, in the context of *appellate* (not trial) error, *id.* at 2646-2650. *But see* Stanford Note, *supra* note 338 at 465, arguing that the rationales of the "cause" and "prejudice" tests are inapplicable in appellate procedural default cases, and "too restrictive" in that context, *id.* at 490.

340. Smith v. Morris, 454 U.S. 1128 (1981).

341. Smith v. Procunier, 769 F.2d 170, 173 (4th Cir. 1985).

342. *Id.* at 174.

343. *See, e.g.*, Perlin, *supra* note 313 at 289.

344. *See* Ake v. Oklahoma, 105 S. Ct. 1087 (1985), discussed *supra* text accompanying notes 151-201.

345. Green v. United States, 355 U.S. 184, 193 (1957).

346. *See generally* Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741 (1985).

Relying strongly on the principles developed in *Sykes*,[347] the court—per Justice O'Connor, in a sharply-split 5-4 opinion—ruled that the defendant failed to demonstrate "cause" for his non-compliance with state procedures.[348] This barred consideration of a claim in subsequent proceedings when that claim was not raised on direct appeal from a criminal conviction.[349] The grant of federal habeas corpus would be inappropriate unless the defendant successfully shows both "cause" for noncompliance with the state rule *and* "actual prejudice resulting from the alleged constitutional violation."[350]

The Court found it unnecessary to reach the prejudice question because it was "self-evident" that defendant failed to demonstrate cause for the noncompliance with state procedures evidenced by his failure to include his objections to Dr. Pile's testimony in his initial appeal.[351] The record revealed that trial counsel "consciously elected not to pursue that claim," making the kind of "deliberate, tactical decision" which was "the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a state's legitimate rules for the fair and orderly disposition of its criminal cases."[352]

The court similarly dismissed defendant's argument that the default should be excused because trial counsel made his decision "in ignorance" as he failed to satisfactorily investigate the validity of the claim.[353] "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."[354] The court also rejected the claim that the "novelty" of the argument excused default;[355] the issue in question—while not definitively resolved—had been "percolating in the lower courts for years at the time of [Smith's] original appeal,"[356] and had even been raised by an *amicus* before the Virginia Supreme Court.[357]

Finally, the Court examined whether interposition of the procedural default rule would result in a "fundamental miscarriage of justice."[358] The

347. *See infra* text accompanying notes 693-737, for a full discussion of the implications of the use of *Sykes* in this context.

348. *Smith*, 106 S. Ct. at 2066.

349. *Id.* at 2665, *citing* Coppola v. Warden of Virginia State Penitentiary, 222 Va. 369, 282 S.E.2d 10 (1981); Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

350. *Smith*, 106 S. Ct. at 2666, *quoting Sykes*, 433 U.S. at 84; *cf.* Wainwright v. Greenfield, 106 S. Ct. 634, 637-38 (1986).

351. *Smith*, 106 S. Ct. at 2666.

352. *Id. See* Reed v. Ross, 104 S. Ct. 2901, 2909 (1984):

> [D]efense counsel may not make a tactical decision to forgo a procedural opportunity—for instance, to object at trial or to raise an issue on appeal—and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore inexcusable, and cannot qualify as "cause" for purposes of federal habeas corpus review.

353. *Smith*, 106 S. Ct. at 2666.

354. *Id.* at 2667, *quoting* Murray v. Carrier, 106 S. Ct. 2639, 2641 (1986).

355. *Smith*, 106 S. Ct. at 2667.

356. *Id.*

357. *Id.*

358. Engle v. Isaac, 456 U.S. 107, 135 (1982).

Court ruled that it would not; "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones."[359] There was nothing "fundamentally unfair" about enforcing procedural default rules "in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination."[360]

Justice Stevens[361] dissented.[362] He criticized the majority for failing to reach the merits of the case,[363] which "*unquestionably demonstrates* that [defendant's] constitutional claim is meritorious, and that there is a significant risk that he will be put to death[364] *because* his constitutional rights were violated."[365]

Brushing off trial counsel's "default" as " 'harmless' error,"[366] Justice Stevens expressed the "fear that the Court has lost its way in a procedural maze of its own creation and that it has grossly misevaluated the requirements of 'law and justice' that are the federal court's statutory mission[367] under the federal habeas corpus statute."[368]

The dissent characterized the role of the writ of habeas corpus "as the ultimate protection against fundamental unfairness."[369] This led them to sharply criticize the majority's "reformulation of the traditional understanding of habeas corpus . . . premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate the [concept of] 'fundamental fairness'."[370] Finding that this view was "far too narrow and . . . conflicts with the nature of our criminal justice sys-

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359. *Smith*, 106 S. Ct. at 2668.

360. *Id.*

361. The author of the majority opinion in *Greenfield*. See *supra* text accompanying note 296.

362. *Smith*, 106 S. Ct. at 2669 (Stevens, J., dissenting). Justice Stevens was joined in his dissent by Justices Marshall, Blackmun, and, on the psychiatric issue, Justice Brennan.

363. *Id.* (Stevens, J., dissenting).

364. Smith was executed on July 31, 1986. *See* Baker, *Va. Killer Executed As Appeals Fail; Smith Recites Psalm Before Electrocution*, Washington Post (Aug. 1, 1986), at B3 (Metro section).

365. *Smith*, 106 S. Ct. at 2669 (first emphasis added; second emphasis in original) (Stevens, J., dissenting).

366. The issue was raised at trial by counsel, *id.*, and before the Virginia Supreme Court by "respected amicus," *id.*

367. *See* 28 U.S.C. § 2243: "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

368. *Smith*, 106 S. Ct. at 2669-70 (Stevens, J., dissenting).

369. *Id.* at 2670. Justice Brennan did not join in this portion of the dissent.

370. *Id.* at 2671, *quoting* Engle v. Isaac, 456 U.S. 107, 126 (1982). Justice Stevens continued:

> If accuracy is the only value, however, then many of our constitutional protections—such as the Fifth Amendment right against compelled self-incrimination and the Eighth Amendment right against cruel and unusual punishment, the very claims asserted by petitioner—are not only irrelevant, but possibly counter-productive. Our Constitution, however, and our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice, reflect a different choice. That choice is to afford the individual certain protections—the right against compelled self-incrimination and the right against cruel and unusual punishment among them—even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.
>
> In my opinion, then, the Court's exaltation of accuracy as the only characteristic of "fundamental fairness" is deeply flawed. Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve "law and justice" should similarly reflect those values.

Id. (footnotes omitted).

tem,"[371] the dissenters reached the merits of the case.

First, they found that the introduction of defendant's comments to the court-appointed psychiatrist "clearly violated the Fifth Amendment"[372] under *Estelle*,[373] which made it "absolutely clear" that the introduction of this evidence by the prosecution at the sentencing stage[374]—thus making the defendant the " 'deluded instrument of his own conviction' "[375]—was constitutionally impermissible.[376] Justice Stevens concluded on this point:

> Given the historic importance of the Fifth Amendment, and the fact that the violation of this right makes a significant difference in the jury's evaluation of petitioner's "future dangerousness" (and consequent death sentence), it is not only proper, but imperative, that the federal courts entertain petitioner's entirely meritorious argument that the introduction of the psychiatrist's testimony at his sentencing hearing violated that fundamental protection.[377]

Dissenting both in *Smith* and in *Murray v. Carrier*,[378] a non-psychiatric case involving a similar procedural default issue,[379] Justice Brennan (for himself and Justice Marshall) argued that, where a defendant's constitutional rights had been violated and that violation "might have affected the verdict," a federal court should not decline to entertain a habeas petition "solely out of deference to the State's weak interest in punishing lawyers' inadvertent failures to comply with State procedures," and that, under *Sykes*, "cause" should be deemed to be established "where a procedural default resulted from counsel's inadvertance."[380]

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371. *Id.* at 2672; *see also* Gardner v. Florida, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.) ("death is a different kind of punishment from any other which may be imposed in this country"); cases cited in *Smith*, 106 S. Ct. at 2672 n.11 (Stevens, J., dissenting).

372. *Id.* at 2675 (Stevens, J., dissenting).

373. *Estelle v. Smith*, 451 U.S. 454 (1981).

374. *Id.* at 462.

375. *Smith v. Murray*, 106 S. Ct. at 2675, *quoting* Culombe v. Connecticut, 367 U.S. 568, 581 (1961), *quoting* 2 HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824). *Cf.* Estelle v. Smith, 451 U.S. 454, 462 (1981) (citing same references); *see supra* text accompanying notes 234-36.

376. *Smith*, 106 S. Ct. at 2675-76.

377. *Id.* at 2676 (footnote omitted).

The dissent continued by rejecting the state's argument that the case in question was distinguishable from *Estelle*, because the defendant requested the evaluation:

> In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent for the State" in the same sense in which the psychiatrist in *Estelle* was an agent for the State. *See* 451 U.S. at 467 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent for the State recounting unwarned statements made in a postarrest custodial setting").

Id. at 2676 n.23.

On the other hand, the dissent declined to consider the argument urged by defendant and supporting *amici* that "an absolute guarantee of confidentiality, rather than *Miranda* warnings should have been required." *Id.*

The dissent also would have found that introduction of the evidence in question violated the defendant's Eighth Amendment right to a fair sentencing proceeding, noting that the introduction of such "highly prejudicial, inadmissible evidence . . . quite clearly undermines the validity of the capital sentencing proceeding." *Id.* at 2626-27.

378. 106 S. Ct. 2639 (1986). Justice Brennan's dual dissent in *Carrier* and *Smith* is found at 106 S. Ct. 2678 (1986).

379. *See supra* note 339.

380. *Carrier*, 106 S. Ct. at 2678, 2682 (Brennan, J., dissenting).

(4) Illinois v. Allen

a. *The privilege against self-incrimination and "civil" cases: an overview*

There can no longer be any question as to the applicability of the fifth amendment's privilege against self-incrimination to the criminal trial and, in capital punishment cases, to the penalty phase of the prosecution as well.[381] On the other hand, one of the sharpest conflicts in caselaw has been found in cases determining whether or not a patient facing involuntary *civil* commitment has a right to assert such a privilege,[382] either in a pre-trial psychiatric examination[383] or at trial.[384] This issue has been characterized by a commentator as "one of the most troublesome problems in judicial scrutiny of civil commitment procedures."[385]

(1) Cases finding privilege applicable

The lead case finding the privilege applicable is *Lessard v. Schmidt*.[386] There, a federal district court relied strongly on the Supreme Court's decision in *In re Gault*[387] that a state may not, consonant with due process, "commit individuals on the basis of their statements to psychiatrists in the

381. Estelle v. Smith, 451 U.S. 454, 462 (1981).

382. *See, e.g.*, Annotation, *Necessity and Sufficiency of Statements Informing One Under Investigation for Involuntary Commitment of Right to Remain Silent*, 23 A.L.R. 4th 563.

383. *See infra* text accompanying notes 386-95.

384. *See, e.g.*, People v. Nayder, 106 Ill. App. 3d 489, 435 N.E.2d 1317 (1982) (not error—as violation of patient's constitutional right to *counsel*—to allow state to call respondent to testify as adverse party at involuntary civil commitment proceeding).

385. Shuman, *The Road to Bedlam: Evidentiary Guideposts in Civil Commitment Proceedings*, 55 NOTRE DAME L. 53, 73 (1979). *See generally* Griffith & Griffith, *The Patient's Right to Protection Against Self-Incrimination During the Psychiatric Examination*, 13 TOLEDO L. REV. 269 (1982).

The issue is one which has traditionally attracted a substantial amount of academic attention. *See, e.g.*, Fielding, *Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination*, 9 GONZAGA L. REV. 117 (1973); Note, *Civil Commitment in Tennessee—What Process is Due?*, 8 MEMPHIS STATE U.L. REV. 135 (1977); Note, Conservatorship of Roulet *and* Cramer v. Tyars: *Inconsistency in Involuntary Civil Commitment Proceedings*, 68 CALIF. L. REV. 716 (1980); Note, 61 J. URB. L. 639 (1984); and *see* articles cited in Tyars v. Finner, 709 F.2d 1274, 1280-81 nn.9-10 (9th Cir. 1983).

386. 349 F. Supp. 1078, 1100-1102 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976). The implementation of *Lessard* has been examined carefully in Zander, *Civil Commitment in Wisconsin: The Impact of* Lessard v. Schmidt, 1976 WIS. L. REV. 503.

On the question of the applicability of the physician-patient privilege to involuntary civil commitment proceedings, *see e.g.*, Chacko v. State, 630 S.W.2d 842 (Tex. Ct. App. 1982), *see also* Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893 (1982).

387. 387 U.S. 1, 49 (1967):

> [T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding, if the statement is or may be inculpatory.
>
> * * * * * *
>
> [C]ommitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of liberty—a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.

absence of a showing that the statements were made with 'knowledge' that the individual was not obliged to speak."[388]

The district court carefully explained that its use of the term "knowledge" was premised on the presumption that an individual subject to involuntary civil commitment was competent, and that, therefore, if his rights "are explained to him in simple terms, it may be presumed [also] that he has the requisite knowledge."[389] After counsel and the psychiatrist have explained to the patient that he is to be examined, that his statements may be the basis for commitment, and that he does not have to participate, the patient may be examined if he "willingly assents."[390]

The court "fortified" its conclusion by medical evidence indicating that patients "respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings,"[391] and finally distinguished those cases that had rejected the privilege in criminal trials where the defendant had raised the question of his own mental capacity.[392] The reasoning in this decision has been endorsed by some of the scholarly literature,[393] and has been followed both in other constitutional

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See also McNeil v. Director, Patuxent Institution, 407 U.S. 245, 250 (1972) (Douglas, J., concurring).

But see Stromberg & Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. LEGIS. 275, 342 (1983), characterizing this discussion as focusing on a "metaphysical issue [that] misses the point."

388. *Lessard*, 349 F. Supp. at 1101 (footnote omitted).

On the other hand, the court also held that the safeguards of the privilege could be obtained "without the presence of counsel in the psychiatric interview." *Id. Cf. Estelle*, 451 U.S. at 470 n.14 (no constitutional right to presence of counsel during interview asserted).

389. *Lessard*, 349 F. Supp. at 1101 n.33.

390. *Id.* at 1101.

391. *Id.* at 1101-1002.

392. *Id.* at 1102. *See, e.g.*, United States v. Albright, 388 F.2d 719 (4th Cir. 1968).

The *Lessard* court explained:

> The purpose of a civil commitment proceeding is to ascertain if a person's mental state justifies the state taking away his liberty. The "evidence" obtained in a psychiatric interview goes to the heart of the government's case in the civil proceeding. In a criminal context, evidence obtained as to mental capacity goes only to a defense. In fact, any real evidence obtained which relates to the real issue in the proceeding, the defendant's guilt of the crime charged, is excluded at the subsequent trial.

Lessard, 349 F. Supp. at 1102.

393. *See, e.g.*, Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L.J. 729, 746-47. *See also* Aronson, *Should the Privilege Against Self-incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55, 93 (1973):

> [W]hen commitment is equivalent to criminal incarceration, that is, when it is based on "dangerousness" and no treatment is given, the privilege against self-incrimination should apply. However, in other contexts, for example where the defendant has waived the privilege by raising the insanity defense and producing his own psychiatric testimony, or where treatment is in fact being given following involuntary civil or postconviction commitment, application of the privilege is not desirable. In such instances, the deprivations inherent in institutional commitment nonetheless demand that the policies behind the privilege be protected by providing the defendant with maximum due process safeguards consistent with recognizing the state's interest in meeting its burden of proof. Thus, presence of defense counsel or psychiatrist at the examination would be desirable if such procedures would not excessively disrupt the interview. And, at the minimum, the defendant should be warned that his statements may serve as the basis of his commitment.

See also, Note, *The Fifth Amendment and Compelled Psychiatric Examinations: Implications of* Estelle v. Smith, 50 GEO. WASH. L. REV. 275, 303 (1982) [hereinafter *Estelle* Implications] (recommending application of *Estelle* to involuntary civil commitment cases).

challenges,[394] and in a group of cases premised on state statutes similarly granting the privilege.[395]

(2) Cases finding privilege inapplicable

On the other hand, more courts have found the privilege to be *inapplicable* to involuntary civil commitment proceedings. In the lead case of *French v. Blackburn*,[396] a federal district court rejected plaintiff's argument that the privilege was compelled by the fifth amendment: "To apply the privilege to the type of proceedings here challenged would be to destroy the valid purposes which they serve as it would make them unworkable and ineffective."[397]

The court reasoned that, because the purpose of the North Carolina involuntary civil commitment statute was "treatment,"[398] the granting of the privilege would frustrate the "legitimate objectives of the legislation" and "thwart the personal examinations and interviews considered indispensable in determining" whether or not commitment is appropriate.[399]

Similarly, the West Virginia Supreme Court of Appeals declined to order the privilege applicable, noting that, to grant it would make the procedures too "burdensome [and] cumbersome."[400] More recently, a New York trial court stressed that, as there is no way to obtain a "fair view of the patient's mental status without a psychiatric interview," the privilege against self-incrimination "must give way to ensure that the more fundamental

394. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378, 394 (M.D. Ala. 1974); Suzuki v. Quisenberry, 411 F. Supp. 1113, 1130-32 (D. Haw. 1976); Tyars v. Finner, 518 F. Supp. 502, 509-10 (C.D. Cal. 1981), *aff'd on other gds.* 709 F.2d 1274 (9th Cir. 1983).

Suzuki elaborated upon the *Lessard* holding:

> We must be clear about what the claim of privilege against self-incrimination means in this context. It means that the state may not commit an individual on the basis (in whole or in part) of his statements to examining psychiatrists (or others) in the absence of a showing that the statements were made voluntarily after the individual was informed of and understood the purpose of the examination and that he was not obliged to speak. It does not mean that psychiatrists cannot talk to a patient for purposes of treatment. It does not mean that evidence cannot be adduced as to the patient's statements in a non-inquisitorial setting.

411 F. Supp. at 1131-32 (footnotes omitted).

But see Suzuki v. Yuen, 617 F.2d 173, 176-78 (9th Cir. 1980), discussed *infra* at note 401.

395. *See, e.g.*, Matter of Collins, 102 Ill. App. 3d 138, 429 N.E.2d 531, 535-36 (1981) (under "plain" statutory language [ILL. REV. STAT., ch. 91½, ¶ 3-807 (1986 Supp.)], examining physicians "must *personally* inform respondents of his rights") (emphasis in original); Matter of Rizer, 87 Ill. App. 3d, 409 N.E.2d 383, 385-87 (1980); State ex rel. Simanek v. Berry, 597 S.W.2d 718, 720-22 (Mo. Ct. App. 1980).

See also In re D.B.W., 626 P.2d 1149, 1152 (Okla. 1980) (requirement that counsel inform patient of his statutory and constitutional rights obviated any need for further warning by mental health professionals); Moss v. State, 539 S.W.2d 936, 946 (Tex. Ct. Civ. App. 1976) (statements made to doctor pursuant to court order as aspect of involuntary civil commitment proceeding was subject to privilege to the extent that statement may not be used to incriminate patient in subsequent criminal proceedings).

396. 428 F. Supp. 1351, 1358-59 (M.D.N.C. 1977), *aff'd* 443 U.S. 901 (1977).

397. *Id.* at 1359.

398. *Id. See* Allen v. Illinois, 106 S. Ct. 2988 (1986), discussed *infra* at text accompanying notes 406-56.

399. *French*, 411 F. Supp. at 1359, quoting Tippett v. Maryland, 436 F.2d 1153, 1162 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part).

400. State ex rel. Hawks v. Lazaro, 202 S.E.2d 109, 126 (W. Va. 1974).

right, in this context, to a full and fair hearing is not compromised."[401]

These rationales have been applauded in another segment of the scholarly journals[402] and in state cases.[403] In its draft model civil commitment statute, the American Psychiatric Association stresses that patients "shall not have a 'right to remain silent' at a psychiatric examination or hearing,"[404] arguing that such a right would be "fundamentally inconsistent with the therapeutic purposes of the [involuntary civil commitment] process."[405]

b. *The* Allen *case*[406]

While the Supreme Court had shown some interest in cases involving sex offender statutes in the late 1960's and early 1970's,[407] it had not chosen

401. Ughetto v. Acrish, 130 Misc. 2d 74, 494 N.Y.S.2d 943, 947 (Sup. Ct. 1985). *See also* Project Release v. Prevost, 551 F. Supp. 1298, 1308 (E.D.N.Y. 1982), *aff'd* 722 F.2d 960 (2d Cir. 1983).

Elsewhere, the Ninth Circuit reversed that aspect of a district court decision which had held that a Hawaii statute, HAW. REV. STAT. § 334.60(b)(4)(G) (1976), allowing for a five day involuntary commitment period in which to evaluate an individual if he refuses to be examined, violated the privilege. Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980), *aff'g in part, rev'g in part, dismiss'g in part* 438 F. Supp. 1106 (D. Haw. 1977); *see also* Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976) (construing predecessor law).

The Court of Appeals noted that "practical considerations," 617 F.2d at 177, warranted reversal:

> If the state may not commit a person absent a medical evaluation, and if the subject refuses to be examined, then under the district court's ruling, he must be released. Any subject of a commitment petition could avoid commitment merely by refusing to speak. We can imagine the case of a belligerent hostile person who is the subject of a petition. He may be demonstrably dangerous to himself or others. His hostility may extend to examining physicians, to whom he refuses to speak. Without some means of ealuating his condition, the purpose of the statute (protecting others from mentally ill persons) would be defeated. Sound policy reasons demand that this portion of the decision below be reversed.

Id. at 177-78; *see also id.* at 179-80 (Schroeder, J., concurring in part).

For the circuit court's other policy and constitutional reasons for reversal, *see id.* at 176-77.

402. *See, e.g.*, Stromberg & Stone, *supra* note 387, at 341-44; *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1312 (1974).

At least one empirical study has concluded that implementation of the privilege in the civil commitment context has had "little impact on the willingness of involuntarily committed patients to be evaluated by hospital staff." Miller, Maier & Kaye, Miranda *Comes to the Hospital: The Right to Remain Silent in Civil Commitment*, 142 AM. J. PSYCHIARY 1074, 1076 (1985). *Cf.* Shuman & Weiner, *supra* note 386, at 927 (both proponents and opponents of application of physician-patient privilege to commitment setting have "overstated their cases").

403. Cases are collected in *In re* Helvenston, 658 S.W.2d 99, 103 n.5 (Tenn. Ct. App. 1983). *See, e.g.*, State v. O'Neill, 274 Or. 59, 545 P.2d 97, 103-04 (1976) (statements not designed to elicit "incriminating information," but to determine "what urgent medical treatment is necessary for the individual"); Matter of Mathews, 46 Or. App. 757, 613 P.2d 88, 90-92 (1980); In re Beverly, 342 So.2d 481, 488-89 (Fla. 1977); Helvenston, 658 S.W.2d at 102-05; In re Porter, 98 Ill. App. 3d 869, 424 N.E.2d 952, 954 (1981) (distinguishing Matter of Rizer, 87 Ill. App. 3d 138, 429 N.E.2d 531 (1981)); Kraemer v. Mental Health Board, 199 Neb. 784, 261 N.W.2d 626, 632-34 (1978); *In re* Winstead, 67 Ohio App. 2d 111, 425 N.E.2d 943, 946-47 (1980) (involuntary civil commitments not "penal in nature, but humanitarian").

404. Stromberg & Stone, *supra* note 387, at 341 (Guideline 6.D.6.). The Model Law specifies further that no patient shall be held civilly or criminally liable for not testifying, *id.*, and that no information adduced at such an interview or hearing "may be admitted against the patient on the issue of guilt in a criminal proceeding unless he places his mental condition in issue in such proceeding, and unless the disclosure or opinion is relevant to such an issue raised by him," *id.*

405. *Id.* at 342. Such warnings might "bewilder and alarm the patient," and might "make it impossible to ascertain the patient's mental state, thereby preventing the assessment both of his need for treatment and his potential dangerousness." *Id.*

406. Allen v. Illinois, 106 S. Ct. 2988 (1986).

407. *See supra* notes 2, 5.

For a helpful history and survey of such laws, see Weiner, *Mental Disability and the Criminal*

to consider either the substantive or procedural limitations on the use of such laws[408] for nearly fifteen years,[409] before it agreed to hear *Allen v. Illi-*

Law, in S. BRAKEL, PARRY & WEINER, THE MENTALLY DISABLED AND THE LAW 693, 739-43 (3d ed. 1985); M. FORST, CIVIL COMMITMENT AND SOCIAL CONTROL 17-29 (1978). While more than half of the states had such laws in the mid 1960's—for general discussions of the early laws, see Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME L. 527 nn.1-3 (1965) (citing sources)—since 1976, thirteen states have repealed their laws and another twelve have modified them, leaving only seventeen jurisdictions which retain such laws; of these, the laws are regularly enforced in only six states. Weiner, *supra* at 739-40.

The laws have been under attack for years—in 1952, Guttmacher and Weihofen noted "there is doubtless no subject on which one can obtain more definite opinions and less definite knowledge" than the sentencing of sex offenders, M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 110 (1952), *quoted in* Walsh, *Differential Sentencing Patterns Among Felony Sex Offenders and Non-Sex Offenders*, 75 J. CRIM. L. & CRIMINOLOGY 443 (1984). These attacks have been on a variety of legal (*see, e.g.*, Millard v. Cameron, 373 F.2d 468, 472 (D.C. Cir. 1966); Ohlinger v. Watson, 652 F.2d 775, 777-79 (9th Cir. 1981)), and clinical grounds (*see, e.g.*, Monahan & Davis, *Mentally Disordered Sex Offenders*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 326 (J. Monahan & H. Steadman, eds., 1983); Note, *supra* at 550-55, with critics noting that sex offenders are not a homogeneous grouping (Weiner, *supra* at 741; *cf.* Baxter, Marshall, Barbaree, Davidson & Malcom, *Deviant Sexual Behavior: Differentiating Sex Offenders by Criminal and Personal History, Psychometric Measures and Sexual Response*, 11 CRIM. JUST. & BEHAV. 477, 498 (1984) (drawing personality profiles of pedophiles, hebephiles [persons who seek sexual contact with adolescents], and rapists)), and that the laws were enacted "with few or no data to support the premise of existence of a broad category of people known as 'sexual psychopaths' who can be treated successfully," Weiner, *supra* at 741. *See generally*, Dix, *Differential Processing of Abnormal Sex Offenders: Utilization of California's Mentally Disordered Sex Offenders Program*, 67 J. CRIM. L. & CRIMINOLOGY 233, 242-43 (1976).

As with "sociopathy" (*see supra* note 215), a full range of causes, (*see, e.g.*, Rada, Laws, Kellner, Stivastava & Peake, *Plasma Androgens in Violent and Nonviolent Sex Offenders*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 149, 155-57 (1983) (some relationship found between plasma testosterone levels and aggressive behavior, but "psychological, social, pathological and organic factors appear to be much more important than hormone levels in influencing aggressive interactions")), and potential cures and treatments, including *e.g.*, castration (*see* Note, *Castration of the Male Sex Offender: A Legally Impermissible Act*, 30 LOYOLA L. REV. 377 (1984)), group therapy (*see* Kopetski, *Psychotherapy for People Who Molest Children*, 13 COLO. L. 246 (1984)), behavior modification (*see* sources cited in Weiner, *supra*, at 742 nn.580-81), and pharmacological agents (*see* Bradford, *The Hormonal Treatment of Sexual Offenders*, 11 BULL. AM. ACAD. PSYCHIATRY & L. 159 (1983)), have been suggested and discussed. The use of the drug Depo-Provera has touched off the most recent flurry of supportive (*see, e.g.*, Comment, *Sexual Offenders and the Use of Depo-Provera*, 22 SAN DIEGO L. REV. 565, 586 (1985)), critical (*see* Demsky, *The Use of Depo-Provera in the Treatment of Sex Offenders*, 5 J. LEG. MED. 295, 321 (1984)), and cautious articles (*see* Note, *Depo-Provera Treatment as an Alternative to Imprisonment*, 23 HOUSTON L. REV. 801, 818-19 (1986)).

Again, as with "sociopathy," *see supra* note 215, major mental health professional groups have taken the position that the category of "sexual psychopath" lacks clinical validity and that sexual psychopathy is thus not a valid psychiatric diagnosis, *see* GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, PSYCHIATRY AND SEX PSYCHOPATH LEGISLATION: THE 30S TO THE 80S, 840 (1977); consequently, leading professional groups have called for the repeal of such laws, *see* Weiner, *supra*, at 743. Writing recently regarding the American Bar Association's Criminal Justice Mental Health Standards—which concluded that the evidence overwhelmingly demonstrated that such statutes should be repealed, (see ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-8.1 (1984), and Weiner, *supra*, at 447)—Professor Zenoff concluded, somewhat ruefully: "[I]t is worth noting that [this particular experiment in predicting dangerousness] lasted for fifty years and could have been avoided if legislators required some empirical support for the theory before enacting the laws." Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 580-81 (1985). *Cf. Jones*, 463 U.S. at 364-65 n.13 (courts should pay "particular deference to reasonable legislative judgments").

Nonetheless, courts continue to uphold provisions of such statutes providing lessened procedural due process safeguards and extended commitment periods in the face of constitutional attacks such as the one successful in *Ohlinger. See, e.g.*, People v. Sherman, 167 Cal. App. 3d 10, 212 Cal. Rptr. 861, 864 (1985); People v. Kibel, 701 P.2d 37 (Colo. 1985).

408. For recent empirical inquiries into the use of such statutes and the fate of released sex offenders, see Konecni, Mulcahy & Ebbesen, *Prison or Mental Hospital: Factors Affecting the Processing of Persons Suspected of Being "Mentally Disordered Sex Offenders,"* in NEW DIRECTIONS

nois. The question posed in *Allen* was whether, under Illinois' sex offender law,[410] the privilege against self-incrimination was available to an individual facing such commitment.

After Terry Allen was indicted for certain sexual crimes,[411] the state filed a petition to have him declared a "sexually dangerous person" in accordance with state law.[412] Pursuant to the act, the trial court ordered the defendant to submit to two psychiatric examinations.[413] At trial, the state presented the testimony of the psychiatrists over the defendant's objection that the statements were elicited from him in violation of his privilege against self-incrimination.[414] The court ruled that while the defendant's *statements* were inadmissible, the psychiatrists could express their opinion of defendant, based on the interviews.[415]

Both witnesses testified that the defendant was mentally ill and, in accordance with the statute, that he had "criminal propensities to commit sexual assault."[416] Based upon this testimony (and testimony from the victim of the underlying sexual assault), the court found that the defendant to be a sexually dangerous person.[417]

The state appellate court reversed, relying on the Supreme Court's decision in *Estelle*[418] for the proposition that the testimony in question violated defendant's privilege against self-incrimination.[419] The state supreme court reversed and reinstated, finding the privilege inapplicable because the proceedings were "essentially civil," and because the statute's aim was "treatment, not punishment."[420]

The Supreme Court affirmed, holding, per Justice Rehnquist, that the proceedings in question were essentially civil in nature.[421] First, the Court

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IN PSYCHOLEGAL RESEARCH 87 (P. Lipsitt & B. Sales, eds. 1980); Sturgeon & Taylor, *Report of a Five-Year Follow-Up Study of Mentally Disordered Sex Offenders Released From Atascadero State Hospital in 1973*, 4 CRIM. JUST. J. 30 (1980).

409. *See, e.g.*, Davis v. Connecticut, 190 Conn. 327, 461 A.2d 947 (1983), *cert. denied*, 104 S. Ct. 350 (1983) (does state sex offenders' statute create "capricious classification" in violation of equal protection clause); Thrasher v. Illinois, 106 S. Ct. 147 (1985) (denying *certiorari*) (application of sex offenders' statute to defendant sentenced, but not convicted, after act's effective date).

410. *See* ILL. REV. STAT. ch. 38 ¶ 105-1.01 to 105-9. (Supp. 1986).

411. Prior to indictment, defendant had been charged by information with the same offenses, and the state had then filed its initial petition to have him declared sexually dangerous. *Allen*, 106 S. Ct. at 2990. Both the information and petition were apparently dismissed, and the defendant was subsequently indicted on the same charges. *Id.*

412. *See* ILL. REV. STAT. ch. 38 ¶ 105-1.01 (Supp. 1986).

413. *Allen*, 106 S. Ct. at 2990.

414. *Id.* at 2990-91.

415. *Id.* at 2991.

416. *Id. See* ILL. REV. STAT. ch. 38 ¶ 105-1.01 (Supp. 1986).

417. *Allen*, 106 S. Ct. at 2991. In accordance with Illinois caselaw, the Court found 1) that defendant suffered from mental illness for at least one year, 2) that he had propensities to commit sexual offenses, and 3) that by his actions he had demonstrated such propensities. *See* People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28, 29-30 (1976).

418. Estelle v. Smith, 451 U.S. 454 (1981). *See supra* text accompanying notes 207-55.

419. People v. Allen, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984).

420. People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690, 694, 695 (1985). The court added that the statutory aim of treatment would be "almost totally thwarted" by the invocation of the privilege, *id.* at 696. On the other hand, it ruled that such statements could not be used against the defendant in any subsequent criminal proceedings. *Id. See also e.g.*, People v. Nayder, 106 Ill. App. 3d 489, 435 N.E.2d 1317 (1982).

421. *Allen*, 106 S. Ct. at 2992-93.

stressed that the privilege was available only in criminal proceedings,[422] or in other circumstances "where the answers might incriminate [a defendant] in future criminal proceedings."[423]

Next, the Court noted that the Illinois legislature had characterized the statute as "civil."[424] While it conceded that the "label" employed was "not always dispositive,"[425] the Court found that defendant failed to show that the scheme was "so punitive either in purpose or effect as to negate [the State's] intention" that it be civil.[426]

Although the proceedings in question were accompanied by certain strict procedural safeguards, including the presence of counsel,[427] a jury trial,[428] and confrontation and cross-examination of witnesses,[429] the proceedings nevertheless remained civil in nature.[430] Under the statute, the state is obliged to provide care and treatment[431] in a facility for psychiatric care.[432] When the individual is no longer dangerous, the court shall order him discharged.[433] Although the burden is on the defendant to show he is no longer dangerous, he may apply for release at any time.[434] Under these circumstances, the Supreme Court found that this emphasis on treatment "does not appear to promote either of the 'traditional aims of punishment—retribution and deterrence.' "[435]

The Court rejected defendant's argument that, despite the "apparently nonpunitive purposes" of the law, it should still be considered criminal for purposes of the privilege.[436] It noted that the fact that the state has chosen not to apply the act to the "larger class of mentally ill persons does not somehow transform a civil proceeding into a criminal one."[437] The Court relied in part on its opinion in *Addington v. Texas*:[438]

> [T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightfor-

422. *See* Malloy v. Hogan, 378 U.S. 1 (1964).
423. *Allen*, 106 S. Ct. at 2991-92, *quoting* Minnesota v. Murphy, 465 U.S. 420, 426 (1984), quoting Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).
424. ILL. REV. STAT. ch. 38 ¶ 105-3.01 (Supp. 1986).
425. *Allen*, 106 S. Ct. at 2992.
426. *Id.*, *quoting* United States v. Ward, 448 U.S. 242, 248-49 (1980).
427. ILL. REV. STAT. ch. 38 ¶ 105-5 (Supp. 1986).
428. ILL. REV. STAT. ch. 38 ¶ 105-5 (Supp. 1986).
429. People v. Nastasio, 19 Ill. 2d 524, 168 N.E.2d 728, 731 (1960).
430. *Allen*, 106 S. Ct. at 2993.
431. ILL. REV. STAT. ch. 38 ¶ 105-8 (Supp. 1986).
432. ILL. REV. STAT. ch. 38 ¶ 105-8 (Supp. 1986).
433. ILL. REV. STAT. ch. 38 ¶ 105-9 (Supp. 1986).
434. ILL. REV. STAT. ch. 38 ¶ 105-9 (Supp. 1986). Conditional release is also available. *Id.*
435. *Allen*, 106 S. Ct. at 2992, quoting Kennedy v. Mendoza-Martin, 372 U.S. 144, 168 (1963).
436. *Allen*, 106 S. Ct. at 2992.

Defendant also argued that the act could not be invoked unless criminal charges had been brought against an individual (ILL. REV. STAT. ch. 38 ¶ 105-3 (Supp. 1986)), and that, to sustain a petition, the state must prove the individual committed at least one sexually dangerous criminal act, *Allen*, 481 N.E.2d at 697. Such attributes, he suggested, distinguish the case from other civil commitments which are "not typically tied to any criminal charge." *Allen*, 106 S. Ct. at 2993. At oral argument, the defendant apparently conceded that other civil commitments were not to be considered "criminal" for purposes of the self-incrimination clause. *Id.*

437. *Id.*
438. 441 U.S. 418 (1979).

> ward factual question—did the accused commit the act alleged? There may be factual questions to resolve in a commitment proceeding, but the factual aspects require only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists.[439]

The Court brushed aside defendant's reliance on *In re Gault*[440] for the proposition that, even though the proceedings might be denominated as "civil," the facility to which individuals are committed under the act—a maximum security institution run by the state department of correction—results in "total deprivation of liberty in a criminal setting."[441] First, the Court characterized *Gault*'s statement that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty"[442] as "plainly not good law,"[443] relying again on *Addington* to demonstrate "that involuntary commitment does not trigger the entire range of criminal procedural protections."[444]

Second, the Court read *Gault* as being concerned with the *punishment* of juvenile offenders.[445] In *Allen*, the Court stressed, "the State serves its purpose by *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment."[446]

Had the defendant shown that sexually dangerous persons were confined under conditions "incompatible with the State's asserted interest in treatment," or had he shown that the confinement to which they were subjected was "essentially identical to that imposed upon felons with no need for psychiatric care," the case "might well be a different" one,[447] the Court noted. Nothing in the record before it, however, supported the assertion that "the conditions of [defendant's] confinement themselves amount to 'punishment' and thus render 'criminal' the proceedings which led to the confinement."[448]

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439. *Allen*, 106 S. Ct. at 2993, *quoting Addington*, 441 U.S. at 429. The Court relied on a portion of this same quotation in *Barefoot* as well. *See* 463 U.S. at 898.

440. 387 U.S. 1 (1967).

441. *Allen*, 106 S. Ct. at 2994.

442. *Gault*, 387 U.S. at 50.

443. *Allen*, 106 S. Ct. at 2994. It appears that this is the first time that the Court has ever specifically disapproved of this *Gault* language. *Cf.* Middendorf v. Henry, 425 U.S. 25, 35-42 (1976) (distinguishing *Gault*, and holding that a summary court martial is not a criminal prosecution for sixth amendment purposes).

444. *Allen*, 106 S. Ct. at 2994.

445. *See Gault*, 387 U.S. at 49-50.

446. *Allen*, 106 S. Ct. at 2994 (emphasis in original). The fact that the institution to which defendant would be committed also housed prisoners from other institutions in need of psychiatric treatment did not "transform the State's intent to treat into an intent to punish." *Id.*

See Hochstedler, *Criminal Prosecution of the Mentally Disordered*, 20 LAW & SOC'Y REV. 279, 291 (1986) (in 47% of sample of cases involving mentally disabled criminal defendants studied, courts used their *criminal* authority to mandate *treatment only*).

447. *Allen*, 106 S. Ct. at 2994.

448. *Id.* at 2995.

The Court concluded by rejecting defendant's due process arguments, and by concluding that the privilege "has no place among the procedural safeguards discussed in *Mathews v. Eldridge*, which are designed to enhance the reliability of [the factfinding] process." *Id.*

Dissenting on behalf of four justices, Justice Stevens responded. "When the criminal law casts so long a shadow on a putatively civil proceeding, I think it is clear that the procedure must be deemed a 'criminal case' within the meaning of the Fifth Amendment."[449]

Beyond this, Justice Stevens saw the criminal law as occupying "a central role in the sexually dangerous person proceeding."[450]

> Thus, the Illinois "sexually dangerous person" proceeding may only be triggered by a criminal incident; may only be initiated by the sovereign State's prosecuting authorities; may only be established with the burden of proof applicable to the criminal law; may only proceed if a criminal offense is established; and has the consequence of incarceration in the State's prison system—in this case, Illinois' maximum security prison at Menard. It seems quite clear to me, in view of the consequences of conviction and the heavy reliance on the criminal justice system—for its definition of the prohibited conduct, for the discretion of the prosecutor, for the standard of proof, and for the Director of Corrections as custodian—that the proceeding must be considered "criminal" for purposes of the Fifth Amendment.[451]

Further, Justice Stevens argued that the statute's "benign purpose" of treatment "is not sufficient, in and of itself, to render inapplicable the Fifth Amendment, or to prevent a characterization of proceedings as 'criminal.' "[452] If the sexually dangerous person proceeding may escape characterization as criminal simply because "a goal is 'treatment,' . . . nothing would prevent the State from creating an entire corpus of 'dangerous person' statutes to shadow its criminal code," resulting in the "evisceration of criminal law and its accompanying protections."[453]

Finally, Justice Stevens focused on what he saw as the "role and value" of the Fifth Amendment,[454] by quoting Dean Griswold:

> [T]he Fifth Amendment can serve as a constant reminder of the high standards set by the Founding Fathers, based on their experience with tyranny. It is an ever-present reminder of our belief in the importance of the individual, a symbol of our highest aspirations. As such it is a clear and eloquent expression of our basic opposition to collectivism, to the unlimited power of the state.[455]

Justice Stevens concluded by characterizing the court's decision as conflicting "with the respect for liberty and individual dignity that has long

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449. *Id.* at 2995, 2996 (Stevens, J., dissenting).

He reasoned that the "impact of an adverse judgment against an individual deemed to be a 'sexually dangerous person' is at least as serious as a guilty verdict in a typical criminal trial," noting that the ensuing commitment—accompanied by a significant stigma—involved a "massive curtailment of liberty" (*id.*, quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)), which might last far longer "than a mere finding of guilt on an analogous criminal charge," *id.*, citing United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

450. *Allen*, 106 S. Ct. at 2997 (Stevens, J., dissenting).

451. *Id.* (Stevens, J., dissenting).

452. *Id.* at 2998 (Stevens, J., dissenting).

453. *Id.* at 2998-99 (Stevens, J., dissenting).

454. *Id.* at 2999 (Stevens, J., dissenting).

455. *Id.* at 2999-3000 (Stevens, J., dissenting), quoting E. GRISWOLD, THE FIFTH AMENDMENT TODAY 81 (1955). Note that the majority opinion in *Estelle* also cited Griswold's treatise. 451 U.S. at 462.

characterized, and that continues to characterize, our free society."[456]

(C) *Execution of the insane*

(1) *Introduction*

Dr. Paul Appelbaum has aptly characterized the question of the constitutional appropriateness of standards and procedures required to determine whether a death row prisoner is competent to be executed as "one of the more perplexing issues in criminal justice today."[457] In *Ford v. Wainwright*,[458] the Supreme Court has finally given a partial answer.[459] Nonetheless, the "conundrum" perceived by Dr. Appelbaum still exists.[460] Examination of the *Ford* opinion in its historical context should reveal some helpful clues to understanding both the depth of the Supreme Court's true feelings in this matter, as well as the expected impact of the *Ford* case.

The issue of executing the insane is one which has plagued the legal system for centuries. In their seminal study, Professors Hazard and Louisell[461] examined arguments made by Blackstone,[462] Hale[463] and Coke[464] specifically opposing such execution, and looked also at the writings of St. Thomas Aquinas[465] and Shakespeare[466] for the religious and cultural roots of the doctrine.[467] In his classic treatise on *Insanity and the Criminal Law*, Dr. William White focused over 60 years ago on the "general feeling of abhorrence against executing a person who is insane."[468]

The Supreme Court had rejected as recently as 1950 the argument that there was a due process right to a pre-execution judicial sanity determination.[469] That decision predated by twelve years the court's incorporation of the eighth amendment to be applied to the states,[470] and the Court had not considered the argument again since that time. In short, while the slate was not a clean one when *certiorari* was granted in *Ford*, neither was there much in the way of binding precedent for the Court to uphold, distinguish or overrule.

Although the roots of the policy against execution of insane offenders

456. *Allen*, 106 S. Ct. at 3000 (Stevens, J., dissenting).

457. Appelbaum, *Competence to be Executed: Another Conundrum for Mental Health Professionals*, 37 HOSPITAL & COMMUNITY PSYCHIATRY 682 (1986).

458. 106 S. Ct. 2595 (1986).

459. See *infra* note 548.

460. Appelbaum, *supra* note 457, at 682.

461. Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381 (1962).

462. *Id.* at 383-84 (citing W. BLACKSTONE, COMMENTARIES 395*-396* (13th ed. 1800)).

463. Hazard & Louisell, *supra* note 461, at 383 (citing 1 HALE, PLEAS OF THE CROWN 34-35 (1736)).

464. Hazard & Louisell, *supra* note 461, at 384-85 (citing COKE, THIRD INSTITUTE 6 (1797)).

465. Hazard & Louisell, *supra* note 461, at 387 (citing T. AQUINAS, SUMMA THEOLOGICA, First Part, Treatise on the Angels, ques. 64, art. 2, objection, reply to second objection; T. AQUINAS, SUMMA CONTRA GENTILES, bk. 3, ch. 146).

466. Hazard & Louisell, *supra* note 461, at 387-88 (citing and quoting W. SHAKESPEARE, HAMLET, act III, sc. iii, lines 72-96).

467. *See also* Ward, *supra* note 37, at 49-57. Traditional arguments are collected in Solesbee v. Balkcom, 339 U.S. 9, 17-19 (1950) (Frankfurter, J., dissenting).

468. W. WHITE, INSANITY AND THE CRIMINAL LAW 245 (1923) (1981 reprint).

469. *Solesbee*, 339 U.S. at 12.

470. Robinson v. California, 370 U.S. 660 (1962).

are ancient,[471] according to Professor Zenoff "no consensus exists about the reasons for it, about the meaning of 'insane' in this context, or the procedures which should be used to determine it."[472] Another commentator suggests that these "seemingly intractable dilemmas"[473] are no more perplexing than other problems regularly arising out of the law/psychiatry relationship. Earlier attempts at prescribing appropriate standards[474] "have proved incoherent because they failed to confront the reality that law and psychiatry rarely, if ever, exist separately from culture and politics."[475]

Capital punishment is today "probably a stronger force in American society than it has been in thirty years."[476] Therefore, it should be no surprise that the "conundrum"[477] raised by Dr. Appelbaum has begun to, again, assume greater significance as an issue to be confronted both by forensic psychiatrists and the law. This has become especially important in the post-*Hinckley*[478] universe. Insanity defense statutes[479] had been seen tradi-

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471. See *supra* notes 461-66.

472. Zenoff, *Can an Insane Person Be Executed?* [1985-1986] ABA PREVIEW, Issue No. 16 (June 27, 1986), at 465, 466. Professor Zenoff has graphically represented the various policy arguments both in support of and in opposition to such a ban:

ARGUMENT	COUNTERARGUMENT
1. The insane are unable to suggest reasons why the sentence cannot be carried out.	Offenders who were sane at the time of trial and sentence are unlikely to have any new information to offer.
2. Insanity is sufficient punishment for the crime.	It is not recognized as sufficient punishment because the offender who recovers sanity is executed.
3. The insane cannot make their peace with God.	Assessing the offender's capacity to do so is difficult in a pluralistic society and presents first amendment problems.
4. It is inhumane to take the life of an offender who became insane after trial and conviction.	It is reverse humanitarianism that frees one from capital punishment only if insane.
5. Deterrence and retribution are not served by executing the insane.	The death penalty is a deterrent because the potential murderer will know that he or she cannot escape punishment, even if he or she becomes insane after being sentenced. Retribution is served if it is regarded as exacting a life for a life.

Id.

473. Ward, *supra* note 37, at 100.

474. *See*, for an overview, *id.* at 59-68.

475. *Id.* at 100.

476. Perlin, *supra* note 9, at 97; *see generally* H. BEDEAU, THE DEATH PENALTY IN AMERICA 3-95 (3d ed. 1982).

477. Appelbaum, *supra* note 457, at 682.

478. For pretrial rulings, see United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), *opinion clarified and reconsid. denied* 529 F. Supp. 520 (D.D.C. 1982), *aff'd* 672 F.2d 115 (D.C. Cir. 1982). The *Hinckley* verdict has inspired a cottage industry of commentary. *See* Perlin, *The Things We Do For Love: John Hinckley's Trial and the Future of the Insanity Defense in the Federal Courts* (book review of L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR. (1984)), 30 N.Y.L. SCH. L. REV. 857, 859 nn.6-7, 860-61 nn.11-17 (1985), for a partial listing of sources; *see also* Hermann, *Assault on the Insanity Defense: Limitations on the Effectiveness and Effect of the Defense of Insanity*, 14 RUTGERS L.J. 241 (1983); Slovenko, *The Insanity Defense in the Wake of the Hinckley Ruling*, 14 RUTGERS L.J. 373 (1983); Perlin, *After Hinckley: Old Myths, New Realities, and the Future of the Insanity Defense*, DIRECTIONS IN PSYCHIATRY, Vol. 5, Lesson 22 (1985).

479. See, for an analysis of the tactical problems confronted by counsel for mentally ill defendants facing the death penalty on the question of whether or not to interpose the insanity defense, White, *supra* note 312, at 989-90.

tionally, albeit incorrectly,[480] as "an impenetrable bulwark to prevent execution of the insane."[481] After *Hinkley,* however, these statutes have narrowed,[482] and some states have even abolished the insanity defense.[483] What can be expected is that more mentally ill offenders[484] will be represented in prison,[485] and that a significant number of death row inmates[486] will suffer serious mental disorder.

(2) *Psychiatric ethics and capital punishment*

The issues involved in psychiatric participation in capital punishment decision-making[487] raises a series of "intractable"[488] *operational* problems for mental health professionals. These problems include: the responsibility

480. *See* Perlin, *supra* note 9, at 96 n.31, and *see* especially, SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 105-08 (1960).

481. Perlin, *supra* note 9, at 96. *See, e.g.,* sources cited at *id.* nn.27-30. *See also* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (2d ed. 1981); J. CHRISTOPH, CAPITAL PUNISHMENT AND BRITISH POLITICS, 23 (1962).

The Chief Justice has made it clear that, in his view, the problem of imprisoning and executing the insane is rooted strictly in the past. *See* Burger, *supra* note 10, at 5:

> I have little doubt that *in times past, especially prior to the mid-1800's,* a great many people were found guilty and condemned either to lengthy imprisonment or even to death when their wrongful conduct was, *by present day standards and knowledge,* attributable to a true lack of recognition of wrong or true lack of capacity to control behavior.

(emphasis added).

482. *See, e.g.,* 18 U.S.C. § 20(a) (1984).

483. *See, e.g.,* IDAHO CODE § 18-207(a) (1986 Supp.); *Mont. House Bill* 877 (1979). Montana's abolition of the insanity defense has been upheld in State v. Korell, 690 P.2d 992 (Mont. 1984), and in State v. Raty, 692 P.2d 17 (Mont. 1984).

484. See, for a recent survey, Steadman *et al., Mentally Disordered Offenders: A National Survey of Patients and Facilities,* 6 LAW & HUM. BEHAV. 31 (1982).

485. See, on the health problems of prisoners, Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Law?,* 63 VA. L. REV. 921 (1977). On the specific problems of mentally ill prisoners, *see* George, *The American Bar Association's Mental Health Standards, An Overview,* 53 GEO. WASH. L. REV. 338, 371-74 (1985).

486. It has been estimated that "as many as fifty percent of Florida's death row inmates become intermittently insane." Ward, *supra* note 37, at 42. *See generally,* Lewis, Pincus, Feldman, Jackson & Bard, *Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States,* 143 AM. J. PSYCHIATRY 838 (1986) [hereinafter Lewis]; *see also,* West, *Psychiatric Reflections on the Death Penalty,* 45 AM. J. ORTHOPSYCHIATRY 689, 694 (1975).

487. The general ethical issues relating to medical participation in execution by lethal injection were raised over six years ago by Dr. William Curran and an associate who argued that such involvement, by "intentional, careful, skillful injection of a medically prepared substance into the veins of the prisoner," seemed to constitute a "grievous expansion of medical condonation of and participation in capital punishment." Curran & Cascells, *The Ethics of Medical Participation in Capital Punishment by Intravenous Drug Injection,* 302 N. ENG. J. MED. 226, 228 (1980). *See also,* Curran & Cascells, *Strange Bedfellows: Death Penalty and Medicine,* 248 J.A.M.A. 518 (1982).

Drawing on declarations of the International Conference for the Abolition of Torture; *citing* Final Report, Amnesty International Conference for the Abolition of Torture (Paris, France), Dec. 10-11, 1973); the 29th World Medical Assembly of the World Medical Association (the so-called Declaration of Tokyo); 22 WORLD MED. J. 87 (1975), the authors concluded that a medical professional who "orders or prepares a chemical substance to kill a prisoner under sentence of death would be in direct violation," of these accords. Curran & Cascells, *supra* at 229. Similarly, they suggested that it would be ethically improper for physicians to monitor the condemned prisoner's condition during the drug administration and to carry on this action to pronounce his death when heartbeat and respiration were found to be absent. *Id.*

They concluded by urging that medical professionals should "examine seriously the issues presented by this new method of capital punishment. . . . The line should be drawn here. The medical profession in the United States should formally condemn all forms of medical participation in this method of capital punishment." *Id.* at 230.

488. Ward, *supra* note 37, at 100.

of psychiatrists to appropriately construe the key terms in operative statutes (such as the Florida law which prohibited execution if the defendant did not have "the mental capacity to understand the nature of the death penalty");[489] the assessment of the appropriate standard of proof;[490] the reliability of diagnosis;[491] and the possibility of regression between evaluation and execution.[492] Such participation also raises core ethical problems[493] which have not yet been resolved.

Drs. Radelet and Barnard have recently articulated a set of issues to be considered by psychiatrists in determining the appropriateness of participation in the competence-to-be-executed process. The first issue involves the need for vigorous, professional standards to govern the conduct of the examination, where the "life or death issue makes the question of the validity of and reliability of psychiatric diagnosis and opinions of more crucial significance than in any other area of psychiatric practice."[494] The second issue concerns the problems of due process; since, at least *before* the Supreme Court's decision in *Ford v. Wainwright*, expert opinion could not necessarily be challenged in an adversarial judicial process, a finding of competence should require "more certainty, clarity, and comprehensiveness than a finding of incompetence."[495] Finally, there are the implications of a finding of incompetence; subsuming both the ethical implications of treating a prisoner so that he can be restored to competency and then executed, and the problems involved in a psychiatric assessment when it is believed that competency has been restored.[496]

Barbara Ward has identified four separate positions raised by Radelet and Barnard: (1) the "principled approach" (calling for a total professional boycott of the entire process),[497] (2) the "consequentialist approach" (whereby psychiatrists agree to participate but "argue for increased safeguards to ensure fairness"),[498] (3) the "empirical approach" (by which psychiatrists examine the prisoner and report on the degree of mental disorder but avoid the ultimate question of competency for execution),[499] and (4) the

489. FLA. STAT. ANN. § 922.07(3) (1986 Supp.).

490. Radelet & Barnard, *supra* note 37, at 43.

491. *See generally* Ennis & Litwack, *supra* note 18.

492. Radelet & Barnard, *supra* note 37, at 43; *see also* Hazard & Louisell, *supra* note 461, at 400.

493. For a helpful overview of the full range of psychiatric ethics, see Roth, *To Respect Persons, Families, and Communities: Some Problems in the Ethics of Mental Health Care*, 40 PSYCHIATRY DIGEST 17 (1979).

494. Radelet & Barnard, *supra* note 37, at 46.

495. *Id.* at 47.

496. *Id.* at 49.

497. Ward, *supra* note 37, at 85. *See, e.g.*, West, *supra* note 486; Stone, *To Let Live or Die*, PSYCHIATRIC NEWS (Oct. 1, 1976), at 2. *Cf.* Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167, 174 (1980) (by requiring states to "individualize" the capital sentencing process, the Supreme Court "has virtually assured routine participation by mental health professionals, especially psychiatrists, in the sentencing phase of capital murder trials"); Showalter & Bonnie, *Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 159, 160 (1984) ("indispensability" of psychiatric testimony assured by language of new statutes).

498. Ward, *supra* note 37, at 86.

499. *Id.* at 87; Kenner, *Competency on Death Row*, 8 INT'L J. L. & PSYCHIATRY 253, 255 (1986) (expert should present a "functional rather than diagnostic appraisal"). *Cf.* FED. R. EVID. 704(b) (1985):

"psycholegal approach" (whereby psychiatrists simply examine the prisoner and render an opinion as to his competence to be executed).[500]

While Radelet and Barnard appear to endorse the "consequentialist" position (rejecting what Ward terms the "principled" approach on the theory that this would lead to "nonrepresentative participation by other, perhaps less principled psychiatrists" in competency determinations),[501] and where Ward supports the "empirical" stand (as the most defensible "[g]iven a desire not to abdicate responsibility in this area,"[502] Appelbaum suggests that the issue of participation in treatment to *restore* competency is a "separate, and perhaps even more troubling issue."[503] Although he does not personally endorse any of the three positions he defines,[504] Appelbaum notes that discussion of these issues among clinicians "has been limited by their lack of awareness of competency requirements for execution:"[505] "If a system that mental health professionals find acceptable is to emerge, some effort at achieving consensus within the professions will be required."[506]

(3) Ford v. Wainwright[507]

The Supreme Court's decision to hear *Ford* suggested some recognition of the depth of the problem and appeared to promise a relatively broad-based solution. Florida's "competency-to-be-executed" law[508] was similar in critical aspects to the statutes enacted in over half a dozen other states.[509]

Alvin Ford was convicted in 1974 of murdering a police officer during

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No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

See infra text accompanying notes 672-74.

500. Ward, *supra* note 37, at 87; Adler, *The Cure That Kills*, AM. LAWYER (Sept. 1986), at 1, 30 (*quoting* administrator of Florida facility used to house death row inmates currently incompetent to be executed: "It doesn't make any difference to us how we treat them no matter what sentence they're under. . . . The State executes a sentence, not a mental health staff").

501. Radelet & Barnard, *supra* note 37, at 45.

502. Ward, *supra* note 37, at 87.

503. Appelbaum, *supra* note 457, at 683. *See also*, Adler, *supra* note 500, at 30 (currently incompetent-to-be-executed prisoner was "put through the usual procedure for establishing a treatment plan with no special regard for his death sentence or the overriding issue of his incompetence to be executed"). *Cf.* Leuchter, *The Responsibilities of the State for the Prevention and Treatment of Mental Illness Among Prisoners*, 26 J. FORENSIC SCI. 134 (1981); Denkowski & Denkowski, *The Mentally Retarded Offender in the State Prison System: Identification, Prevalence, Adjustment, and Rehabilitation*, 12 CRIM. JUST. & BEHAV. 55 (1985).

504. Appelbaum, *supra* note 457, at 683 (treat without regard to the consequences; treat only when the prisoner wishes to be treated; refuse to treat since "it might well be more humane to allow a person to suffer the ravages of psychosis than to administer treatment that will restore competency and terminate his life.").

505. *Id.*

506. *Id. See also* Appelbaum, *supra* note 45, at 176:

> If the enormous problems raised by the use of hypothetically derived testimony in capital cases are to be addressed, . . . it will have to be by the psychiatric profession, not by the federal courts . . . . Despite the failure of the federal judiciary to respond to this issue, a strong stand by the profession may prompt state courts and legislatures to prohibit this most regrettable pratice.

507. 106 S. Ct. 2595 (1986).

508. FLA. STAT. ANN. § 922.07 (West 1985).

509. *See* Ward, *supra* note 37, at 75 n.231; for a survey of all state laws, *see id.* at 101-07 (Appendix).

an attempted robbery,[510] and sentenced to death.[511] While there was no suggestion that he was incompetent at the time of the offense, at his trial or his sentencing,[512] he began to manifest behavioral changes in 1982, nearly eight years after his conviction.[513] He developed delusions[514] and hallucinations[515] and his letters revealed "an increasingly pervasive delusion that he had become the target of a complex conspiracy, involving the Ku Klux Klan and assorted others, designed to force him to commit suicide."[516] Counsel requested that a psychiatrist continue to see Ford and recommend appropriate treatment.[517] After fourteen months of evaluation and interviews, the treating psychiatrist concluded that the defendant suffered from "a severe, uncontrollable mental disease which closely resembles 'Paranoid Schizophrenia With Suicide Potential.' "[518] This was a "major mental disorder . . . severe enough to substantially affect [defendant's] present ability to assist in the defense of his life."[519]

Ford's lawyer then invoked Florida procedures governing the determination of competency of an inmate sentenced to death.[520] In accordance with the statute, the Governor appointed three psychiatrists to evaluate whether the defendant had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."[521] After a single thirty minute meeting, each psychiatrist reported separately to the Governor: while each produced a different diagnosis,[522] all found him to

510. Ford v. State, 374 So. 2d 496, 497 (Fla. 1979), *cert. denied* 445 U.S. 972 (1980).

511. *Ford*, 106 S. Ct. at 2598.

512. *Id.*

513. *Id.*

514. "Delusions" are false beliefs or wrong judgments held with convictions despite incontrovertible evidence to the contrary.

515. "Hallucinations" are the apparent, often strong, subjective perception of an object or event when no such situation is present.

516. *Ford*, 106 S. Ct. at 2598.

> He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexually abused somewhere in the prison. This notion developed into a delusion that the people who were tormenting him at the prison had taken members of Ford's family hostage. The hostage delusion took firm hold and expanded, until Ford was reporting that 135 of his friends and family were being held hostage in the prison, and that only he could help them. By "day 287" of the "hostage crisis," the list of hostages had expanded to include "senators, Senator Kennedy, and many other leaders." Appendix, at 53. In a letter to the Attorney General of Florida, written in 1983, Ford appeared to assume authority for the "crisis," claiming to have fired a number of prison officials. He began to refer to himself as "Pope John Paul, III," and reported having appointed nine new justices to the Florida Supreme Court. *Id.* at 59.

Ford, 106 S. Ct. at 2598.

517. *Id.*

518. *Id.*

519. *Id.* Ford subsequently refused to see the psychiatrist again, believing that he had now joined the conspiracy against him. *Id.* Later, Ford "regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word 'one,' making statements such as 'Hands one, face one. Mafia one. God one, father one. Pope one. Pope one, leader one.' [App.] at 72." *Id.* at 2599.

520. FLA. STAT. ANN. § 922.07 (West 1985).

521. FLA. STAT. ANN. § 922.07(2) (West 1985).

522. *Ford*, 106 S. Ct. at 2599. One psychiatrist diagnosed Ford as suffering from "psychosis with paranoia;" a second as "psychotic," and a third as having a "severe adaptational disorder." *Id.* All three, however, found that he had enough "cognitive" functioning to know "fully well what can happen to him." *Id.*

have sufficient capacity to be executed under state law.[523]

The Governor subsequently and "without explanation" signed Ford's death warrant.[524] After the state courts rejected Ford's application for a *de novo* hearing to determine competency,[525] Ford applied for a writ of habeas corpus in federal court. Ford sought an evidentiary hearing on his sanity, "proffering the conflicting findings of the Governor-appointed commission and subsequent challenges to their methods by other psychiatrists."[526]

After the district court denied the petition without a hearing, the Eleventh Circuit granted a certificate of probable cause, and stayed defendant's execution.[527] The Supreme Court rejected the State's application to vacate the stay.[528] A divided panel of the Eleventh Circuit then affirmed the district court's denial of the writ.[529] The Supreme Court granted *certiorari* "to resolve the important issue whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on [defendant's] claim."[530]

A fractured court reversed, and remanded for a new trial. In the only portion of any of the four separate opinions to command a majority of the court,[531] Justice Marshall[532] concluded that the eighth amendment did so prohibit the imposition of the death penalty on an insane prisoner.[533]

First, Justice Marshall pointed out that, since the court decided *Solesbee v. Balkcom*[534] in 1950, its eighth amendment jurisprudence had "evolved substantially."[535] Presently, the Court's ban on "cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."[536] Further, the Court's decisions recognize the "evolving standards of decency that mark the progress of a maturing society."[537] In coming to this determination, the Court thus takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the amendment protects.[538]

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523. *Id.* at 2599.
524. *Id.*
525. *Id.*
526. *Id.*
527. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984).
528. Wainwright v. Ford, 467 U.S. 1220 (1984).
529. 752 F.2d 526 (11th Cir. 1985).
530. *Ford*, 106 S. Ct. at 2599.
531. On the question of what procedures were appropriate to satisfy the constitution, three other justices joined Justice Marshall. *Id.* at 2598. Justice Powell concurred on that issue, and wrote separately. *Id.* at 2606. Justice O'Connor (for herself and Justice White) concurred in part and dissented in part. *Id.* at 2611. Justice Rehnquist (for himself and the Chief Justice) dissented. *Id.* at 2613.
532. The author of Ake v. Oklahoma, 105 S. Ct. 1087 (1985). *See supra* text accompanying notes 151-206.
533. *Ford*, 106 S. Ct. at 2598-2602.
534. 339 U.S. 9 (1950).
535. *Ford*, 106 S. Ct. at 2600.
536. *Id.*, citing, *inter alia*, Solem v. Helm, 463 U.S. 277, 285-86 (1983) (Burger, C.J., dissenting).
537. *Ford*, 106 S. Ct. at 2600, *citing* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).
538. *Ford*, 106 S. Ct. at 2600, *citing* Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion).

The opinion traced the common law development of the doctrine barring execution of the insane,[539] noting that, while the reasons for the rule were not precisely clear,[540] "it is plain the law is so."[541] It concluded that there was "virtually no authority condoning the execution of the insane at English common law,"[542] and that "this solid proscription was carried to America."[543]

This ancestral legacy has not outlived its time, the Court added.[544] No state currently permits execution of the insane[545] and it is "clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England":[546]

> The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. See Note, "The Eighth Amendment and the Execution of the Presently Incompetent," 32 STAN. L. REV. 765, 777 n.58 (1980). Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across the Nation. Faced with such wide-spread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort or understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.[547]

On the question of what procedures were appropriate in such a case, the Court was sufficiently fragmented that no opinion commanded a majority of justices.[548] In a four-justice opinion, Justice Marshall concluded that, under

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539. *Ford*, 106 S. Ct. at 2600.

540. *See supra* note 472.

541. *Ford*, 106 S. Ct. at 2601.

542. *Id.*

543. *Id.*: "[I]t was early observed that 'the judge is bound' to stay the execution upon insanity of the prisoner." *Id.*, citing 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *761 (5th Amer. ed. 1847), and 1 F. WHARTON, A TREATISE ON CRIMINAL LAW § 59 (8th ed. 1880).

544. *Ford*, 106 S. Ct. at 2601.

545. *Id. See id.* at 2602-02 n.2 (listing statutes).

546. *Id.* at 2601-02.

547. *Id.* at 2602.

548. Recently, there has been a significant amount of scholarly attention paid to the meaning and interpretation of plurality decisions by the Supreme Court, and their implication for the judicial process. *See, e.g.*, Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Note, *The Precedential Value of Supreme Court Plurality Opinions*, 80 COLUM. L. REV. 756 (1980) [hereinafter *Columbia Note*]; Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127 (1981) [hereinafter *Harvard Note*].

Where multiple opinions appear to be of "varying scope or breadth," *Columbia Note, supra*, at 760, the Court has indicated that the opinion concurring in the judgment on the "narrowest

the federal habeas corpus statute[549] and *Townsend v. Sain*,[550] a *de novo* evidentiary hearing on Ford's sanity was required unless "the state-court trier of fact has after a full hearing reliably found the relevant facts."[551] Further, if some sort of state judgment were rendered, the habeas statute compels federal courts to hold an evidentiary hearing if state procedures were inadequate,[552] or insufficient,[553] or if the applicant did not receive a "full, fair and adequate hearing" in state court.[554]

In cases such as the one before the Court where factfinding procedures must "aspire to a heightened standard of reliability,"[555] the ascertainment of a prisoner's sanity "as a lawful predicate to execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding."[556] This standard is particularly demanding in light of the reality that "the present state of the mental sciences is at best a hazardous guess however conscientious."[557]

Under this analysis, Florida's procedures failed to pass muster. The state procedure is "wholly within the executive branch, *ex parte*, and provides the exclusive means of determining sanity."[558] That this "most cursory form of procedural review[559] fails to achieve even the minimal level of reliability required for the protection of any constitutional interest, and thus falls short of adequacy under *Townsend*, is self-evident."[560]

There were three significant deficiencies in the Florida procedures. First, state practice failed to allow any material relevant to the ultimate deci-

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grounds" represents the highest common denominator of majority agreement and should thus be considered authoritative for future cases, *id.* at 761; *see, e.g.*, Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion); Vitek v. Jones, 445 U.S. 480, 497 (1980) (on question of scope of right to assistance available to prisoner prior to prison-mental hospital transfer, Justice Powell's separate one-justice opinion becomes judgment of the court). *See also Columbia Note, supra*, at 767 (lower courts look for guidance to "the alignment of the Justices and the extent of agreement, the compatibility of different lines of reasoning, the persuasiveness of the various rationales, and the relative stature of the opinion writers"). Interestingly, another commentator has noted that, among the areas in which plurality opinions "consistently occur," are cases involving the death penalty and various constitutional criminal procedure questions. *Harvard Note, supra*, at 1137 n.66.

The *Gregg* "narrowest grounds" standard has been interpreted as "referring to the ground that is most nearly confined to the precise fact situation before the Court, rather than to a ground that states more general rules." United States v. Martino, 664 F.2d 860, 872-73 (2d Cir. 1981). *But see e.g.*, Catterson v. Caso, 472 F. Supp. 833, 836 (E.D.N.Y. 1979) (holding of concurring Justices viewed as holding of the Court).

549. 28 U.S.C. § 2254 (1982).

550. 372 U.S. 293 (1963).

551. *Townsend*, 372 U.S. at 312-13.

552. 28 U.S.C. § 2254(d)(2) (1982).

553. *Id.*, § 2254(d)(3).

554. *Id.*, § 2254(d)(6).

555. *Ford*, 106 S. Ct. at 2603.

556. *Id.*

557. *Solesbee*, 339 U.S. at 23 (Frankfurter, J., dissenting). *See also* O'Connor v. Donaldson, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring) ("there are many forms of mental illness that are not understood"); Addington v. Texas, 441 U.S. 418 (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 beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous").

558. *Ford*, 106 S. Ct. at 2603.

559. The Governor's office had refused to inform defendant's counsel whether his submission of written materials (including psychiatric reports of experts who examined Ford "at great length") would be considered. *Id.* at 2604.

560. *Id.*

sion to be submitted on behalf of the prisoner,[561] in contravention of established doctrine that the factfinder must have before it "all possible relevant information about the individual defendant whose fate it must determine."[562] Any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or which bars consideration of such material by the fact finder is "necessarily inadequate."[563]

On this point, Justice Marshall cited to and quoted from his opinion for the court in *Ake*, holding that, because " 'psychiatrists disagree widely and frequently on what constitutes mental illness [and] on the appropriate diagnosis to be attached to given behavior and symptoms,' the factfinder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party'[564] when a defendant's sanity is at issue in a criminal trial."[565] The same holds true, he concluded, after conviction:

> [W]ithout any adversarial assistance from the prisoner's representative—especially when the psychiatric opinion he proffers is based on much more extensive evaluation than the state-appointed commission—the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.[566]

Justice Marshall found two other defects in the treatment of the defendant. Under Florida law, the defendant had no opportunity to challenge or impeach the opinion of the state-appointed experts through cross-examination,[567] thus creating a "significant possibility that the ultimate decision made in reliance on those experts will be distorted."[568] "Perhaps the most striking defect," was the placement of the decision entirely in the executive branch: "The commander of the State's corps of prosecutors[569] cannot be

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561. *Id.*

562. *Id., quoting* Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality opinion).

563. *Ford*, 106 S. Ct. at 2604.

564. *Ford*, 106 S. Ct. at 2604, *quoting Ake*, 105 S. Ct. at 1096.

565. *Id.* at 2604.

566. *Id.* at 2604-05.

567. *Id.* at 2605.

> "[C]ross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of the truth." 5 J. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974). Cross-examination of the psychiatrists, or perhaps a less formal equivalent, would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report.

Id.

568. *Id. See also id.* n.3:

> The adequacy of the factfinding procedures is further called into question by the cursory nature of the underlying psychiatric examination itself. While this Court does not purport to set substantive guidelines for the development of expert psychiatric opinion, *cf. Barefoot v. Estelle*, 463 U.S. 880, 903 (1983) [parallel citations omitted], we can say that the goal of reliability is unlikely to be served by a single group interview, with no provisions for the exercise of the psychiatrists' professional judgment regarding the possible need for different or more comprehensive evaluative techniques. The inconsistency and vagueness of the conclusions reached by the three examining psychiatrists in this case attest to the dubious value of such an examination.

569. *See* FLA. STAT. ANN. § 922.07 (1985).

On the issue of dual loyalties in general, *see* Shestack, *Psychiatry and the Dilemma of Dual*

said to have the neutrality that is necessary for reliability in the factfinding proceeding."[570] "In no other circumstance of which we are aware," Justice Marshall concluded, "is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal."[571]

The opinion thus left it to the state to develop appropriate procedures "to enforce the constitutional restriction upon its execution of sentences,"[572] noting that it was not suggesting that "only a full trial on the issue of sanity will suffice to protect the federal interests."[573] The "lodestar" of any such procedures, however, "must be the overriding dual imperative of providing redress for those with substantial claims and of encouraging accuracy in the factfinding determination."[574] Because the state's procedures failed to provide adequate assurance of accuracy to satisfy the *Townsend* doctrine, defendant was thus entitled under the habeas corpus statute to a *de novo* evidentiary hearing on the question of his competence to be executed.[575]

Justice Powell concurred, joining fully in the majority's opinion on the substantive eighth amendment issue,[576] but differing substantially from Justice Marshall's opinion on the issue of the appropriate procedures which states must follow pursuant to the *habeas* statute.[577] Further, Justice Powell considered an issue not addressed by the court: the meaning of "insanity" in the context of the case before it.[578]

First, after considering the common law justifications for barring execution of the insane, Justice Powell concluded that the eighth amendment should only bar the execution of those "who are unaware of the punishment they are about to suffer and why they are to suffer it,"[579] a category into which Ford "plainly fit."[580]

On the question of what procedures are appropriate, Justice Powell indicated that he agreed with Justice Marshall's opinion that the Governor's finding of sanity was not entitled to a presumption of correctness under the *habeas* statute.[581] Justice Powell also agreed that Florida's procedures invited "arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations,"[582] and thus failed to comport with the requirements

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Loyalties, in MEDICAL, MORAL AND LEGAL ISSUES IN MENTAL HEALTH CARE 7 (F. Ayd, ed. 1974). *See also*, Roth, *supra* note 493.

570. *Ford*, 106 S. Ct. at 2605.

571. *Id.*

572. *Id.* at 2606; *see also id.* n.5.

573. *Id.* at 2606.

574. *Id.*

575. *Id.*

576. *Id.* at 2606 (Powell, J., concurring).

577. *Id.* at 2607.

578. *Id.* at 2608; *cf.* Mezer & Rheingold, *Mental Capacity and Incompetency: A Psycholegal Problem*, 119 AM. J. PSYCHIATRY 827, 828 (1962) (identifying varying competency standards governing eleven separate areas of the law).

579. *Id.* at 2609.

580. *Id.*

581. *Id.* Justice Powell agreed because (1) 28 U.S.C. § 2254 required deference to the fact-findings of a "state court of competent jurisdiction," which could not be "stretch[ed]" to include the Governor, *id.*, and (2) defendant did not have a "full and fair hearing" under § 2254(d)(2), *id.*

582. *Id.* at 2610.

of due process.[583]

On the other hand, Justice Powell parted company with Justice Marshall on the question of what procedures were necessary. Justice Powell found that "the requirements of due process are not as elaborate as Justice Marshall suggests."[584] First, because the defendant "has been validly convicted of a capital crime and sentenced to death," the question is not "*whether*, but *when*, his execution may take place."[585] This view made inapplicable earlier court decisions imposing heightened procedural requirements on capital trials and sentencing proceedings.[586]

Second, since the defendant's competency to stand trial was never seriously in question, the state can presume that the defendant remained sane at the time sentence is to be carried out. The state may thus require "a substantial threshold showing of insanity merely to trigger the hearing process."[587]

Third, the sanity issue in *Ford* is not like the basic "historical fact" issues at trial or sentencing; rather, it calls for a "basically subjective judgment"[588] depending substantially on "expert analysis in a discipline fraught with 'subtleties and nuances.' "[589] In such cases, "ordinary adversarial procedures—complete with live testimony, cross-examination, and oral argument by counsel—are not necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity."[590]

In short, Justice Powell concluded that constitutionally acceptable procedures "may be far less formal than a trial."[591] In addition to provision by the state of an impartial officer or board to receive evidence and argument from defense counsel (including expert psychiatric evidence that may differ from the state's own evaluation) the state "should have substantial leeway to determine what process best balances the various interests at stake."[592]

Because the defendant's "viable" eighth amendment claim was not fairly adjudicated, he was entitled to a *habeas* hearing in federal court, Justice Powell concluded. Because of this conclusion, Justice Powell joined the Court's judgment.[593]

Writing for herself and Justice White, Justice O'Connor concurred in part and dissented in part. Because she agreed fully with Justice Rehnquist's two-justice dissent that the eighth amendment did not create a substantive right not to be executed while insane, Justice O'Connor did not join in the Court's opinion or reasoning.[594] Justice O'Connor concurred in the result,

583. Justice Powell read Justice O'Connor's opinion as agreeing with him on this point as well. *Id.* at 2609-10.

584. *Id.*

585. *Id.* (emphasis in original).

586. *Id.* He noted that "some defendants may lose their mental facilities and never regain them, and thus avoid execution altogether." *Id.* n.5.

587. *Id.* at 2610. In a "*cf*" reference, he cited to *Ake*.

588. *Id.* at 2611, *citing Addington*, with a "*cf*" reference to *Barefoot*.

589. *Id.* at 2611, *quoting Addington*, 441 U.S. at 430.

590. *Id.*, *citing*, in a "*cf*" reference, *Parham*, 442 U.S. at 609.

591. *Id.* at 2611.

592. *Id.*

593. *Id.*

594. *Id.* at 2611 (O'Connor, J., concurring in part and dissenting in part).

however, because it was "inescapable" that Florida state law provided a protected liberty interest in not being executed while incompetent.[595]

As Florida did not provide "even those minimal procedural protections required by due process,"[596] she would vacate the judgment and remand for a state court hearing in a manner "consistent with the requirements of the due process clause."[597] She emphasized, however, that, in her view, the federal court should have no role "whatever in the substantive determination of a defendant's competency to be executed."[598]

Relying on the Court's decision in *Hewitt v. Helms*[599] that liberty interests may stem from either the due process clause or state law, Justice O'Connor read applicable, mandatory Florida statutes[600] as creating a protected liberty-expectation that "state conduct injurious to an individual will not occur 'absent specified substantive predicates.' "[601] This was so even where the same statute specified certain procedures to be followed.[602] "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest."[603]

Due process demands in this sort of case are "minimal," Justice O'Connor concluded,[604] noting that "substantial caution" was warranted "before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures."[605] This was so for several reasons: 1) after a valid conviction, the demands of due process are "reduced accordingly;"[606] 2) the potential for false claims and deliberate delay in this context is "obviously enormous;"[607] and 3) by definition, the defendant's protected interest can "*never* be conclusively and finally determined . . . until the very moment of execution."[608] Even given the "broad latitude"[609] that she would give the states in this area, Justice O'Connor concluded that one aspect of Florida's procedure violated the "fundamental requisite" of due process entitling an individual an opportunity to be heard. Florida's failure to consider the defendant's written submissions[610] rendered the state's proce-

595. *Id.*
596. *Id.*
597. *Id.*
598. *Id.*
599. 459 U.S. 460, 466 (1983).
600. FLA. STAT. ANN. § 922.07(3) (West 1985).
601. *Ford*, 106 S. Ct. at 2612 (O'Connor, J., concurring in part and dissenting in part), *quoting*, in part, *Hewitt*, 459 U.S. at 471-72.
602. *Id.* at 2612.
603. *Id.*, *citing* Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 1493 (1985).
604. *Id.* at 2612.
605. *Id.*
606. *Id.*, *citing* Meachum v. Fano, 427 U.S. 215, 224 (1976).
607. *See* Nobles v. Georgia, 168 U.S. 398, 405-06 (1897); *cf.* Rodriguez, LeWinn & Perlin, *supra* note 9, at 404 (no question as to existence of serious mental illness in 138 of 141 successful insanity defense cases studied).
608. *Ford*, 106 S. Ct. at 2612 (O'Connor, J., concurring in part and dissenting in part).
609. *Id.*
610. *Id.* at 2613. *See* Goode v. Wainwright, 448 So.2d 999, 1101 (Fla. 1984) (describing Governor's "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane").

dures constitutionally deficient.[611]

Because Florida failed to consider the defendant's submissions, Justice O'Connor would vacate with orders to the Eleventh Circuit to return the case to Florida "so that it might assess [defendant's] competency in a manner that accords with the command of the Fourteenth Amendment."[612] She reiterated that the "only federal question presented in cases such as this is whether the State's positive law has created a liberty interest and whether its procedures are adequate to protect that interest from artificial deprivation."[613] If those procedures are adequate "a federal court has no authority to second guess a state's substantive competency determination."[614]

Finally, Justice Rehnquist dissented on behalf of himself and the Chief Justice.[615] In his view, the Florida procedures were "fully consistent with the 'common-law heritage' and current practice on which the Court purports to rely,"[616] and, in their reliance on executive-branch procedures, "faithful to both traditional and modern practice."[617]

Further, Justice Rehnquist saw no reason to abandon *Solesbee*, which had sanctioned procedures vesting decision-making in "the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved."[618] He concluded that Florida law did not grant defendant the sort of entitlement "that gives rise to the procedural protections for which he contends."[619]

To create a constitutional right to a judicial determination of sanity prior to execution "needlessly complicates and postpones still further any finality in this area of the law."[620] Yet another adjudication "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity."[621] He concluded:

> Since no State sanctions execution of the insane, the real battle being fought in this case is over what procedures must accompany the inquiry into sanity. The Court reaches the result it does by examining the common law, creating a constitutional right that no State seeks to violate, and then concluding that the common-law procedures are inadequate to protect the newly created but common-law based right. I find it unnecessary to "constitutionalize" the already uniform view that the insane should not be executed, and inappropriate to "selectively incorporate" the common-law practice. I therefore dissent.[622]

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611. *Ford*, 106 S. Ct. at 2613 (O'Connor, J., concurring in part and dissenting in part).
612. *Id.*
613. *Id.*
614. *Id.*
615. *Ford*, 106 S. Ct. at 2613 (Rehnquist, J., dissenting).
616. *Id.*
617. *Id.*
618. *Id.* at 2613-14.
619. *Id.* at 2615.
620. *Id.*
621. *Id.*:

> A claim of insanity may be made at any time before sentence, and, once rejected, may be used again; a prisoner found sane two days before execution might claim to have lost his sanity the next day thus necessitating another judicial determination of his sanity and presumably another stay of execution.

622. *Id.*

RESPONSES TO THE CASES

(A) *Pre-1986 Cases: Commentary and Caselaw*

Of the four pre-1986 cases, only *Estelle*[623] has been the subject of extensive favorable commentary. Scholars have been intensely critical of *Barefoot*[624] and *Jones*,[625] and the meager response to *Ake*[626] has been surprisingly tepid.

(1) Estelle

At least one author characterized *Estelle* as "one of the most important [decisions] in the field of criminal procedure," and, presciently, as a "fertile source of criminal defense litigation for many years," with potential "far-reaching effects outside of the capital punishment context."[627] Another author saw *Estelle* as safeguarding the integrity of the jury process by insuring that "only the most credible evidence should be used in [death penalty] determinations."[628] A third saw the heart of *Estelle* as "a recognition that all psychiatrists may not have a benevolent purpose" in cases where such mental health professionals become "an arm of the prosecutor."[629] Another student note focused on *Estelle's* impact on pre-sentencing investigations, concluding that the "potential danger of a 'Dr. Death' developing in the probation profession necessitates that probation officers afford defendants the same procedural safeguards [including *Miranda* warnings] in the presentence interview process as are available to defendants in the arrest-to-conviction process."[630]

Professor Slobogin, on the other hand, expressed cautious concern over what he perceived as *Estelle's* "limited applicability."[631] This concern was caused by *Estelle's* failure to address the role that the fifth and sixth amendments should play when the state plans to use the results of a pretrial evaluation on issues other than the defendant's future dangerousness.[632]

On the specific issue of how *Estelle* can be reconciled with the Burger

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623. Estelle v. Smith, 451 U.S. 454 (1982). *See supra* text accompanying notes 207-55.

624. Barefoot v. Estelle, 463 U.S. 880 (1983). *See supra* text accompanying notes 43-79

625. Jones v. United States, 463 U.S. 354 (1983). *See supra* text accompanying notes 80-124.

626. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). *See supra* text accompanying notes 151-201.

627. Note, 10 AMER. J. CRIM. L. 65, 78 (1982).

628. Note, *supra* note 79, at 1033.

629. *Estelle* Implications, *supra* note 393, at 303. *See also* on the issue of "dual loyalties," Roth, *supra* note 493; Shestack, *supra* note 570.

630. Note, 4 WHITTIER L. REV. 131, 149 (1982). At least two subsequent cases have dealt with this aspect of *Estelle*. *See infra* note 641.

631. Slobogin, *supra* note 33, at 76. *See id.* at 135-38, suggesting model rules to govern competency evaluations, "reconstructive evaluations" (explained at *id.* 95-109), and capital sentencing evaluations.

632. *Id.* at 76. He stressed that the majority opinion "backed away from the full import of the critical stage analysis found in the Court's earlier decisions," *id.* at 75; *see, e.g.*, United States v. Wade, 388 U.S. 218 (1967); Coleman v. Alabama, 399 U.S. 1 (1970), referring to its reservation of decision on the question of whether the fifth amendment accords a defendant the right to the presence of counsel during an evaluation and its decision to not consider a fifth amendment claim for the right to counsel. *See* Slobogin, *supra* note 33, at 75-76. *Cf.* White, *supra* note 312, at 973 (discussing the use of a recording macine to tape psychiatric interviews as "less likely to inhibit the normal flow of a psychiatric examination"; *cf. Estelle*, 451 U.S. at 470 n.14).

Court's well-publicized "retreat from the *Miranda* doctrine,"[633] Professor Sonenshein paraphrased Mark Twain, stating that "the demise of *Miranda* may have been exaggerated, or at least premature,"[634] and concluded that *Estelle* is a "clear-cut [*Miranda*] victory."[635] While the Court could have decided *Estelle* on non-*Miranda* grounds, by "going out of its way to apply *Miranda* to the pretrial psychiatric examination,"[636] it "implicitly made [*Estelle*] primarily a *Miranda* case by turning first to the fifth amendment self-incrimination issue."[637] This decision, along with another contemporaneous non-psychiatric *Miranda* opinion,[638] demonstrated to Professor Sonenshein that the Burger Court "perhaps . . . has finally accepted the *Miranda* legacy."[639]

Subsequent cases have, however, construed *Estelle* fairly narrowly. While it has been held retroactive,[640] and applied in at least one case, to statements to probation officers,[641] it has been distinguished in cases where defendant raised an insanity claim.[642] *Estelle* was also distinguished in cases where defendant sought a competency examination[643] and in a civil case, where a prison adjustment committee imposed disciplinary sanctions on a prisoner for his refusal to participate in a screening interview with a psychologist.[644]

(2) Barefoot

The psychiatric testimony prong of *Barefoot* has been criticized uniformly by commentators,[645] and flies in the face of carefully crafted guide-

633. *See* Note, *supra* note 630, at 131, and sources cited at *id.* n.3; Sonenshein, *supra* note 20, at 407 ("Although the Burger Court has not overruled *Miranda*, the Court has consistently undermined the rationale, assumptions and values which gave *Miranda* life"). The *Miranda* saga is discussed *infra* at text accompanying notes 884-95.

634. *Id.* at 408. Sonenshein wrote, of course, *prior* to such *Miranda*-limiting decisions as New York v. Quarles, 104 S. Ct. 2626 (1984); Berkemer v. McCarty, 104 S. Ct. 3138 (1984), and Oregon v. Elstad, 105 S. Ct. 1285 (1985).

635. Sonenshein, *supra* note 20, at 451.

636. *Id.* at 454.

637. *Id.*

638. Edwards v. Arizona, 451 U.S. 477 (1981), *see* Sonenshein, *supra* note 20, at 447-51.

639. Shonensheim, *supra* note 20, at 462.

640. Jones v. McCotter, 767 F.2d 101, 103 (5th Cir. 1985) (Dr. Grigson testified for state); Muniz v. Procunier, 760 F.2d 588, 589 (5th Cir. 1985).

641. Jones v. Cardwell, 686 F.2d 754, 756-57 (9th Cir. 1982); *but see* Baumann v. United States, 692 F.2d 565, 574-78 (9th Cir. 1982).

642. Watters v. Hubbard, 725 F.2d 381, 384 (6th Cir. 1984); Sturgis v. Goldsmith, 796 F.2d 1103, 1108 (9th Cir. 1986); United States v. Byers, 740 F.2d 1104, 1109-11 (D.C. Cir. 1984) (Scalia, J.); *but see id.* at 1137, 1147-50 (Bazelon, J., dissenting). *See also* Mahaffey v. Broglin, 630 F.2d 1280, 1284 (N.D. Ind. 1986) (statement used at sentencing, not at merits trial, insanity plea withdrawn prior to trial).

643. Shelby v. Shulsen, 600 F. Supp. 432, 435-36 (D. Ut. 1984). *But see Sturgis*, 796 F.2d at 1108-09 (competency examination "critical stage" under *Estelle*).

644. Taylor v. Best, 746 F.2d 220, 223-24 (4th Cir. 1984). If the state were to use the results of the evaluation at a subsequent criminal prosecution, however, *Estelle* would apply. *Id.* at 224.

645. *See, e.g.*, Appelbaum, *supra* note 21; Appelbaum, *supra* note 22; Appelbaum, *supra* note 45; Appelbaum, *supra* note 23; Levine, *The Adversary Process and Social Science in the Courts*: Barefoot v. Estelle, 12 J. PSYCHIATRY & L. 147, 170 (1984); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 121 n.28, 127 (1983); Showalter & Bonnie, *supra* note 497, at 176; Bonner, *supra* note 68, at 505-09. For the most blistering critique, see Geimer, *supra* note 33, at 760-66, characterizing *Barefoot* as a "gross retreat" from the Court's commitment to reliability in death penalty sentencing, *id.* at 760, as a "bad faith abandonment" of established fairness standards, *id.* at 764, and as a reflection

lines suggesting limitations on expert testimony in such areas.[646] As Professor Richard Bonnie has artfully noted, "[e]ven the best clinical testimony merely casts some light into a room that remains very dark."[647]

To some extent, the Court's decision in *Barefoot* reflects a posthoc, defensive posture. It appears to be saying: we've already decided (in *Jurek*)[648] that dangerousness predictivity is acceptable at the penalty phase, so, even in the light of the overwhelming evidence before us, how can we exclude "psychiatrists, out of the entire universe of persons who might have an opinion on the issue?"[649] This attitude partially mirrors the Chief Justice's position in *Addington v. Texas*: given "the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether the state could *ever* prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous."[650] A student note written two decades ago augured both of these positions: "If ever it be proven that psychiatry is not reliable, there will be created a doctrinal abyss into which will sink the whole structure of commitment law, not just those portions which deal with the harmless mentally ill."[651] The Court in *Barefoot* appeared unwilling to confront the implications of this potential "doctrinal abyss."

In an earlier presentation, I suggested:

> *Barefoot* appears to be indefensible on evidentiary grounds, on constitutional grounds and on common sense grounds. It flies in the face of virtually all of the relevant scientific literature. It is inconsistent with the development of evidence law doctrine, and it makes a mockery of earlier Supreme Court decisions cautioning that *extra* reliability is needed in capital cases.[652]

No subsequent developments[653] have suggested that this assessment is in need of any major substantive revision. *Barefoot* has resulted in surpris-

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of the "little desire on the part of the majority to be bothered with facts at all," *id.* at 763. *See also* Perlin, *supra* note 9, at 118 n.155.

646. *See, e.g.*, Bonnie, *supra* note 497, at 177-78; Dix, *supra* note 64, at 575 (mental health professional should be prohibited from expressing any predictive opinion more specific than that "the subject poses a *greater risk than the average person* of engaging in future assaultive or otherwise criminal conduct") (footnote omitted) (emphasis added).

647. Bonnie, *supra* note 497, at 188. *But see* Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 6 (Court should relieve itself of "the impossible and harmful process of 'finding' light when there is only darkness").

648. Jurek v. Texas, 426 U.S. 262 (1976). *See supra* text accompanying note 562.

649. *Barefoot*, 463 U.S. at 898.

650. 441 U.S. at 429.

651. UCLA Project, *supra* note 18, at 829 n.35.

652. Perlin, *supra* note 9, at 111 (emphasis in original; footnote omitted). See, on the question of the need for extra reliability in capital punishment decisionmaking, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, Stevens, JJ); *see also*, Ford v. Wainwright, 106 S. Ct. 2595 (1986).

653. This aspect of *Barefoot* has seen surprisingly little pertinent follow-up litigation. *See infra* notes 654-56.

See, however, State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984), sanctioning the admissibility of statistical evidence by a defendant at the penalty phase of a capital case concerning empirical studies relating to the defendant's rehabilitatory potential in a case where the defendant raised his character as a mitigating factor, *id.* at 310-12; *see* N.J. STAT. ANN. § 2C:11-3c(5)(h) (West 1982), relying on Justice Blackmun's dissent to buttress its position, 477 A.2d at 311. *Davis* is discussed extensively in Perlin, *supra* note 9, at 119-21; *see also* J. MONAHAN & L. WALKER, SOCIAL SCIENCE AND THE LAW 177-79 (1984).

ingly little legally significant litigation.[654] Courts generally, and especially in Texas,[655] apply the doctrine mechanically.[656]

(3) Jones

Scholarly commentary on *Jones* has been almost entirely critical,[657] with several commentators linking the Court's opinion to the substantive policy issues raised by a plea of not guilty by reason of insanity in a criminal trial.[658] Authors have condemned the decision in both moderate[659] and extreme[660] tones, but have also reasoned that the ultimate impact of *Jones* may be fairly limited.[661] At least one commentator has charged that the decision

654. *But see* State v. Davis, 96 N.J. 611, 477 A.2d 308 (1984). *Cf.* Deveau v. United States, 483 A.2d 307, 315-16 (D.C. Ct. App. 1984) (quoting Justice Blackmun's dissent on unrealiability of psychiatric predictions of future dangerousness), and *id.* at 316: "If the trial court has reason to reject the opinions of the experts on the issue of dangerousness, it may also do so even though they are unanimous").

655. Streetman v. State, 698 S.W.2d 132, 137 (Tex. Ct. Crim. App. 1985); Nethery v. State, 692 S.W.2d 686, 708-09 (Tex. Ct. Crim. App. 1985) (a Dr. Grigson case); Holloway v. State, 691 S.W.2d 608, 616-17 (Tex. Ct. Crim. App. 1984); Smith v. State, 683 S.W.2d 393, 409 (Tex. Ct. Crim. App. 1984). *But see*, Brown v. State, 689 S.W.2d 219, 221 (Tex. Ct. Crim. App. 1984) (Teague, J., dissenting from denial of defendant's motion for rehearing) (*Barefoot* distinguishable in case where defendant sought unsuccessfully to introduce testimony "to assist jurors in judging or evaluating eyewitness identification testimony").

656. *See, e.g.*, State v. Gates, 198 Conn. 397, 503 A.2d 163, 166 (1986); State v. Plath, 313 S.E.2d 619, 627 (1984); Edmonds v. Commonwealth, 329 S.E.2d 807, 813 (1985); *see also In re* L.R., 497 A.2d 753, 755 (Vt. 1985) (hypothetical question permissible at involuntary civil commitment proceeding under authority of *Barefoot*).

657. *But see* Comment, Jones v. United States: *A Sociological Vindication*, 23 DUQUESNE L. REV. 221 (1984).

658. *See, e.g.*, Note, *Mistreating a Symptom: The Legitimatizing of Mandatory, Indefinite Commitment of Insanity Acquittees*—Jones v. United States, 11 PEPPERDINE L. REV. 569, 588 (1984) [hereinafter Pepperdine Note] ("The Court appears to have succumbed to the ideological complexities of the insanity defense"); "Throwing Away," *supra* note 89, at 521 ("Judges and legislators should not impose their dissatisfaction with the insanity defense on defendants who successfully asserted the defense and gained acquittal"); Note, *Automatic and Indefinite Commitment of Insanity Acquittees: A Procedural Straightjacket*, 37 VAND. L. REV. 1233, 1261 (1984) [hereinafter Vanderbilt Note] ("To retain the insanity defense, states must understand that they cannot surreptitiously punish the insanity acquittee by sending him to a mental hospital for an indefinite period when he is not mentally ill"); Note, *Automatic and Indefinite Commitment Following an Insanity Acquittal*: Jones v. United States, 26 B.C.L. REV. 779, 808 (1985) [hereinafter B.C. Note] (*Jones* in keeping with "recent statutory cutbacks in the insanity defense which followed in wake of [John] Hinckley's insanity acquittal"); *see also* Schmidt, *Supreme Court Decision Making on Insanity Acquittees Does Not Depend on Research Conducted by the Behavioral Science Community*: Jones v. United States, 12 J. PSYCHIATRY & L. 507, 515 (1984) ("in immediate aftermath of Hinckley fiasco," Supreme Court used *Jones* as vehicle with which to deal with "one of the most controversial aspects of the insanity defense, disposition").

Professor Singer has also pointed out that, as a practical matter, *Jones* will likely result in a significant drop in the number of insanity pleas. Singer, *The Aftermath of an Insanity Acquittal: The Supreme Court's Recent Decision in* Jones v. United States, 477 ANNALS 114 (1985).

659. *See, e.g.*, Note, 17 CREIGHTON L. REV. 947, 971 (1984) (*Jones* results in less protection for the insanity acquittee who is facing commitment); B.C. Note, *supra* note 658, at 808 (opinion both "substantively and analytically flawed").

660. *See* Note, *supra* note 89, at 521 ("*Jones v. United States* rang the death knell for the constitutional rights of insanity acquittees").

661. Hermann, *Automatic Commitment and Release of Insanity Acquittees: Constitutional Dimensions*, 14 RUTGERS L.J. 667, 680-81 (1983); Vanderbilt Note, *supra* note 658, at 1260 (court "appropriately framed its holding narrowly"); *see also*, Pepperdine Note, *supra* note 658, at 588: immediate impact of *Jones* "will not be great," but long term impact "may be of much greater significance" and: "As legislatures across the country consider proposals to reform or abolish the insanity defense, they will do so with the knowledge that the Supreme Court has given them free reign concerning the disposition of the insanity acquittee." *Id.*

reveals an "unwillingness" on the Court's part to "contradict public sentiment in such a controversial area."[662]

In the most comprehensive analysis yet offered,[663] Professor Margulies concluded that by invoking the most feeble model of review at its disposal the Court's decision encouraged the punitive urge which is often displayed toward insanity acquittees. *Jones*' language will thus encourage the indefinite commitment of insanity acquittees unless legislatures and courts dealing with commitment adopt less restrictive procedures.[664]

Despite such scholarly criticism, however, courts have, virtually without exception, found the *Jones* standards constitutionally sufficient in a variety of fact-settings and in the face of a variety of statutory challenges.[665]

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662. Note, Jones v. United States: *Automatic Commitment of Individuals Found Not Guilty by Reason of Insanity*, 68 MINN. L. REV. 822, 840 (1984). *See id.* at 839-40:

> The Court's inconsistent reasoning and selective use of the punishment rationale puts insanity acquittees in the worst position possible—they can be automatically committed for an indefinite period *and* are never provided a rehearing under the "clear and convincing" standard. Instead, at all rehearings, the committed individual, rather than the state, must shoulder the burden of establishing sanity. Considering the controversy currently surrounding the insanity defense, this result may be most in line with the thinking of the American public and may evidence societal uncertainty with regard to the insanity defense. The Court's contradictory analysis of these issues reflects its unwillingness to contradict public sentiment in such a controversial area.

(emphasis in original; footnote omitted).

663. *See* Margulies, *supra* note 33, at 801-35 (critiquing decision).

664. *Jones* is subject to a number of criticisms. Its justification of indefinite automatic commitment ignored the profound gulf between the issue resolved at the acquittee's criminal trial—the defendant's state of mind at the time of the offense—and the issues which should be resolved at the time of commitment (which may be years after the offense was committed): the acquittee's present level of mental illness and dangerousness. The *Jones* majority ignored this disparity by invoking the most feeble model of review at its disposal—the rational basis equal protection test. It then filtered these minimal standards through a due process prism which blocked out individual liberty interests by labeling acquittees a "special class." This truncated review failed to take into account the powerful punitive urge which the public and its elected representatives, as well as some of our most noted judges, have displayed toward insanity acquittees. The Court's upholding of a lower standard of proof for acquittees than for civil commitment candidates in effect encourages this punitive urge, along with the overprediction of dangerousness to which acquittees are also subjected. In this context, the Court's caveat that insanity acquittees must be treated, not punished, seems like a convenient device for insuring that no acquittee's indefinite commitment will be abbreviated by the inconvenient intrusion of civil commitment due process safeguards.

> Finally, the Court's implied approval of release proceedings which shift the burden of proof to the acquittee assures that for many acquittees, regardless of their underlying offense or their present condition, indefinite commitment will be virtually interminable commitment. Legislatures and courts dealing with commitment and release procedures for insanity acquittees should look at less restrictive procedures for adequately protecting the interests of both the patient and the public before embracing the drastic devices upheld in *Jones*.

Id. at 836.

See also B.C. Note, *supra* note 658, at 784-85 (*Jones* incorrectly decided for three reasons: failure to accord sufficient weight to relevant commitment caselaw; holding based on *presumptions*, not *findings*, of mental illness and dangerousness; patient's due process interests not given sufficient weight).

665. Cases construing *Jones* are collected in Vanderbilt Note, *supra* note 658, at 1249 n.104; *see, e.g.*, United States v. Cohen, 733 F.2d 128 (D.C. Cir. 1984) (procedures governing NGRI for federal defendants in District of Columbia constitutional).

Soon after the Supreme Court decided *Jones*, it vacated, in light of that decision, a Fifth Circuit case which had held that Georgia could not constitutionally place the burden of proof on insanity

(4) Ake

Critical response to *Ake* has been surprisingly tepid. Commentators have characterized its due process reasoning as "paradoxical," suggesting that the Burger Court's fourteenth amendment jurisprudence "as well as its attitude toward the poor remain unchanged."[666] In accordance with the Chief Justice's concurrence, commentators have predicted that the decision's holding will be limited to capital cases.[667] Due to the decision's unnecessary vagueness and lack of explicit criteria for determining the scope of the right,[668] and the "ambiguity" surrounding the prerequisite showing necessary to invoke the declared constitutional right,[669] others have complained that it has left "many unanswered questions."[670]

Finally, a student author[671] has questioned the potential impact of *Ake*

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acquittees in commitment and release hearings. Ledbetter v. Benham, 463 U.S. 1222 (1983), *vacating* Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982).

On remand, the Georgia district court relied on *Jones* to repudiate its prior holdings, and rule that "the Constitution provides no right in insanity acquittees to be free from the burden of proof in release proceedings." Benham v. Ledbetter, 609 F. Supp. 125, 127 (N.D. Ga. 1985), *aff'd* 785 F.2d 1480 (11th Cir. 1986); *see also id.* (quoting *Jones* in ruling that it was not unreasonable to presume "an inference of continuing mental illness" in the case of an insanity acquittee). On appeal, the Eleventh Circuit—while warning that *Jones* "must be used cautiously in analyzing Georgia's procedures," 785 F.2d at 1484,—considered *Jones*' emphasis on the flexibility of due process, consequently examined state law through a *Mathews v. Eldridge* filter, and concluded that the state scheme was "an attempt to balance the interest of the insanity acquittee in liberty against the interest of the state in maintaining a check on the medical profession's assessment of the current mental state of persons acquitted by insanity," *id.* at 1488-93, and thus affirmed. *See also* Williams v. Wallis, 734 F.2d 1434, 1439 (11th Cir. 1984); Hickey v.Morris, 722 F.2d 543, 547-49 (9th Cir. 1983).

In New Jersey, where the state legislature had enacted a preponderance standard for NGRI's, *see* N.J. STAT. ANN. 2C:4-8b(3) (1981), after an appellate court retroactively imposed *Addington*'s "clear and convincing" standard for that population, (*see In re* Scelfo, 170 N.J. Super. 394, 406 A.2d 973, 975 (App. Div. 1979); *see also* Matter of Newsome, 176 N.J. Super. 511, 424 A.2d 222 (App. Div. 1979)), the same court found that, in light of *Jones*, the preponderance standard was constitutional, and that its earlier holding had been "incorrectly decided." *In re* A.L.U., 192 N.J. Super. 480, 471 A.2d 63, 65 (App. Div. 1984); *see also* Matter of Commitment of J.L.J., 196 N.J. Super. 34, 481 A.2d 563, 571 (App. Div. 1984), *on remand appeal* 210 N.J. Super. 1, 509 A.2d 184 (App. Div. 1985).

In New York, the Court of Appeals upheld the constitutionality of a similar statute, pointing out: "the New York statute, which places the burden of proof upon the District Attorney, rather than the defendant, to show that an insanity acquittee is either mentally ill or has a dangerous mental disorder, provides greater protection to the defendant than is required under the Federal Constitution." People v. Escobar, 61 N.Y.2d 431, 474 N.Y.S.2d 453, 457, 462 N.E.2d 1171 (Ct. App. 1984).

666. *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 120, 130, 135 (1985) [hereinafter *1984 Term*]. The Court's focus on the due process rather than the equal protection clause as the source of the constitutional right thus reflected a "fundamentally conservative" approach in *Ake*. *Id.* at 138. *See* Clune, *The Supreme Court's Treatment of Wealth Discrimination Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, 298: "At bottom, equal protection makes one ask the wealth question; due process does not. Under the due process approach, new cases would emerge as increments to the federal constitutional definition of the essentials of ordered liberty." (citation omitted).

667. Note, *supra* note 201, at 973.

668. Note, *Due Process and Psychiatric Assistance*: Ake v. Oklahoma, 21 TULSA L.J. 121, 155 (1985).

On the other hand, the same commentator has predicted that "*Ake* may prove to be the seminal case for the development of a generalized body of law dealing specifically with forensic assistance to indigent defendants." *Id.* at 156.

669. Note, ILL. B.J. 401, 404 (April 1986).

670. Note, *supra* note 668, at 155.

671. Comment, Ake v. Oklahoma: *An Interloper in the Brave New World of the 1984 Insanity Defense Reform Act Challenges Federal Rule of Evidence 704(b)*, 55 MISS. L.J. 287 (1985).

in federal prosecutions on cases brought under the Insanity Defense Reform Act of 1984.[672] This Act, via an amendment to the Federal Rules of Evidence, now bars experts from giving opinion testimony concerning the mental state of a defendant as it relates to an element of the crime or as a defense to the crime.[673] She frames the ultimate question this way:

> If a federal evidence rule precludes psychiatric testimony on the mental state which includes intent or mens rea as a statutorily required element of the crime, can this rule be overridden by the substantive constitutional right of an indigent to meaningful psychiatric assistance in his defense because of the limits this evidence rule places on such assistance.[674]

It is too soon to determine what impact, if any, *Ake* will have on the new rule and statute.

As to litigation already concluded, post-*Ake* criminal[675] cases have interpreted the case's requirements fairly strictly.[676] In a case vacated and remanded by the Supreme Court for reconsideration in light of *Ake*,[677] the Virginia Supreme Court affirmed a murder conviction, distinguishing *Ake* because the defendant in question did not "demonstrate to the trial judge that his sanity at the time of the offense would be a significant factor at trial."[678]

Other courts have not found *Ake* to require psychiatric assistance for all defendants. The Eighth Circuit stressed the role of the trial judge's "sound discretion" in assessing whether the defendant made the requisite "*ex parte* threshold showing."[679] The Eleventh Circuit denied expert appointment where trial counsel had previously acknowledged that the defendant had cooperated with him in "all other phases of the case"[680] and defendant showed "no signs of mental disturbance" at trial.[681] Similarly, where "nothing" other than defense counsel's statements indicated that defendant "might be insane,"[682] where defendant sought successive appointments of additional psychiatric experts after a series of witnesses returned reports unfavorable to

672. 18 U.S.C. § 20 (1986 Supp.). *See generally*, Perlin, *supra* note 478, at 861 nn.18-19, 864-65 nn.41-45.

673. FED. R. EVID. 704(b) (1986 Supp.); *see*, for a critical analysis of pre-amendment Rule 704 recommending such an amendment, *supra* note 9, at 419-25. *See generally*, 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1985), at 704-1 to 704-26.

674. Comment, *supra* note 671, at 325-26. Ultimately, she concludes that, in the insanity context, *Ake* "holds the potential . . . to eviscerate Federal Rule of Evidence 704(b)." *Id.* at 328.

675. Although it was suggested that the right in *Ake* had not been extended to civil cases, *In re* Williams, 133 Ill. App. 3d 232, 478 N.E.2d 867, 869 (App. Ct. 1985), in *In re* Brown, 493 A.2d 447, 450 (1985), *Ake* is cited in a "see also" reference on the application of Mathews v. Eldridge, 424 U.S. 319, 325 (1976), methodology to the determination of due process rights in a case involving a patient subject to *civil* commitment. *See also*, United States v. Flynt, 756 F.2d 1352, 1361 (9th Cir. 1985) (applying *Ake* in criminal contempt case).

676. *See* Perlin, *supra* note 9, at 138 n.288, for earlier cases and commentary.

677. Tuggle v. Virginia, 105 S. Ct. 2315 (1985).

678. Tuggle v. Commonwealth, 334 S.E.2d 838, 843 (1985).

679. Vassar v. Solem, 763 F.2d 975, 977 (8th Cir. 1985), *quoting also*, Williams v. Martin, 618 F.2d 1021, 1026 (4th Cir. 1980). *Williams* is discussed in Perlin, *supra* note 9, at 122 n.184, and in Note, 58 WASH. U.L.Q. 317 (1981).

680. Bowden v. Kemp, 767 F.2d 761, 764 (11th Cir. 1985).

681. *Id.* at 764-65.

682. Campbell v. State, 484 So. 2d 1168, 1170 (Ala. Crim. App. 1986).

his claim,[683] and where one member of a court-appointed sanity commission had, pursuant to state law, examined defendant pre-trial and had "implicitly attested to [defendant's] mental state at the time of the murders,"[684] courts have denied expert appointment. In one case, retroactive application of *Ake's* holding was denied.[685]

In two federal prosecutions, however, failure to appoint a psychiatrist in accordance with *Ake's* dictates was deemed reversible error.[686] In the most expansive reading of the decision, the Eleventh Circuit construed *Ake* as "seeming to equate the need for psychiatric aid to assistance of counsel."[687]

(B) *1986 Cases: A First Look*

(1) Greenfield[688]

Of the cases decided in the 1986 term, only *Greenfield* has been construed even briefly by commentators and interpreted by subsequent cases. A student analysis has concluded that "uncertainties remain,"[689] in light of the court's sole focus on *post*-Miranda silence,[690] its failure to "recognize that a request for an attorney in response to *Miranda* is, in and of itself, protected,"[691] and in its failure to clarify a question "left open in *Doyle*—the protections that the fifth amendment self-incrimination clause affords a suspect who asserts the right to remain silent."[692] The few post-*Greenfield* cases have reflected precisely these uncertainties.[693]

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683. Martin v. Wainwright, 770 F.2d 918, 933-35 (11th Cir. 1985), modified on other grounds, 781 F.2d 185 (11th Cir. 1986).

684. Glass v. Blackburn, 791 F.2d 1165, 1168-69 (5th Cir. 1986).

685. Skurkowski v. Commonwealth, 341 S.E.2d 667, 674-75 (Va. Ct. 1986).

686. United States v. Sloan, 776 F.2d 926, 929 (10th Cir. 1985); United States v. Crews, 781 F.2d 826, 833-34 (10th Cir. 1986); *see also*, 18 U.S.C. § 3006A(e)(1) (1985):

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necesary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services.

687. Blake v. Kemp, 758 F.2d 523, 5631 (11th Cir. 1985), *cert. denied* 106 S. Ct. 374 (1986).

688. Wainwright v. Greenfield, 106 S. Ct. 634 (1986). *See supra* text accompanying notes 269-308.

689. Note, Greenfield v. Wainwright: *The Use of Post-Miranda Silence to Rebut the Insanity Defense*, 35 AMER. U.L. REV. 221, 269 (1985).

690. *Id.*

691. *Id.*

692. *Id.* at 270.

693. *See, e.g.*, Fencl v. Abrahamson, 628 F. Supp. 1379, 1387 n.1 (E.D. Wis. 1986) ("*Greenfield* did not address the issue of whether there is any constitutional protection for pre-arrest or pre-*Miranda* exercise of the right to counsel"); Nichols v. Wainwright, 783 F.2d 1540, 1543 n.2 (11th Cir. 1986):

> *Greenfield*'s holding that the general defense of insanity does not invite comments upon or evidence of post-*Miranda* silence is inapplicable to the instant case in which the defense was specific in its reliance upon the proximity of the statement to the time of arrest. *Greenfield* neither specifically nor implicitly overruled footnote 11 of *Doyle v. Ohio* which permits comment upon post-*Miranda* silence in response to defense arguments that the defendant's post-arrest behavior was probative of his innocence.

See also Accord v. Hedrick, 342 S.E.2d 120, 124 n.2 (W. Va. 1986) (*Greenfield* inapplicable where prosecutor questioned defendant about his prior inconsistent statement, not his post-arrest silence).

In the narrowest reading yet rendered of the case, the Arizona Supreme Court limited *Greenfield* so as to bar only testimony as to the defendant's actual words in response to the *Miranda* warnings: "The state can present evidence that [defendant] was able to talk rationally after his

(2) Smith[694]

Although *Smith* has yet to be interpreted or analyzed, its likely future significance should be clear. While the Supreme Court has sanctioned death sentences in other procedural default cases,[695] its endorsement and expansion of *Sykes* in a case such as *Smith* is startling. *Smith* is extremely close on the procedural default issue[696] and is clear on the merits.[697] The decision appears to reflect nothing less than the Court's determination to remove what it perceives as trivial procedural roadblocks to an accelerated execution schedule.[698]

Any understanding of *Smith* in the context of "mentally disabled criminal defendant" cases must be preceded by consideration of *Smith* in the context of "post-*Sykes* procedural default cases," for at least two reasons. First, Smith's precedential effect will inevitably be limited to cases involving procedural default. Second, while it may be significant that the Court chose to "deliberately by-pass"[699] the important mental disability issue, it is certainly significant that it chose to *expand Sykes* in this kind of case: a case involving a more-than-arguably mentally disabled criminal defendant whose execution inexorably flowed from the Court's decision to avoid the merits.[700]

Beyond this, it is necessary to consider the importance, and the extraordinary punitiveness, of the procedural default doctrine in the Court's vision of a federal jurisprudence. *Smith* provides an opportunity to consider the meaning of the procedural default doctrine to the Burger Court as a microcosm of its vision of procedure as "a mechanism for expressing political and social relationships and . . . a device for producing outcomes."[701]

Over a quarter century ago, in discussing the new federal criminal rules of procedure, Professor Hall charted *his* vision of procedure by arguing that, if "rational settlement" were possible in criminal trials, "it should be possible in every field of human conduct."[702] By its decision in *Smith*, however, the Court raises a question as to whether it is truly interested in such a "rational settlement."

The Court's decision in *Smith* rejects the notion that, for *Sykes* default

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arrest; however, they cannot make specific reference to this conversation." State v. Mauro, 149 Ariz. 24, 716 P.2d 393, 401 (1986).

694. Smith v. Murray, 106 S. Ct. 2678 (1986). *See supra* text accompanying notes 309-80.

695. *See* Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1212 (1986), discussing the "infamous decision" of *Daniels v. Allen* (companion to Brown v. Allen, 344 U.S. 443 (1953)), upholding forfeiture of constitutional challenge where lawyer hand-delivered appellate papers one day late); see other cases cited in Meltzer, *supra*, at 1212 n.417.

696. *See Smith*, 106 S. Ct. at 2669 (Stevens, J., dissenting).

697. *Id.* (discussing role of *amicus*).

698. *See* Perlin, *supra* note 9, at 101 n.57 (comparing Coleman v. Balkcom, 451 U.S. 949, 958 (1981) (Rehnquist, J., dissenting from denial of *certiorari*), to Maggio v. Williams, 104 S. Ct. 311, 317 (1983) (Brennan, J., dissenting), on the question of whether the death penalty appeals process impedes or expedites the imposition of the death penalty).

The significance of *Smith* to the Supreme Court's jurisprudence in this area will be explored more closely *infra* at text accompanying notes 710-34.

699. *Cf.* Fay v. Noia, 372 U.S. 391 (1963), discussed *supra* note 338.

700. *Cf.* Daniels v. Allen, 344 U.S. 443 (1953), discussed in Meltzer, *supra* note 695, at 1212.

701. Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 840 (1984).

702. Hall, *Objectives of Federal Criminal Procedural Reform*, 51 YALE L.J. 723 (1941).

purposes, "death is different."[703] The enforcement of default rules cannot be characterized as "fundamentally unfair" absent any "substantial claim" that the alleged error "undermined the accuracy of the guilt or sentencing determination."[704] Such a test is insufficient, Professor Resnik argues, because its net "may catch the possibly innocent as well as the likely guilty."[705]

Smith also makes it clear that the Court is still obsessed by what it characterized as "sandbagging" in *Sykes*.[706] The Court fears that defense lawyers will take their chances on a "Not Guilty" verdict "with the intent to raise their constitutional claims in a federal habeas corpus if their initial gamble does not pay off."[707] Although the meritricious nature of this argument has been more than adequately addressed,[708] the Court nonetheless quotes from its opinion in *Reed v. Ross*:

> [D]efense counsel may not make a tactical decision to forego a procedural opportunity—for instance, to object at trial or to raise an issue on appeal—and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would undermine the accuracy and efficiency of the state judicial systems to the detriment of all. Procedural defaults of this nature are, therefore, inexcusable, and cannot qualify as "cause" for purposes of federal habeas corpus review.[709]

Writing on *Sykes* and *Smith v. Powell*,[710] Professor Rosenberg recently suggested that, in its habeas corpus rulings, the Court "has gone far beyond the traditional common law interpretative process and is engaging in a rule-oriented jurisprudence designed to make habeas hearings on the merits almost as rare as sightings of Halley's Comet."[711] This jurisprudence, exemplified by repeated "deference and preference" to state courts,[712] is an aspect of the court's "federalism drive,"[713] and is often "outcome-oriented."[714] "[T]he Court, in its preclusionary procedural decisions, has exerted stringent, hypertechnical barriers for habeas petitioners to overcome, with severe

703. *See Smith*, 106 S. Ct. at 2672 (Stevens, J., dissenting). *See also* Gardner v. Florida, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.); California v. Ramos, 463 U.S. 992, 998-99 (1983); Zant v. Stephens, 462 U.S. 862, 884 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (opinion of Burger, C.J.).

704. *Smith*, 106 S. Ct. at 2668. See, Cover & Aleinikoff, *supra* note 338, at 1086-1100, for the implications of "innocence" in federal habeas corpus inquiries.

705. Resnik, *supra* note 701, at 898-99.

706. 433 U.S. at 89.

707. *Id.*

708. *See, e.g.*, Note, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981, 994-95 (1982); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 43-46 (1978); Resnik, *supra* note 702, at 896-97.

709. *Smith*, 106 S. Ct. at 2666, *quoting Ross*, 468 U.S. at 14.

710. 428 U.S. 465, 494 (1976) (federal habeas corpus challenges to fourth amendment rulings barred where defendant had opportunity for full and fair litigation in state court).

711. Rosenberg, *supra* note 338, at 598. See, for a historical perspective, Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978).

712. Rosenberg, *supra* note 338, at 633-34.

713. *Id.* at 633 n.187.

714. *Id.* at 634.

sanctions for failure to do so."[715] The Court, Professor Rosenberg thus concludes, has almost rendered habeas corpus "an extraordinary remedy confined to prevention of miscarriages of justice,"[716] an "ongoing evisceration [which] roughly tracks the Court's constriction of substantive constitutional rights,"[717] leaving only "shards of the original rulings."[718]

Other respected commentators paint a similarly gloomy picture. Professor Hill predicted eight years ago, figuratively, that "we may well be on the way to revival of the pre-*Fay*[719] principle that a procedural forfeiture by a federal or state prisoner will be *fatal* to the prisoner, on direct review and collateral attack alike, unless the forfeiture is incompatible with the Federal Constitution."[720] In *Smith*, this figurative prediction becomes a literal reality.

One final issue of significance to the entire question raised implicitly by *Smith* is the link between the procedural default doctrine and the criminal defendant's right to be represented by competent counsel.[721] The right of

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715. *Id. Cf.* Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 466 (1897) ("Certainty generally is [an] illusion"), and *see generally* Bradley, *supra* note 647.

716. Rosenberg, *supra* note 338 at 640; *see also* Comment, *The Burger Court and Federal Review for State Habeas Petitioners After* Engle v. Isaac, 31 KAN. L. REV. 605, 634 (1983) (Supreme Court in *Engle*, 456 U.S. 207, 135 (1982), "creates precisely the avenue for the 'miscarriage[s] of justice' it professes to avoid").

717. Rosenberg, *supra* note 338 at 641. He refers here to Mapp v. Ohio, 367 U.S. 643 (1961), and *Miranda*, "whose holdings remain only in skeletal form," *id.* at 641 n.237. *But see, infra* text accompanying notes 884-94.

718. *Id. See also* Neuborne, *The Procedural Assault on the Warren Legacy: A Study in Repeal by Indirection*, 5 HOFSTRA L. REV. 545, 580 (1977):

> Rather than forthrightly confronting [Warren Court] decisions and seeking to reverse them openly, some members of the Court have apparently chosen to cripple them covertly by dismantling the apparatus needed for their enforcement. While reasonable persons may agree or disagree with many of the substantive decisions of the Warren Court, if they are to be reversed, it should be pursuant to an open process after full argument, rather than by emasculation of the federal courts.

719. Fay v. Noia, 372 U.S. 391 (1963). *See generally* Rosenberg, *supra* note 711, at 372, for a historical overview of the "fall of *Noia*," and *see* Cover and Aleinikoff, *supra* note 338, at 1069-72, for a discussion of the "erosion of *Fay v. Noia*."

720. Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1096 (1978) (emphasis added).

721. *See generally* Strickland v. Washington, 104 S. Ct. 2052 (1984), establishing an "objective," *id.* at 2065, standard for attorney performance of "reasonably effective assistance," *id.* at 2064, measured by "simple reasonableness under prevailing professional norms," *id.* at 2065. In determining whether counsel's assistance was "so defective as to require reversal," *id.* at 2064, the Court laid down a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id.

Strickland has been criticized vigorously as "unfortunate and misguided," Genego, *The Failure of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 182 (1984), for having been written so as "to ensure that the review test will produce the same results as the old 'farce and mockery-due process' test," *id.* at 196, of being "poisoned with obtrusive subjectivity," Note, *The Ineffective Assistance of Counsel Quandry: The Debate Continues*, 18 AKRON L. REV. 325, 334 (1984), for establishing a "nearly-standardless, seemingly-impossible-to-fail test," Perlin, *supra* note 9, at 164, and for presenting as a standard what "is

representation is seen by Professor Meltzer as "the doctrine most pertinent" to default questions.[722] Writing prior to the Court's *Smith* and *Strickland*[723] decisions, Professor Resnik saw *Sykes* as standing for the proposition that failures by criminal defense attorneys to follow state court objection rules may, "absent something deliberately not fully defined [in *Sykes*], but labeled 'cause and prejudice,' make state first-tier rulings unassailable in federal court."[724] Looking at the other side of the same coin, Professor Rosenberg—writing *after Strickland* (not coincidentally, a death penalty decision)—phrased the problem in this manner:

> [W]ith respect to individuals represented by merely competent criminal defense attorneys who are not prescient or skilled to be on the cutting edge of constitutional litigation, the "demands of comity and finality" require that defendants forfeit the opportunity to vindicate their constitutional rights through federal court habeas corpus actions. Thus, defendants face a formidable "Catch-22": counsel for the defendant may be sufficiently competent to preclude an ineffective assistance claim, yet insufficiently astute to enable the accused to avoid a procedural default or to meet the apparently more difficult cause and prejudice requirements.[725]

Similarly, reading *Strickland* in light of *Sykes*, Professor Berger has concluded that the Court's "rock-bottom focus on 'fundamental fairness' in habeas corpus may be exerting a general downward pull on the law [as t]he justices have simply grown used to discussing constitutional rights in base line terms and blending enumerated guarantees with an eviscerated version of due process."[726] As a result, the justices now march "less to the tune of *Gideon*'s trumpet than the faraway beat of *Betts v. Brady*:"[727]

> In sum, we see an increasing use by the Court of a primitive miscarriage-of-justice test as a sort of universal solvent, a touchstone for both the content of constitutional rights and the availability of federal remedies. With respect to remedies, the trend is most pronounced in the area of forfeited points: with regard to rights, *Strickland* and *Cronic*[728] furnish a prime and sad illustration. For many defendants who are poor, ignorant, or just unlucky[729] in their choice of lawyers

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largely a concept without workable substance," Hagel, *Toward a Uniform Statutory Standard for Effective Assistance of Counsel: A Right in Search of Definition After* Strickland, 17 LOYOLA U.L.J. 203, 209 (1986).

For post-*Strickland* cases, see Perlin, *supra* note 9, at 160 n.436, and see United States ex rel. Franzen v. Rivera, 594 F. Supp. 198 (N.D. Ill. 1984), discussed in Perlin, *supra* note 9, at 160-64. *But see*, Alvord v. Wainwright, 105 S. Ct. 355 (1984) (Marshall, J., dissenting from denial of *certiorari*), discussed *infra* note 816.

722. Meltzer, *supra* note 695, at 1186.

723. Strickland v. Washington, 104 S. Ct. 2052 (1984); *see supra* note 721.

724. Resnik, *supra* note 701, at 891 (footnote omitted).

725. Rosenberg, *supra* note 338, at 617-18. After *Strickland*, the "troubling possibility" remains that a defendant "may forfeit the right to assert constitutional claims of a sophisticated nature in federal habeas actions if he or she is represented by a 'merely' competent criminal lawyer." *Id.* at 619-20.

726. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?* 86 COLUM. L. REV. 9, 99 (1986).

727. *Id.*

728. United States v. Cronic, 104 S. Ct. 2039 (1984), argued "in tandem" with *Strickland*.

729. Or mentally disabled. *See* Perlin, *supra* note 9, at 157 ("The problems with the Court's

(or the state's choice of lawyers for them), assistance of counsel is now a greatly debilitated safeguard.[730]

Partially because "life and death should not be decided by a roulette wheel assigning lawyers to capital defendants,"[731] Professor Meltzer has suggested the adoption of special procedural default rules in capital cases where "the finality of the punishment requires less finality in the process."[732] When a capital defendant raises a "nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that *in matters of procedural default, as in other matters, death is different.*"[733] As *Smith* teaches us, however, the Court has refused to articulate such a difference.[734]

(3) Allen[735]

Allen has not been construed as of yet, and it is thus difficult to determine what its ultimate impact will be in sex offender prosecutions in other jurisdictions. This is also true of involuntary civil commitment cases, especially in light of the fact that defendant's counsel conceded the privilege's inapplicability in the latter situations.

On the other hand, the court stressed that its decision was premised on both the promise of treatment and the lack of punitive motive.[736] It is therefore conceivable that other courts might seek to *distinguish Allen* from other fact patterns: where, for example, treatment has been demonstrably absent;[737] where punitive confinement conditions are present;[738] or where there are no relevant differences between the treatment afforded patients and felons.[739]

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holding [in *Strickland*] are reflected in its treatment of trial counsel's failure to obtain a psychiatric evaluation in preparation for his client's capital sentencing hearing").

730. Berger, *supra* note 726, at 100 (footnotes omitted).

731. Meltzer, *supra* note 695, at 1221; *see also, id.* at 1234 (the right to effective assistance of counsel should be taken "more seriously").

732. *Id.* at 1221.

733. *Id.* at 1222 (emphasis added).

734. *Cf. Smith*, 106 S. Ct. at 2672 n.11 (Stevens, J., dissenting) (quoting Meltzer, *supra*, note 695).

735. Allen v. Illinois, 106 S. Ct. 2988 (1985). *See supra* text accompanying notes 406-56.

736. *Allen*, 106 S. Ct. at 2994.

737. *See, e.g.*, Scott v. Plante, 641 F.2d 117, 132 (3d Cir. 1981), *vacated and remanded* 458 U.S. 1101 (1982), *on remand* 691 F.2d 634 (3d Cir. 1982) (in 24 years of plaintiff's confinement, "neither a psychiatrist nor a psychologist had seen him individually on any regular basis"); Donaldson v. O'Connor, 493 F.2d 507, 515 (5th cir. 1974), *vacated and remanded* 422 U.S. 563 (1975) (plaintiff talked to the two psychiatrists in charge of his case for a total of three hours in ten years).

738. *See* Rennie v. Klein, 462 F. Supp. 1131, 1136 (D.N.J. 1978), *supp'l* 476 F. Supp. 1294 (D.N.J. 1979), *mod.* 653 F.2d 836 (3d Cir. 1981), *vacated and remanded* 458 U.S. 1119 (1982), *on remand* 720 F.2d 266 (3d Cir. 1983) (recounting beating of patients by attendant while patient tied to bed). *See also*, Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973) (the "mere characterization of an act as 'treatment' does not insulate it from Eighth Amendment scrutiny").

739. On the question of the applicability of the doctrine of the least restrictive alternative to persons so housed, see Petition of Thompson, 394 Mass. 502, 476 N.E.2d 216 (1985). On the question of the minimum due process standards at a discharge hearing for sex offenders, see State v. Higginbotham, 110 Wis. 2d 393, 329 N.W.2d 250 (Ct. App. 1982). On the question of the sufficiency of evidence in such a case, see State v. Ward, 369 N.W.2d 293 (Minn. 1985).

See also German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011 (1976).

It is finally ironic that, only two terms ago, the Supreme Court noted "the plight of many if not most of the mental institutions in our country."[740] Discussing the proper allocation of responsibility for administration of a Pennsylvania state facility for the mentally retarded in a case which greatly expanded the role of the eleventh amendment in public institutional cases,[741] Justice Powell—speaking for a five-justice majority—noted:

> As the District Court in this case found, "History is replete with misunderstanding and mistreatment of the retarded." . . . It is common knowledge that "insane asylums," as they were known until the middle of the century, usually were underfunded and understaffed. It is not easy to persuade competent people to work in these institutions, particularly well trained professionals. Physical facilities, due to consistent underfunding by state legislatures, have been grossly inadequate—especially in light of advanced knowledge and techniques for the treatment of the mentally ill. . . . Only recently have States commenced to correct widespread deplorable conditions. The responsibility . . . has rested on the *State itself*.[742]

Allen makes no reference to this decision.[743]

(4) Ford[744]

Ford is both a curious and difficult opinion. *Ford* both reflects much of the ambiguity and ambivalence which permeates this subject-matter,[745] and serves as a paradigm for the Court's confusion. *Ford*, to some extent, also illustrates the Court's use of rationalization[746] as a means of dealing with most of the cases in question.

First, the difficulty which is always faced in the application of a plurality opinion[747] will be increased where the states have enacted such a wide range of statutory vehicles for making the critical determination,[748] and where it is truly not clear what sort of procedures a state need enact to meet *Ford*'s standards. Professor Greenawalt aptly quotes Benno Schmidt in a

740. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900, 912 n.16 (1984).

741. *Id.* at 911-12.

742. *Id.* at 912 n.16 (emphasis in original; citations omitted).

743. Also absent from the *Allen* opinion is any mention of Romeo v. Youngberg, 451 U.S. 307, 319 (1982), the only United States Supreme Court opinion dealing with the substantive treatment rights of the mentally handicapped (finding right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint").

More surprisingly, there is no mention in either the *Allen* majority or dissenting opinion of Specht v. Patterson, 386 U.S. 605 (1967). In *Specht*, the Supreme Court construed the Colorado Sex Offender's Act to lead to "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm," *id.* at 608-09, and thus ruled that the due process clause required that the defendant "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own," *id.* at 610.

744. Ford v. Wainwright, 106 S. Ct. 2595 (1986). *See supra* text accompanying notes 507-619.

745. *See* Perlin, *supra* note 9, at 167-69.

746. O. ENGLISH & S. FINCH, INTRODUCTION TO PSYCHIATRY 66 (1954): Rationalization is a mechanism of defense in which the ego substitutes an acceptable reason for an unacceptable one in order to explain a given action or attitude. This is carried on primarily to delude the superego [*see infra* note 903] into accepting something which might otherwise result in guilt.

747. *See supra* note 549.

748. *See, e.g.*, Ward, *supra* note 37, at 72-76.

different context but to the same end: "a confused opinion whose underlying principles cannot be confidently ascertained may have much the same effect of limiting the scope of the decision to the immediate facts as would a very narrowly drawn opinion."[749]

Second, there are significant inconsistencies between the positions articulated in the various *Ford* opinions and positions with which the Court has appeared to be entirely comfortable in the past:

1) Justice Powell's position that the *only* question is not "*whether* but *when*"[750] ignores the possibility that organic brain damage, for instance, could make a once-competent-to-be-executed defendant become *irreversibly* incompetent. The mirror image of this problem is that, in a state that has abolished the insanity defense, it is not beyond the realm of possibility that a defendant like the petitioner in *Jackson v. Indiana*[751] might face execution.[752]

2) Justice Powell's reliance on *Parham v. J.R.*[753] for the proposition that the protections of the adversary process in proceedings to determine the appropriateness of medical decisions "may well be more illusory than real"[754] is astonishing when applied to a death penalty case. *Parham* countenanced looser procedural safeguards in the juvenile commitment context, in part, because of the assumption that "natural bonds of affection lead parents to act in the best interests of their children."[755] Certainly, no one would suggest that such a benign motive propels state action in a capital punishment case.

3) At its base, Justice Rehnquist's dissent, co-signed by the Chief Justice, sees little purpose in "constitutionalizing"[756] the competency-to-be executed procedures, since he views the problem as basically a trivial one: no state sanctions execution of "the insane," so why "needlessly complicate[] and postpone[] still further any finality in this area of the law?"[757] This is a far cry from the Chief Justice's familiar position in *O'Connor v. Donaldson*[758] that there can be "little responsible debate regarding 'the uncertainty of diagnosis in this field and the tentativeness of professional judgment.' "[759]

4) Both Justice Rehnquist's and Justice O'Connor's opinions remain obsessed with the feat that defendants will raise "false"[760] or "spurious

749. Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1004 n.76 (1978).

750. *Ford*, 106 S. Ct. at 2610 (Powell, J., concurring). *See supra* text accompanying note 585.

751. 406 U.S. 715, 726 (1972) ("There is nothing in the record that even points to any possibility that Jackson's present condition can be remedied at any future time").

752. *See, e.g.*, People *ex rel.* Myers v. Briggs, 46 Ill. 2d 281, 263 N.E.2d 109 (1970) (defendant indicted for murder in case "virtually indistinguishable" from the clinical and procedural facts of *Jackson*). *See* 406 U.S. at 735-36.

753. 442 U.S. 584 (1979).

754. *Id.* at 609, *quoted* in *Ford*, 106 S. Ct. at 2611 (Powell, J., concurring).

755. *Parham*, 442 U.S. at 618, citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *447, 2 J. KENT, COMMENTARIES ON AMERICAN LAW *190.

756. *See Ford*, 106 S. Ct. at 2615 (Rehnquist, J., dissenting).

757. *Id.*

758. 422 U.S. 563, 584 (1975) (Burger, C.J., concurring).

759. *Id.*, quoting in part, Greenwood v. United States, 350 U.S. 366, 375 (1956).

760. *Ford*, 106 S. Ct. at 2612 (O'Connor, J., concurring in part and dissenting in part).

claims"[761] in desperate attempts to stave off execution. This fear—a *doppelganger* of the public's "swift and vociferous . . . outrage"[762] over what it perceives as "abusive"[763] insanity acquittals, which allow "guilty" defendants to "beat the rap"[764]—was responded to more than adequately almost 150 years ago by Dr. Isaac Ray, the father of American forensic psychiatry:

> The supposed insurmountable difficulty of distinguishing between feigned and real insanity has conduced, probably more than all other causes together, to bind the legal profession to the most rigid construction and application of the common law relative to this disease, and is always put forward in objection to the more humane doctrines.[765]

On the other hand, at least one inevitable outcome of *Ford* will be that more clinicians will be aware of the problems involved and will begin to stake out the competing positions outlined by Radelet and Barnard, Ward, and Appelbaum, as a step towards, perhaps, "achieving consensus within the professions."[766]

RANDOM DECISIONS OR DOCTRINAL COHESION?

A. *Guiding Principles?*

A cursory examination of the cases just discussed appears to corroborate Professor Nagel's charge that the Burger Court has provided us with a "fractured and uncertain quality of . . . constitutional interpretation [and] doctrinal inconsistency."[767] The decisions appear to create a crazy-quilt of murky and inconsistent precedents, creating a "labyrinth of judicial uncertainty,"[768] and revealing no common jurisprudential or doctrinal thread, but merely an unrelated series of outcome-determinative rulings which defy meaningful characterization.

The opinions under consideration here seem to support all of Professor Nagel's positions: *Ake* appears to reflect an "inexplicable reversal" of *Barefoot* and *Jones*; with regard to the actions of the psychiatric witnesses, *Smith* stands in almost the same position *vis a vis Estelle*. The proliferation of *Ford* opinions makes the understanding or resolution of one of the most profound issues with which the Court will ever have to deal difficult, if not impossible.

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761. *Id.* at 2615 (Rehnquist, J., dissenting).

762. *See* I. KEILITZ & J. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS 3 (1984).

763. *See* Perlin, *supra* note 478, at 859, and *see* sources cited *id.* nn.6-7.

764. *Id.* at 860; *see also*, D. NISSMAN, B. BARNES & G. ALPERT, BEATING THE INSANITY DEFENSE; DENYING THE LICENSE TO KILL (1980).

765. I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY § 247, at 243 (1962 ed.). *See also*, R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 63 (1981) (in mid-eighteenth century Britain, psychiatrists were accused of "being biased in favour of finding insanity and of being deceived by simulation").

766. Appelbaum, *supra* note 457, at 683.

767. Burger Comment, *supra* note 19, at 237. Professor Nagel finds futile the "great lengths" to which some commentators have gone "to find harmony under the cacophony." *Id. See also* Frank, *The Burger Court—The First Ten Years*, 43 LAW & CONTEMP. PROBS. 101, 124 (1980) (Burger Court has been "years of cacophony").

768. Bradley, *supra* note 647, at 14, *quoting* 2 W. LA FAVE, SEARCH AND SEIZURE (1978), § 7.2 at 509, *quoting* People v. Brosnan, 32 N.Y.2d 254, 344 N.Y.S.2d 900, 298 N.E.2d 78 (Wachtler, J., dissenting). *See also* Stone, *Psychiatric Abuse and Legal Reform: Two Ways To Make a Bad Situation Worse*, 5 INT'L J. L. & PSYCHIATRY 9, 15 (1982) (Supreme Court "embraces incoherence").

Language in decisions such as *Barefoot* and *Jones* sanctions questionable legislative judgments; *Ford* and *Ake* hold other questionable judgments constitutionally impermissible. *Allen* may substantially undercut a Warren Court decision[769] which it never cites; also, *en passant*, it calls into question a major prong of the historic *Gault* decision. *Greenfield* and *Estelle* breathe life into a staggering *Miranda* doctrine, but *Smith* and *Allen* reject similar *Miranda* extensions. *Smith*, finally masks a repressive, punitive, and fatal doctrine in sterile language of "procedural defaults," but the procedural default doctrine is rejected in *Greenfield* and *Ake*.

Is death, any more, different? *Estelle* says "yes;" *Smith* implies "no." Is *Gault* still good law? *Estelle* implies "yes;" *Allen* suggests "no" or "not completely." Must a defendant conform to common conceptions of "craziness" in order to succeed in a mental disability case? In Justice Rehnquist's separate opinions in *Estelle, Ake, Ford*, and *Greenfield*, the answer is "absolutely. Is empirical data credible? Justices Blackmun and Brennan insist it is in their dissents in *Barefoot* and *Jones*, but the majority in *Jones* and *Allen* pay it less than lip service.

Can these cases be meaningfully sorted out? Are these more than "ad hoc, episodic opinions?"[770] A closer look might reveal some guiding principles in this area. *First*, it might be helpful to attempt to "factor" the cases to examine how the court has dealt with certain elements in common: type of penalty and crime, and type of psychiatric diagnosis. *Second*, an investigation of whether any or all of the justices have articulated positions which appear to reflect any prevalent "themes" may help us understand their true motivational concerns. *Third*, it is necessary to identify those extra-legal (or, perhaps, more accurately, *meta*-legal), social, cultural, and psychological principles which appear to be guiding the court in its decisionmaking. These principles are important even though they may be influential on an unarticulated or unconscious level. A close examination of these questions should give us some idea as to whether or not there *are* "guiding principles" at work, or whether the "doctrinal abyss" charge leveled twenty years ago is indeed accurate.

1) *"Factoring" the Cases*

First, the fact that five of the eight cases in which the Supreme Court has chosen to deal with issues affecting mentally disabled criminal defendants are death cases is not coincidental.[771] There is no reason to assume that the members of the Court are any less the prisoners of symbolism than are

769. Specht v. Patterson, 386 U.S. 605 (1967).

770. Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 LAW & CONTEMP. PROBS. 7, 24 (1980).

771. While all five homicide cases—*Barefoot, Ake, Estelle, Smith*, and *Ford*—were death penalty cases, only *Estelle* involved a prototypic felony-murder fact pattern. *Ake*'s case was part of a "crime spree"; *Smith*'s victim was a stranger, and *Barefoot*'s a police officer. While *Ford*'s murder grew out of a robbery (like *Estelle*'s), his victim was a police officer.

Of the other three cases, two involved sexual crimes (*Greenfield* and *Allen*), and one (*Jones*) a minor charge (shoplifting).

the rest of us.[772] The Court has continued to adhere rigidly to a policy which "look[s] with disfavor on further efforts to impede application of the death penalty."[773] This is evidenced by its adoption of an accelerated appeals schedule in *Barefoot* in response to its "irritation at the use of multiple habeas corpus petitions as a tool to thwart the imposition of the death penalty,"[774] and through its employment in *Smith*[775] of the procedural default doctrine first articulated in *Sykes*.[776] Nevertheless, although the consequences may be death,[777] the fact that this substantive argument was improperly preserved below is dispositive of the case. That the introduction of the psychiatric evidence violated the constitution by making the defendant the "deluded instrument of his own conviction"[778] was substantively virtually unassailable. Such a crabbed approach to the constitutional issues appears to cruelly mimic Dickens' description in *Bleak House* of nineteenth century Chancery practice, albeit with far higher stakes.[779] This adherence to *Sykes* in *Smith*—where death is the result—may be a significant clue to understanding the Court's true view of these cases.

Second, of the eight defendants, the prevailing diagnosis in four cases—*Estelle, Barefoot, Allen*, and *Smith*—was the generally-discarded and discredited "sociopath" or "psychopath," while in the other four cases, the defendants—*Greenfield*,[780] *Ake, Jones*, and *Ford*—appeared to meet the general criteria compatible with a diagnosis of schizophrenia. There seems little question as to the severity of, at least, *Jones'*, *Ake*'s and *Ford*'s major mental illnesses. *Jones'* insanity defense was not contested.[781] In *Ake*'s counsel's somewhat florid description, he was "goofier than hell." The virulence of *Ford*'s system of delusions and hallucinations was not even questioned seriously by those justices obsessed with the "fear of faking."[782]

Although the perils of diagnosis are well-known to all,[783] an attempt to divide the cases by this determinant reveals that the only diagnosed sociopath to "win" was the defendant in *Estelle* (the first case of the eight to be decided, and, perhaps, the Burger Court's highwater *Miranda* mark). The only defendant diagnosed other than as a sociopath to "lose" was *Jones* (a

772. *See* Tyler & Weber, *supra* note 9; symbolism in a related context is discussed in Perlin, *supra* note 9, at 91 n.1. *See infra* text accompanying notes 849-937.

773. Perlin, *supra* note 9, at 167.

774. *Id.* at 101.

775. Smith v. Murray, 106 S. Ct. 2678 (1986).

776. *See supra* note 338.

777. *See supra* note 364.

778. Estelle v. Smith, 451 U.S. 454, 462 (1981), *quoting* Culombe v. Connecticut, 367 U.S. 568, 581 (1962); *see also, Smith*, 106 S. Ct. at 2675, *quoting Culombe* (Stevens, J., dissenting).

779. C. DICKENS, BLEAK HOUSE 3 (1904). *See, e.g.*, W. HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN 86 (1928); A. VANDERBILT, THE CHALLENGE OF LAW REFORM 48-49 (1955).

780. Although there was a dispute as to Greenfield's diagnosis, a reasonable reading of the medical evidence in the case would suggest that this flowed from the defendant's raising of the insanity defense, and that there was no real question as to his psychosis. *See Greenfield* Respondent's Brief, *supra* note 278, at 17-18.

781. *Jones*, 463 U.S. at 360.

782. The psychiatrists who examined Ford for the Governor's sanity hearing, *see Ford*, 106 S. Ct. at 2599, all couched their diagnosis solely in terms of *cognitive* abilities; *i.e.*, the defendant's ability to intellectually comprehend his pending execution.

783. *See* Appelbaum, *supra* note 45, at 173-74 (critiquing use of "sociopath" diagnosis).

case that the Court was clearly using as a vehicle for an explicit social agenda: the diminution of the use of the insanity defense in the wake of the *Hinckley* acquittal).

2) *Justices' "Themes"*

The views of several of the justices on the types of questions before the court in the eight cases in question appear to be fairly well crystallized. Four justices—Brennan, Marshall and Blackmun consistently, Stevens generally[784]—have articulated positions that are sympathetic to the plight of the mentally disabled criminal defendant. These justices are suspicious of overblown claims of psychiatric expertise in matters dealing with the predictivity of dangerousness and evince a willingness to extend procedural due process protections in a wider variety of fact-settings. Their opinions are supportive of the application of the *Miranda* doctrine in cases involving both psychiatric and police activity, and reject the majority's efforts to broaden the spectre of "procedural default." Notwithstanding the deep suspicion of psychiatric *predictive* expertise, Justice Marshall, especially, looks at the multiple roles a psychiatrist can play in *aiding* a defendant in "marshal[ling] his defense."[785]

The other five—who typically make up the majority in a case where the mentally disabled defendant "loses"[786]—do not approach the cases in such a uniform way. Justice White's faith in the jury's ability to separate the "wheat from the chaff"[787] enables him to sanction the admission of testimony as to future dangerousness by a witness who has, in 120 of 120 capital cases in which he has testified, *never* testified that a capital defendant would *not* meet statutory criteria of "future dangerousness."[788] Justice White retains this confidence in spite of overwhelming professional agreement that, in a "best-case analysis," the types of psychiatric predictions relied upon by the state as to future dangerousness are wrong two out of three times.[789]

Justice Powell[790] is willing to expand earlier opinions sanctioning fewer safeguards for certain populations.[791] He would apply the rationale of these cases in *Ford* to competence-to-be-executed decisions and, in *Jones*, to commitment and release hearings for insanity acquittees. He also appears to be entirely comfortable leaving many of the hard questions in the area to medi-

784. In this term, Justice Stevens joined the other three on each case, writing for the court in *Greenfield*, and authoring the dissents in *Smith* and *Allen*. In earlier terms, he concurred in the judgment of the court in *Barefoot*, and dissented separately in *Jones*.

785. *Ake*, 105 S. Ct. at 1095.

786. *E.g. Allen, Smith, Jones, Barefoot.*

787. *Barefoot*, 463 U.S. at 899 n.7.

788. Nethery v. State, 692 S.W.2d 686, 708-10 (Tex. Ct. Crim. App. 1985).

789. *Barefoot*, 463 U.S. at 916 (Blackmun, J., dissenting), relying on J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 47-49 (1981). The state's witness at *Barefoot*'s habeas hearing had conceded that Monahan was the "leading thinker" at work in this area today. *Barefoot*, 463 U.S. at 899-900 n.7.

790. The author of *Pennhurst II*, 104 S. Ct. 900 (1984) (expanding scope of eleventh amendment in federal cases brought against state officials on state law bases; *see, e.g.*, Chemerinsky, *supra* note 26).

791. *E.g.*, Parham v. J.R., 442 U.S. 584 (1979) (juveniles); Vitek v. Jones, 445 U.S. 480, 497 (1980) (Powell, J., concurring) (scope of prison inmates' right to assistance at transfer-to-mental-hospital hearing).

cal expertise.[792]

Justice O'Connor appears eager to expand the procedural default doctrine in *Smith* (notwithstanding the unique procedural posture of a death case[793] or the special issues raised by psychiatric testimony); also, she expresses fear that *Ford* will inspire other defendants to feign insanity in last-ditch efforts to cheat death.

Chief Justice Burger remains overwhelmingly ambivalent, and offers the widest range of positions. Building on his years of involvement with similar issues on the District of Columbia Court of Appeals[794] and his earlier opinions in civil cases,[795] he first authors *Estelle*—expanding *Miranda* and raising the issue of psychiatric expertise in dangerousness predictivity problems—but then concurs in *Ake* (to limit its application to capital cases), and is the sole member of the court to join in Justice Rehnquist's *Ford* dissent and *Greenfield* concurrence. In addition, the Chief Justice joins in the majority in *Smith* (reflecting that, in *his* core value system, Smith's lawyer's trivial appellate[796] default outweighs the importance of his client's on-the-merits *Estelle* claim). Finally, Chief Justice Burger joins in the majority in *Allen*, sanctioning fewer procedural due process protections because of the *promise* of treatment, notwithstanding his solitary concurrences in *O'Connor*[797] and *Youngberg*[798] as to the constitutional invalidity of such a right.

Justice Rehnquist[799] is implacable and his positions are clear. He is the *only* justice not to join in any of the opinions in which the defendants "won."[800] His concurrences-urging-limitations in *Estelle* and *Greenfield* reveal a vision of mental disability that virtually mirrors public perceptions: he sees an importance in the *Estelle* defendant's failure to "invoke . . . [his] rights when confronted with Dr. Grigson's questions"[801] (*i.e.*, since he wasn't "really crazy,"[802] his failure to complain should be seen as probative),[803] and focuses explicitly on Greenfield's appearance: when given his

792. *Compare* State v. Krol, 68 N.J. 236, 344 A.2d 289, 302 (1975) (determinations as to dangerousness, "while requiring the court to make use of the assistance which medical testimony may provide, is ultimately a legal one, not a medical one"), *with* Youngberg v. Romeo, 451 U.S. 307, 322 (1982) ("We emphasize that courts must show deference to the judgment exercised by a qualified professional").

793. *See generally* Meltzer, *supra* note 695, at 1221.

794. *See, e.g.*, Blocker v. United States, 274 F.2d 572 (D.C. Cir. 1959); Campbell v. United States, 377 F.2d 135 (D.C. Cir. 1966); *cf.* Rouse v. Cameron, 387 F.2d 241 (D.C. Cir. 1967) (insanity acquittee's right to treatment).

795. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring) (would find no right to treatment); Addington v. Texas, 441 U.S. 518 (1979) (burden of proof); Parham v. J.R., 442 U.S. 584 (1979) (juvenile commitment standards); *see also*, Youngberg, 457 U.S. at 329 (Burger, C.J., concurring in judgment) (rejecting concept of constitutional right to treatment).

796. *Cf.* Note, *supra* note 338, at 465.

797. O'Connor v. Donaldson, 422 U.S. 563 (1975) (Burger, C.J., concurring).

798. Youngberg v. Romeo, 451 U.S. 307 (1982) (Burger, C.J., concurring in judgment).

799. The author of *Pennhurst I*, 451 U.S. 1 (1981).

800. The use of the word "won" is concededly somewhat Orwellian. Glenn Ake, for instance, was retried, and sentenced to life imprisonment. *See High Court Appellant Found Guilty in 2d Trial*, N.Y. Times, Feb. 14, 1986, at 15 (insanity defense rejected by jury).

801. *Estelle*, 454 U.S. at 475 (Rehnquist, J., concurring).

802. *See infra* notes 807-12.

803. It is not clear under Justice Rehnquist's formulation how *any* person—mentally disabled or otherwise—would know to invoke his or her rights at an uncounseled *Estelle*-type examination.

Miranda warnings, he was not "incoherent or obviously confused or unbalanced"[804] (*i.e.*, he didn't "look" crazy).

Justice Rehnquist is the lone dissenter in *Ake*, expressing concerns of feigning[805] in the face of staggeringly-unanimous professional diagnosis and lay observation as to the profundity of Ake's mental illness. In his *Ford* dissent, in addition to rejecting the argument that the eighth amendment applies to the execution of the insane, he again raises the spectre of sane capitally-sentenced defendants seeking to "cheat" death by raising spurious, multiple claims of insanity. Writing for the majority in *Allen;* he rejects the notion that the privilege against self-incrimination applies to committed sex offenders on the thin reed of the promise of treatment, in an area where unanimous scholarly and professional opinion appears to reveal that such a promise is virtually oxymoronic.[806]

3) *Extra-Legal Principles*

It might next be helpful to identify what other motivating social, cultural, and psychological principles—all extra- or meta-legal in nature—guide the court as a whole in its decisionmaking. *First*, the Court remains fearful of ordering the execution of a "truly insane" person.[807] Writing in an entirely different context,[808] Professor Stephen Morse has suggested that, if any group of the mentally disabled is to be singled out for disparate treatment, it should be "only [that] tiny fraction of crazy persons[809] who seem clearly and totally crazy."[810] While courts and jurors are suspicious of most insanity claims,[811] the Supreme Court still shies away from ordering the exe-

804. *Greenfield*, 106 S. Ct. at 642 (Rehnquist, J., concurring).

805. *Ake*, 105 S. Ct. at 1101 (Rehnquist, J., dissenting).

806. *See supra* note 738 (quoting Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973)).

807. Perlin, *supra* note 9, at 166.

808. Morse, *supra* note 16. Although Morse discusses the insanity defense briefly, *id.* at 640-45, his article is globally concerned with whether there should be specifically different legal treatment of those "recognizably abnormal" persons who behave "crazily," *id.* at 652.

809. He defines "crazy" generally as "an intuitive or commonplace meaning of abnormal that reflects social evaluations and values." *Id.* at 549.

810. *Id.* at 654. *See also*, Mestrovic, *Need for Treatment and New York's Revised Commitment Laws: An Empirical Assessment*, 6 INT'L J. L. & PSYCHIATRY 75, 78 (1983) (in assessing admission to facility, public hospital staff "essentially concerned with [the] idea of 'normal craziness' that enables one to function versus 'more than normal craziness' ").

811. *See, e.g.*, Perlin, *supra* note 9, at 166 n.482; Ellsworth, *supra* note 9; *Ake*, 105 S. Ct. at 1099, 1101 (Rehnquist, J., dissenting) (suggesting that there was credible evidence that Ake had told his cellmate he was going to try to "play crazy"); *Greenfield*, 106 S. Ct. at 641, 642 (Rehnquist, J., concurring) (defendant's request for lawyer tends to show he "is not incoherent or obviously confused or unbalanced"); *1984 Term, supra* note 666, at 133 n.25 (criticizing Justice Rehnquist's *Ake* opinion); *see also, Ford*, 106 S. Ct. at 2611, 2612 (O'Connor, J., concurring in part and dissenting in part) ("the potential for false claims and deliberate delay in this context is obviously enormous"); *Ford*, 106 S. Ct. at 2613, 2615 (Rehnquist, J., dissenting) (majority opinion "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity").

Justice Rehnquist's vision—linking sanity to a "normal appearance"—is not a unique one. *See* Perlin, *Psychiatric Testimony in a Criminal Setting*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 143, 147 (1975) ("[T]rial judges will say 'He doesn't look sick to me,' or, even more revealingly, 'He is as healthy as you or me'), and *id.* at 147-48 *quoting* Laswell, *Foreward*, in R. ARENS, THE INSANITY DEFENSE xi (1974) (judges, jurors and attorneys have been adverse to enlarge the scope of the insanity defense "especially if the defendants failed to conform to *popular images of 'craziness'* ") (emphasis added). Arens graphically reproduces transcripts of two competency hearings conducted by the same judge on the same day in which he merely asks defendants the date, the names of the President and Vice President and Washington's standing in the American League. *Id.* at 77-79. The

cution of a defendant who appears to be, in Professor Morse's words, "clearly and totally crazy," or, in the words of Glenn Ake's trial counsel, "goofier than hell."[812]

This is not a new point of view, of course: writing in 1817, John Haslam, in one of the first treatises on medical jurisprudence, set out the issue in florid prose still applicable in American courtrooms today:[813] "It is not eccentricity, habitual gusts of passion, ungovernable impetuosity of temper, nor the phrensy of intoxication, *but a radical perversion of intellect*, sufficient to convince the jury that the party was bereft of the reason of an ordinary man."[814] It is striking that the defendants in *Ake* and *Ford* (and perhaps in *Greenfield* and *Jones*, two of the three non-death penalty cases) met Morse's and Haslam's test.[815]

Interestingly, the majority opinion in *Jones*—the one case that involved a trivial, underlying offense (shoplifting)—makes the point as well as any other decision. The Court fears the "smokescreen" of a spurious insanity defense, and thus insures that defense lawyers will not seek that plea in a last-ditch effort to avoid conviction,[816] so as to insure that only the "truly

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motion of the defendant who answered all four questions correctly was denied; the defendant who knew only the President's name was ordered held for psychiatric evaluation. *Id.*

812. *See supra* note 156. *See also* C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 52-54 (1974), *quoted* in White, *supra* note 312, at 943 n.2:

> [Although [w]e are committed, as a society, not to execute people whose action is attributable to what we call "insanity," [nevertheless,] where the crime exhibits a total wild departure from normality, we come exactly to the point where consideration of the insanity problem is at once most necessary and most difficult.

813. *See* Ellsworth, *supra* note 9.

814. J. HASLAM, MEDICAL JURISPRUDENCE AS IT RELATES TO INSANITY ACCORDING TO THE LAW OF ENGLAND 50 (1817) (1979 reprint). Haslam noted that, while "insanity may be counterfeited by the criminal, in order to defeat the progress of justice," *id.* at 60, such deception is virtually impossible to effectuate: "To sustain the character of a paroxysm of active insanity would require a continuity of exertion beyond the power of a sane person." *Id. See also* Smith, *supra* note 765, at 90-92 (on the nineteenth century public's view of "raving lunatics" who committed crimes).

815. Another three (Barefoot, Ernest Smith in *Estelle*, and Michael Smith) were classified as "sociopathic," a diagnostic category which has been characterized as a "garbage pail" grouping by prominent psychiatrists for over half a century, and which is not listed by the American Psychiatric Association in DSM-III, *see generally, supra* note 215.

It is probably not insignificant that, in affirming the denial of Michael Smith's habeas corpus petition, the Fourth Circuit premised its decision, in addition to the procedural default issue (*see supra* text accompanying note 342), on the fact that the jury had relied on *two distinct* aggravating factors in recommending the death penalty, *see* VA. CODE ANN. § 19.2-264.2 (1983), and that only *one* of these was related to the subject matter affected by the psychiatric testimony. *See* Smith v. Procunier, 769 F.2d 170, 173 (4th Cir. 1985). In other words, putting aside the psychiatric testimony issue, the jury found an independent reason to recommend the death penalty. *But see*, Zant v. Stephens, 462 U.S. 862 (1983); *Smith*, 106 S. Ct. at 2676-77 (Stevens, J., dissenting) (Court of Appeals misread *Zant*).

816. *But see* Alvord v. Wainwright, 105 S. Ct. 355 (1984) (Marshall, J., dissenting from denial of *certiorari*), where defense counsel accepted his client's refusal to rely on the insanity defense without independently investigating either his client's mental or criminal history, in a case where the record demonstrated "unequivocally" that defendant had history of mental illness *and* a prior insanity acquittal.

> The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully assist in his defense. The result is to deny the persons who are most in need of it the educated counsel of an attorney.

Id. at 360 (Marshall, J., dissenting from denial of *certiorari*).

On the question of a defendant's right to refuse the imposition of an NGRI plea, *see, e.g.* State v. Kahn, 175 N.J. Super. 72, 417 A.2d 585 (App. Div. 1980); Fredak v. United States, 408 A.2d 364

crazy" are so exempted from responsibility. As Justice Rehnquist noted in *Ake*, the defendant's post-crime spree "would not seem to raise any question of sanity unless one were to adopt the dubious doctrine that no one in his right mind would commit a murder."[817]

On the other hand, the available empirical data also reflects another undeniable reality to which the court has paid no attention: the percentage of death row inmates with serious psychiatric problems is staggeringly high. An extensive and careful study of fifteen death row inmates nearing execution done by Dr. Dorothy Lewis and her colleagues revealed that *all* the prisoners had histories of severe head injuries, that of the fifteen, twelve had neurological impairments (assessed as "major" in five of the cases), that six were chronically psychotic and two manic-depressive.[818] Perhaps most importantly, malingering was ruled out since "almost all of the abnormalities identified could be confirmed with objective evidence [*e.g.*, hospital records, CAT scans, paralysis]."[819]

However, not all of these inmates *appeared* "totally crazy." Dr. Lewis notes that, at first glance, "none of the subjects seemed flamboyantly schizophrenic,"[820] and it was only after "long interviews, hospital record reviews, psychological assessments, and interviews with relatives" that "the nature and extent of psychopathology in the group" could be appreciated.[821] Astonishingly, all but one of the subjects attempted to *minimize* their psychiatric disorders, "preferring, it seemed, to appear 'bad,' rather than 'crazy.' "[822]

Second, a majority of the Court appears to feel that cases raising issues of mental disability are, somehow, "different." In quietly expanding the scope of its earlier civil decisions in cases such as *Addington*[823] and *Parham*,[824] the Court takes the position that cases involving mental illness questions can somehow be dealt with in a way different from, and with concededly fewer due process protections, than the more stringent criteria demanded in other factfinding investigations.[825]

Allen clarifies that the promise of treatment (which may or may not be

(D.C. Ct. App. 1979); Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637 (1980).

817. *Ake*, 105 S. Ct. at 1101 (Rehnquist, J., dissenting).

818. Lewis, *supra* note 486. *Cf.* Adler, *supra* note 500, at 32 (After *Ford*, "the detection of malingering is going to have to be something that is really salient").

819. Lewis, *supra* note 486, at 842-43.

Elsewhere, Ward has cited evidence that as many as fifty percent of Florida's death row inmates "become intermittently insane." Ward, *supra* note 37, at 42. *See also* Johnson, *Life Under Sentence of Death*, in THE PAINS OF IMPRISONMENT 129 (R. Johnson & H. Toch, eds. 1982).

820. Lewis, *supra* note 486, at 840.

821. *Id.* at 840-41.

822. *Id.* at 841. On the feigning of *sanity, see* P. ROCHE, THE CRIMINAL MIND 165 (1958), discussing the factual backdrop of Commonwealth v. Ballem, 386 Pa. 20, 123 A.2d 728 (1956), *cert. denied* 352 U.S. 932 (1956).

823. Addington v. Texas, 441 U.S. 518 (1979).

824. Parham v. J.R., 442 U.S. 584 (1979).

825. *See*, for an analysis of *Addington, Parham*, and *Pennhurst I*, Note, *Involuntary Civil Commitment: The Inadequacy of Existing Procedural and Substantive Protections*, 28 UCLA L. REV. 906, 951 (1981) (decisions are consistent in that they "clearly" convey the "message" that the Supreme Court does not view the federal courts as an appropriate forum in which involuntarily committed individuals may assert their rights).

illusory)[826] is enough to remove sex offender cases from the full mantle of procedural due process protections available in criminal trials. This reduction produces, in the words of Justice Stevens' dissent, "a shadow criminal law without the fundamental protection of the Fifth Amendment [which] conflicts with the respect for liberty and individual dignity that has long charaterized, and that continues to characterize, our free society."[827] The same reduction can be seen in Justice Powell's separate opinion in *Ford*, suggesting that "due process minus" might be sufficient in hearings to determine whether or not an individual is competent to be executed, citing to the civil line of cases.[828]

Third, the Burger Court remains overwhelmingly ambivalent about the role of psychiatry and other mental health professions in the adjudicative process.[829] While this may be traced to some degree to the Chief Justice's long-term fascination with this topic while he served on the United States Court of Appeals for the District of Columbia[830] (especially in cases involving a "sociopathic" diagnosis),[831] the decisions clearly indicate that much of the court is troubled by this problem.

After consistently making reference in *O'Connor* and *Addington* to the vagaries and unreliability of psychiatric testimony in civil cases (where commitment to a hospital is the result), the court blithely sanctions the admission of broad ranging psychiatric evidence in *Barefoot* in spite of the strongest possible disclaimer from the American Psychiatric Association, and then demurs to the fact that the statutory scheme it upholds in *Jones* flies in the face of virtually unanimous psychiatric knowledge.[832] Remarkably, the *Jones* majority re-cites the "uncertainty of diagnosis" cases, drawing from them the lesson that "courts should pay particular deference to reasonable legislative judgments," a quite different lesson than seen by Justice Blackmun in dissent in *Barefoot* or Justice Brennan in dissent in *Jones*.[833] Yet, the Court turns around and recognizes in *Ake* that this ambiguity risks an "inaccurate resolution of sanity issues,"[834] thus compelling expert assistance to indigent defendants.[835]

Psychiatrists have begun to take notice of this ambivalence as well. For, as part of the process by which the law begins to question concepts that

826. *See supra* text accompanying notes 741-43, discussing Penhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984).

827. *Allen*, 106 S. Ct. at 3000 (Stevens, J., dissenting).

828. *Ford*, 106 S. Ct. at 2611 (Powell, J., concurring).

829. Perlin, *supra* note 9, at 167.

830. *Id.* at 168. *See, e.g.*, Campbell v. United States, 307 F.2d 597, 611-16 (D.C. Cir. 1962) (Burger, J., dissenting), discussed *supra* note 215.

831. Perlin, *supra* note 9, at 168.

832. *See Jones*, 463 U.S. at 364 n.13.

833. The Court's use of social science data has come under searing criticism in a broad variety of mental disability cases. *See, e.g.*, Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 RUTGERS L.J. 595 (1983) (on Youngberg v. Romeo, 457 U.S. 307 (1982)); Perry & Melton, *Precedential Value of Judicial Notice of Social Facts*: Parham *as an Example*, 22 J. FAM. L. 633 (1983-84); Perlin, *supra* note 9 (on *Barefoot*).

834. 105 S. Ct. at 1096.

835. *See also Ford*, 106 S. Ct. at 2606 n.4 (noting Florida's statutory safeguards ensuring fairness in incompetency to stand trial and involuntary civil commitment proceedings).

psychiatrists "always held dear or [took] for granted,"[836] the Supreme Court has articulated positions that appear to reflect both ambivalence and inconsistency about the "role and efficacy" of psychiatrists.[837] The Court has done this to such an extent that Paul Appelbaum has suggested that the Court's unwillingness to confront the problems raised by cases such as *Barefoot* "leave[s] the ball in psychiatry's court."[838]

Indeed, it often appears that the Supreme Court is playing an elaborate and ritualistic Alphonse-and-Gaston game with organized psychiatry. Extensive deference to psychiatric expertise is counseled in civil cases such as *Addington* and *Youngberg*, while suspicion that psychiatrists cannot detect malingering—a fear that has imprisoned the American legal system since the early nineteenth century[839]—permeates the writing of Justice Rehnquist and is clear in Justice O'Connor's *Ford* opinion. If psychiatrists are competent to testify as to dangerousness (in civil and criminal cases), and to make nearly-unfettered treatment decisions in state-run institutions, why are they not competent to ferret out the spurious insanity defense pleader[840] or the competent death row inmate who seeks to avoid execution? This question becomes even more perplexing since the only contemporary credible evidence now available reveals that there are objective medical tests[841] which can verify the presence of the full range of serious neurological disorders and disability suffered by the latter universe of defendants.

The Court, in short, appears paradoxically fascinated and repelled by the role of psychiatry in the criminal trial process. While it eagerly welcomes *disreputable* evidence (in *Barefoot*), it uses *Jones* to symbolically narrow the universe of cases in which a psychodynamic explanation of aberrant behavior (*i.e.*, insanity defense testimony) will be offered. On one hand, the Court suggests, psychiatrists are competent experts and this in the area where all of the leading psychiatrists speak with a unified voice, saying "We're not." On the other hand psychiatrists are little more than shamanistic wizards[842]

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836. Sadoff, *Changing Laws and Ethics for Psychiatrists*, 5 BULL. AM. ACAD. PSYCHIATRY & L. 34, 39 (1977).

837. Malmquist, *supra* note 13, at 137.

838. Appelbaum, *supra* note 22, at 1004.

839. *See* Rodriguez, LeWinn & Perlin, *supra* note 9, at 404 (quoting Dr. Isaac Ray; *see supra* note 765). *See also* Nobles v. Georgia, 168 U.S. 398, 405-06 (1897) (if a right to trial by jury as to competency to be executed were to be conferred, "it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely *upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial after trial*") (emphasis added).

For what is probably the first recorded example of feigned insanity, see Cohn, *Some Psychiatric Phenomena in Ancient Law*, in A. CARMI, S. SCHNEIDER & A. HEFEZ, PSYCHIATRY, LAW AND ETHICS 59, 61 (1986) (David's decision to feign mental disorder so as to escape from King Saul; *see* 1 *Samuel* 21:13-16).

840. *See* Gerber, *The Insanity Defense Revisited*, [1984] ARIZ. ST. L.J. 83, 117-18 (discussing roots of President Nixon's charges that the defense has been subject to "unconscionable abuse by defendants"); *see also* MacKenzie, *New Code Would Alter Rules on Insanity*, Wash. Post, Oct. 12, 1975, at C6, col. 1. *See generally*, Perlin, *supra* note 502, at 860; Rodriguez, LeWinn & Perlin, *supra* note 9, at 401.

841. *See* Diamond & Louisell, *supra* note 141, at 1340 ("The psychological sciences differ from the biological sciences in that the subject matter of the former is not visible").

842. *See, e.g.*, W. BROMBERG, FROM SHAMAN TO PSYCHOTHERAPIST: A HISTORY OF THE TREATMENT OF MENTAL ILLNESS 2-3 (1975) (Bronze Age shamans first used magical aids to contribute to "mental ease"; attempts to invoke supernatural, "magical" powers "probably represents

B. *Sorting out Ambiguities and Searching for Symbols*

What should one make of this remarkable state of affairs?[843] To some extent the conflict may be no more than a reflection of the fact that, when dealing with the mentally ill the Justices of the Supreme Court are confronted by the same ambiguous emotions: "unconscious feelings, of awe, of fear, of revulsion, of wonder,"[844] which bring forth self-rationalization in all the rest of us. For the Court's apparent randomness to come a bit more clearly into focus, this "ambivalence and inconsistency"[845] must be considered in light of the powerful symbols of the insanity defense and the death penalty.[846] And this need is even greater in attempting to understand the cases (*Estelle* and *Greenfield* squarely; *Smith* and *Allen* collaterally) which are imbued with the *additional* layer of *Miranda* symbolism, an area of criminal procedure about which the Court finds itself hopelessly fragmented.[847]

1) *Symbolism in General*

If we define "symbol" in the Jungian sense—"the best possible expression for a complex fact *not yet clearly apprended by consciousness*"[848]—we can see that the cases and issues in question are rich with multiple symbols: the death penalty[849] and the insanity defense,[850] *Miranda*,[851] the trial process,[852] and, finally, the conflicting symbols of the "Warren Court"[853] and the "Burger Court."[854]

Making comprehension even more difficult is the reality that, in the law,

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the earliest form of psychotherapy"); Bazelon, *Psychiatrists and the Adversary Process*, SCIENTIFIC AMERICAN, Vol. 230, No. 6 (June 1974), at 18 ("Psychiary . . . is the ultimate wizardry"); Steadman, *Predicting Dangerousness Among the Mentally Ill: Art, Magic, and Science*, 6 INT'L J.L. & PSYCHIARY 381, 382 (1983) (discussing whether expertise in predicting dangerousness—"so central to the profession of psychiatry in the public's view"—"currently *can be* or *ought to be* considered science or magic or art") (emphasis in original); Gunn, *An English Psychiatrist Looks at Dangerousness*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 143, 147 (1982) ("The psychiatrist is after all the medicine man who heals anxiety, the man we call upon to take away our fears"). For a recent analysis in the popular press of the public's ambiguity, see *Bleak Days for Psychiatry: A Search For Answers*, 98 U.S. NEWS & WORLD REPORT (Feb. 25, 1985), at 73-74.

See also Barefoot, 463 U.S. at 926-27 n.8 (Blackmun, J., dissenting), *quoting* United States v. Alexander, 526 F.2d 161, 168 (8th Cir. 1975) (scientific evidence is "likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi").

843. *See* Dix I, *supra* note 44, at 217 (characterizing state of Texas law on use of expert testimony to predict dangerousness as an "incredible state of affairs").

844. Perlin, *supra* note 9, at 168.

845. Malmquist, *supra* note 13, at 137.

846. *See* H. WEINHOFEN, THE URGE TO PUNISH 144-45 (1956) ("We can put to death only creatures whom hatred and fear have convinced us are inhuman monsters").

847. *See generally* Stone, *supra* note 261.

848. Jung, *On Psychic Energy*, in 8 COLLECTED WORKS OF C.G. JUNG, THE STRUCTURE AND DYNAMICS OF THE PSYCHE 75 (Hull trans. 2d ed. 1972) [hereinafter COLLECTED WORKS] (emphasis added).

849. *See* Tyler & Weber, *supra* note 9.

850. *See* Bazelon, *The Dilemma of Criminal Responsibility*, 72 KY. L.J. 263 (1982-83) ("the insanity defense has become a scapegoat for the entire criminal justice system").

851. Saltzburg, *supra* note 20, at 199 n.335, citing G. WHITE, THE AMERICAN JUDICIAL TRADITION 354-65 (1976) (*Miranda* engendered more public furor than any other Warren Court decision).

852. *See generally*, J. FRANK, LAW AND THE MODERN MIND 18-20 (1935).

853. For a variety of relevant sources about the symbolic significance of the Warren Court, *see, e.g.*, Saltzburg, *supra* note 20, at 151-52 nn.1-10.

854. *See, e.g.*, THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T (V. BLASI, ed., 1983).

as in mysticism,[855] "no 'symbolic' object has only one meaning; it is always several things at once."[856] Moreover, "the very multiplicity of . . . symbols and symbolic processes prove that success [in reconciling and harmonizing them] is doubtful."[857] This is so, in part, because, not all components of the symbol can be "grasped by reason."[858] As Professor Erich Neumann has pointed out, "While this is perfectly obvious with straightforward symbols like the flag, the cross, etc., *it is also true of more abstract ideas in so far as these are concerned with symbolic realities.*"[859]

Perhaps an examination of how the court views each of the key symbols in the context of the cases in question will shed some helpful light on the major issues with which this Article is concerned.

a) *Symbols of insanity defense and death penalty*

It may thus be somewhat clearer why the members of the court—especially in badly-split opinions like *Ford*—invoke past sources "as symbolic assurances of truths about judicial disinterestedness and legal continuity . . . too complex to express literally in opinions."[860] While the court repressively articulates sets of "formulaic rules"[861] to insure that the death penalty does not remain "virtually an illusion"[862] and expresses concern that a deceptive defendant can avoid his rightful punishment,[863] it also understands—albeit unconsciously—that it must stop one step short of shocking the conscience[864] of the public by allowing the execution of the truly insane.[865]

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855. *See* J. FRANK, *supra* note 852, at 3-12 (on basic legal myths).

856. 14 COLLECTED WORKS, *supra* note 848, at 443 (Hull trans. 1963). Jung added that "we are all badly in need of the symbolic life" to "express the daily need of the soul." *The Symbolic Life*, in 18 COLLECTED WORKS, *supra* note 848, at 267, 274 (Hull trans. 1976).

857. *Psychology of the Transference*, 16 COLLECTED WORKS, *supra* note 848, at 163, 197 (Hull trans. 1954).

858. E. NEUMANN, THE ORIGINS AND HISTORY OF CONSCIOUSNESS 367 (Hull trans., Princeton/Bollinger paperback ed. 1970).

859. *Id.* (emphasis added).

860. Greenawalt, *supra* note 750, at 1011.

861. *See generally* Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985). Professor Nagel argues that the court's use of multi-pronged formulae distances the justices from their audience (the public) and their text (the Constitution). Also, its attempt to constrain the "activism" of the federal judiciary has "created an irresponsible judicial freedom, while its attempts to locate a middle ground between the fact-responsiveness of realism and the abstraction of conceptualism has in reality led to a regulatory, abstract, and adversarial perspective." *Id.*

862. Perlin, *supra* note 9, at 102.

863. As discussed above, *see supra* text accompanying notes 761-66, this is not a particularly new complaint. *See also, e.g.*, M. KAVANAGH, THE CRIMINAL AND HIS ALLIES 90 (1928) (charging that, because "skillful criminal lawyers" can turn insanity defense trials into "emotional disputes . . . in cases where insanity is presented as a defense, so many verdicts which outrage justice are returned"). On the use of the word "outrage" to describe insanity acquittals which puzzle and/or shock and/or frighten the public, *see* Perlin, *supra* note 478, at 859 n.6.

Similarly, the court's focus on the underlying admission of a criminal act as inherent in an insanity defense plea (*see Jones*, 463 U.S. at 364), is used as a partial justification of longer terms of institutionalization for individuals who enter such a plea. *See supra* text accompanying notes 656-64.

864. *See, e.g.*, Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STANFORD L. REV. 893, 902 (1977), analyzing prison conditions cases which have found eighth amendment violations for conditions which are so "base, inhumane and barbaric . . . so as to shock and offend a court's sensibilities." *See, e.g.* Burns v. Swenson, 430 F.2d 771, 778 (8th Cir. 1970), *cert. denied* 404 U.S. 1062 (1972); *see also* cases cited in Robbins & Buser, *supra*, at 902 n.65. *But*

To some extent, the "doctrine" which can be mined from the cases discussed reflects broad principles which are arguably a reasonably accurate portrayal of contemporaneous public opinion. There is a profound suspicion of the use of mental illness to exculpate criminal behavior and a concomitant fear that extension of certain procedural due process protections to mentally ill criminals, especially in a death penalty context, might either: 1) "open the floodgates" to spurious claims[866] or; 2) encourage duplicity.[867] Responding to these concerns, stringent procedural rules are adopted as a "safety net" to insure that mental illness defenses are not used to subvert commonly-held social values as to punishment or free will.

Since, however, there is still a significant fear of sanctioning state behavior that "shocks the conscience" or violates community standards of "fundamental fairness,"[868] in the case of a "goofier than hell" Glenn Barton Ake or a profoundly psychotic Alvin Ford, it is acceptable to approve of substantive or procedural constitutional protections which allows such an individual—but *only* such an individual—to "cheat the chair."[869] Again, this is a reflection of the way the Court's response mirrors the overwhelming ambivalence shown by the public[870] toward the role of psychiatry and psychiatrists[871] at

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see, Rhodes v. Chapman, 452 U.S. 337, 349 (1981) ("But the Constitution does not mandate comfortable prisons, and prisons of [the] type [in the case before the Court], which house prisoners convicted of serious crimes, cannot be free of discomfort").

865. *But see* Lewis, *supra* note 486 (high incidence of serious neurological disability in sample of death row inmates). *See also* SMITH, *supra* note 766, at 184 n.65 (in nineteenth century Britain, when convicts in Ford's position returned to sanity, they were not subsequently executed).

866. *See* Nagel, *supra* note 862, at 169-70 (discussing how public has misinterpreted—and overexaggerated the perceived-Draconian effects of, important, *symbolic* court decisions in such areas as criminal procedure, school suspensions, and libel requirements). For a discussion of symbolic issues affecting the disposition of insanity defense cases, see Perlin, *supra* note 9, at 91 n.1; *see generally* Bazelon, *supra* note 851.

See, for an excellent account of the response of prison officials to a court decision, J. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY 105-37 (1977):

> Since [Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967), on remand from 378 U.S. 546 (1964)], the Stateville [prison] elite defined the courts as the single greatest obstacle to "running the institution." Almost any discussion with administrators or top guards elicits the same invectives against the courts, which are said to be "for the criminal," "naive," "unsympathetic," and "ignorant" of the unique problems of administration in a maximum security prison.

Id. at 107.

867. *See supra* text accompanying notes 607, 621 (discussing Justices Rehnquist and O'Connor's opinions in *Ford* on this point).

868. Smith v. Murray, 106 S. Ct. 2672-74 (1986) (Stevens, J., dissenting) (criticizing majority for its cramped interpretation of "fundamental fairness" doctrine).

869. Again, Justice Rehnquist's lament as to the allegedly mentally disabled defendant who does not appear to be "incoherent or obviously confused or unbalanced," Wainwright v. Greenfield, 106 S. Ct. 634, 642 (1986) (Rehnquist, J., concurring), stands in stark juxtaposition with the findings of Dr. Lewis and her colleagues that, although none of the studied inmates appeared "*flamboyantly* schizophrenic," Lewis, *supra* note 486, at 840 (emphasis added), almost all suffered from serious psychiatric and/or neurological disability, *id.* at 841 (emphasis added).

870. *See* Steadman, *supra* note 842, at 386: "Is it possible that neither the profession nor the public wants to know how accurate psychiatric diagnoses are? Might the empirical facts dispel the magical power?" *But see*, Greenawalt, *supra* note 749, at 999 ("important stake" of litigants in "reasoned justification" of judicial decisions); *cf.* Nagel, *supra* note 861, at 169 (public perception often distorts constitutional requirements imposed by Supreme Court).

Compare e.g., Greenfield, 741 F.2d at 333 (paranoid schizophrenics often "quiet" and "capable of spawning complex, rational plans of action"), *with Greenfield*, 106 S. Ct. at 642 (Rehnquist, J., concurring) (request for lawyer tends to show defendant "is not incoherent, or obviously confused or unbalanced").

the "cutting edge" of the mental health and the criminal justice systems.[872]

It may thus not be coincidental that the procedural default doctrine is invoked successfully by the state in the case of the "sociopath" *Smith*, but *unsuccessfully* in the cases of the "totally crazy" *Ake* and the most-likely, similarly-situated *Greenfield*,[873] or that the Court was aware in *Smith* that the jury's death decision appeared to be premised on a putatively-untainted independent evidential ground as well: that the offense was "outrageously or wantonly vile, horrible or inhuman."[874]

On the other hand, the court continues to back away from its decisions of the early 1970's in *Jackson* and *O'Connor*, by overtly approving of *fewer* due process protections for individuals in "civil" contexts.[875] Beyond eviscerating much of the spirit, if not the *stare decisis* value of *Gault*[876] this is most important in the present context because, on the part of at least Justice Powell, this retrenchment extends to those already convicted and sentenced to death.[877]

This must all be sorted out in the context of other recent Supreme Court decisions dealing with other disabled populations; the institutionalized mentally retarded[878] and the non-institutionalized physically handicapped.[879] This latter case has triggered the resumption of a never-truly-dormant debate on the question of whether the Supreme Court is, as is the common wisdom, a countermajoritarian institution,[880] or whether it has be-

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871. *See* Bazelon, *supra* note 851, at 276-77.

Writing soon after *Estelle* was decided, Dr. Appelbaum noted:

> The pressure from courts and legislatures for psychiatrists to play a role in sentencing decisions should not come as a surprise to those who recognize the universal desire for someone else to make the hard decisions. Unwilling to ban capital punishment yet disturbed by the seemingly unfair manner in which it has been applied in the past, the Supreme Court has emphasized in its decisions the importance of individualizing the sentencing process. The justices seem to hope that if only enough data about the individual can be accumulated, decisions will be fairer, more consistent, and easier to make.
>
> In practice, it is unclear whether the use of psychiatric testimony accomplishes any of these ends. Psychiatrists' opinions about dangerousness—of dubious reliability—have often been accepted as definitive, while the courts are less sure what to do with their mitigating findings or "neutral" evaluations. The positivist belief that more information makes better decisions appears fallacious in this context. Society's demand for psychiatric input into these decisions may be serving as a substitute for some hard thinking about the purpose of punishment, and particularly about the role of the death sentence in the modern world.

Appelbaum, *Psychiatrists' Role in the Death Penalty*, 32 HOSPITAL & COMMUNITY PSYCHIATRY 761, 762 (1981) (footnote omitted).

872. *See Rodriguez Testifies on New Jersey's Insanity Defense*, 110 N.J.L.J. 453, 473 (1982), *quoted* in Perlin, *supra* note 478, at 863 n.26. *See also*, SMITH, *supra* note 761, at 3 ("Deciding between guilt and insanity has a symbolism transcending an individual's fate").

See also Note, *supra* note 662, at 840 (Supreme Court's *Jones* decision reveals "unwillingness" by court to "contradict public sentiment in such a controversial area").

873. *See supra* text accompanying note 278.

874. *See supra* note 342. *But see, Smith*, 106 S. Ct. at 2676-77 (Stevens, J., dissenting).

875. *See Allen*, 106 S. Ct. at 2995.

876. *See supra* text accompanying notes 440-46.

877. *See Ford*, 106 S. Ct. at 2610-11 (Powell, J., concurring).

878. Pennhurst State School & Hospital v. Halderman, 104 S. Ct. 900 (1984).

879. *See* Atascadero State Hospital v. Scanlon, 105 S. Ct. 3142 (1985).

880. *See, e.g.*, Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Review*, 73 GEO. L.J. 1665, 1666 n.4 (1984), discussing, *inter alia*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982).

come, is becoming, or wishes to become, a "supermajoritarian" body.[881] Although this issue is not dealt with squarely in the cases discussed, the decisions in question may prove to be a microcosm of this trend to supermajoritarianism.[882]

b) *Symbolism of* Miranda

In addition, the cases in question must be considered in light of the Supreme Court's continual tinkering with the contours of the *Miranda* doctrine in a variety of settings.[883] For these cases reflect the court's ambivalence—again—about *Miranda. Miranda* remains a punch-drunk fighter, reeling on the ropes, but not yet counted out. For empirical,[884] institutional,[885] and instrumental purposes,[886] the Court has chosen not to overrule it, although it continues to carve out new exceptions.[887] The Court's decisions are also so baffling as to make its doctrine, in Professor Bradley's phrase, "an enigma wrapped in a mystery."[888]

Whether the Court is responding implicitly to Professor Sunderland's observation that to overrule *Miranda* outright "would have such potential overtones that it would jeopardize the Court's status as an institution and the perceptions of citizens and commentators that the Court is adjudicating on the basis of constitutional principles,"[889] whether it sees *Miranda* as an aspect of what Professor Monaghan has characterized as "constitutional common law,"[890] or whether it is content to "simply bounce along from case to case in these areas with no principle at all to justify its course of ac-

881. *See generally*, Sherry, *supra* note 26, at 660-62. She sees decisions such as *Pennhurst II* as an ominous aspect of an "underlying agenda": "to change the Constitution from a document balanced between majoritarianism and countermajoritarian premises to one that is primarily majoritarian, and to transform the role of the court from the guardian of individual rights to the guardian of majority rule," *id.* at 662-63.

882. Elsewhere, for instance, Professor Sherry characterizes *Pennhurst II* as reflecting the Court's "aggressive majoritarianism," *id.* at 661 n.225, and "supermajoritarianism," *id.* at 660.

883. *See, e.g.*, New York v. Quarles, 104 S. Ct. 2626 (1984); Moran v. Burbine, 106 S. Ct. 1135 (1985); Oregon v. Elstad, 105 S. Ct. 1285 (1985). The Court in *Elstad* acknowledges that the decision makes the *Miranda* rules "murk[ier]," *id.* at 1297; according to Professor Bradley, the court's attempts to avoid the "clear rule of *Miranda*" in *Elstad* "makes the Justices look like shyster lawyers." Bradley, *supra* note 647, at 60.

884. The great weight of empirical evidence supports the conclusion that *Miranda*'s impact on the police's ability to obtain confessions "has not been significant." White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 19 n.99 (1986) (*citing* studies).

885. The Court's reluctance to overtly overrule established doctrine is not new. *See, e.g.*, J. FRANK, *supra* note 853, at 22-24, discussing Court's anti-trust policy, and the announcement of the "rule of reason" in Standard Oil v. United States, 221 U.S. 1 (1911).

886. *See* Rhode Island v. Innis, 446 U.S. 291, 305 (1980) (Burger, C.J., concurring): "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures. I would neither overrule *Miranda*, disparage it, nor extend it at this late date."

887. *See* New York v. Quarles, 104 S. Ct. 2626 (1984) ("public safety" exception).

888. Bradley, *supra* note 647, at 53.

889. Sunderland, *Self-Incrimination and Constitutional Principle*: Miranda v. Arizona *and Beyond*, 15 WAKE FOREST L. REV. 171, 201 (1979). *See generally* Wingo, *Rewriting* Mapp *and* Miranda: *A Preference for Due Process*, 31 U. KAN. L. REV. 219, 234-44 (1983). *See also* Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 169 (justices who regularly vote to limit *Miranda* "are almost surely sensitive to what would be the inescapably political overtones of a direct reversal").

890. Monaghan, *The Supreme Court, 1974 Term—Foreward: Constitutional Common Law*, 89 HARV. L. REV. 1, 15-20 (1975). *But see* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978); Wingo, *supra* note 891, at 238.

tion,"[891] Professor Sonenshein's reliance on Mark Twain[892] is probably apt; reports of the doctrine's death *are* exaggerated. While *Miranda*'s vigor is questionable, decisions such as *Estelle* and *Greenfield* reflect a certain amount of institutional force supporting retention. As Professor Stone noted almost a decade ago, "*Miranda* is simply, but ambiguously, a given."[893]

c) *Symbol of trial process*[894]

To understand the significance of the decisions, it is necessary to examine more closely the ritualistic and religious meaning of the criminal trial process as a "moral parable . . . of an order defined by the prevailing ethical system."[895] Over half a century ago, Jerome Frank suggested—using psychoanalytic terminology[896]—that the law often functions as an unconscious parent symbol. "The Law—a body of rules apparently devised for infallably determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for Father-as-Infallible-Judge."[897]

In this construct, the criminal law, "symbolized by policeman and judge, is an ever-present threat of force, a punitive superego,[898] even when not in consciousness."[899] This is reflected, unconsciously, in the motivations

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891. Monaghan, *supra* note 892, at 15-20. *See, e.g.*, Note, *Criminal Procedure—The Public Safety Exception to* Miranda v. Arizona—New York v. Quarles, 21 WAKE FOREST L. REV. 169, 189 (1985) (*Quarles* an "unprincipled departure" from traditional fifth amendment interpretations).

892. *See* Sonenshein, *supra* note 20.

893. Stone, *supra* note 261, at 106. It is probably not coincidental that the two *Miranda* cases in which defendants "won" involved *psychiatric* issues rather than *police* practices; in *Estelle*, there was no pertinent activity by the police whatsoever, while in *Greenfield*, there was no suggestion that the police were at fault in their delivering the *Miranda* warnings to the defendant.

894. *See* Hart & McNaughton, *Evidence and Inference in the Law*, in EVIDENCE AND INFERENCE 48, 52 (D. Lerner, ed., 1958) (lawsuit is ritual that is "society's last indispensable effort to secure the peaceful settlement of social conflicts"); *see* Tribe, *Trial By Mathematics*, 84 HARV. L. REV. 1329, 1376 n.151 (1971).

895. ROCHE, *supra* note 823, at 245. Roche defines the criminal trial as "an operation having a religious meaning essential as a public exercise in which the prevailing moral ideals are dramatized and reaffirmed." *Id.*

896. It is not necessary to accept a psychoanalytic vision of the universe to concede the symbolic significance of the trial process.

897. J. FRANK, *supra* note 853, at 18.

898. On the meaning of "superego" in this context, *see generally* C. SCHOENFELD, PSYCHOANALYSIS AND THE LAW 22-32 (1973). "[T]he superego . . . performs such functions as setting moral and ethical standards, evaluating thought and actions in light of these standards, granting rewards (self praise, for example) for moral conduct and demanding repentance and punishment for punitive behavior." *Id.* at 22 (footnotes omitted). *See also* E. BERGLER, THE SUPEREGO (1952); C. BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS (1957).

899. J. MARSHALL, INTENTION IN LAW AND SOCIETY 198 (1968).

On the need for "rational settlement" in criminal cases, see Hall, *supra* note 703, at 723:

> Criminal procedure is a microcosm of universal significance. It is the repository of present understanding of serious controversy-solving as well as the promise of any enduring solution of major conflict in any field whatever. For in the procedure of criminal law, we read the history of man's halting circuitous ascent from resort to vengeful feud and sheer annihilation to that of peaceful and intelligent adjudication. To appreciate both the conceit and the solemnity of such endeavor, one must recall, also, the long history of superstitious reliance on chance as well as that of dependency upon the Oracle or other authority. The almost unimaginable advance represented by modern criminal procedure has not meant progress merely of professionals. Criminal procedure is a community's way of life in its areas of greatest stress. If rational settlement is possible here, where emotion and instinctual drive beat hardest upon restraint and intelligence, it should be possible in every

of those who seek to punish offenders by the most repressive means,[900] and, consciously, by the "marked" increase in punitiveness on the part of the public towards criminal defendants charged with violent crime.[901] The law, in the words of Lon Fuller, must respond to an "inner morality,"[902] that "there must be rules of some kind, *however fair or unfair they may be.*"[903]

In short, rules such as the one announced in *Sykes* and extended in *Smith* must be seen as a reflection of both the law's unconscious need to punish as well as its internal need for some kind of clear structure so as to make the legal process "not so much 'sublimation mechanisms for combat feelings and the expression of grudges,' as rational investigations of the factual bases of controversies."[904]

In a recent article, Professor Bradley has suggested that there is an "uncertainty principle"[905] at work in the judicial process:

> [A]ny attempt to achieve certainty regarding any important con-

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field of human conduct. Hence the current undertaking for revision of federal criminal procedure, though it demands the nicest of technician's skill, in its wider significance challenges American scholarship to understand its basic complex nature and the ramifications of its social as well as its legal functions.

900. *See, e.g.*, WEIHOFEN, *supra* note 847, at 28.

901. *See* J. GORECKI, CAPITAL PUNISHMENT: CRIMINAL LAW AND SOCIAL EVOLUTION 105-10 (1983). *See id.* at 110 (indignation and anger are the precipitant feelings of the public's "increasingly punitive mood"). This, of course, is nothing new. *See, e.g.*, SMITH, *supra* note 766, at 185, n.79, citing M. EGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850, 179-87 (1978); D. PHILIPS, CRIME AND AUTHORITY IN VICTORIAN ENGLAND: THE BLACK COUNTRY 1835-1860 (1977); J. TOBIAS, CRIME AND SOCIETY IN THE NINETEENTH CENTURY (1972).

902. L. FULLER, THE MORALITY OF LAW 43 (1964).

903. *Id.* at 47 (emphasis added).

For other views on this point, see J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND LAW 15-32 (1967).

904. Schoenfeld, *supra* note 899, at 32, *quoting*, in part, Smith, *Components of Proof in Legal Proceedings*, 51 YALE L.J. 537, 575 (1942). Concludes Schoenfeld on this point: "Hopefully, the mature superego will help to supply the impetus needed to achieve this goal and, in so doing, help to narrow the gap between man's moral strivings and the law." *Id.*

Schoenfeld's views on the death penalty appeared to have changed significantly since the publication of his text in 1973, when he suggested that "the failure of efforts to abolish timeworn and counterproductive retributive punishments . . . may well reflect in part the disinclination of the immature and undeveloped superego to abandon its demand for talion vengeance." *Id.* at 28. Since that time, he has employed psychoanalytic interpretative techniques in an attempt to understand the arguments proffered by capital punishment abolitionists, and he has concluded that those arguments are "so seriously flawed . . . as to cause one to wonder whether the abolitionists who espouse them are moved by unrecognized unconscious motives," including the "unconscious identification with the criminals whose lives they seek to protect." Schoenfeld, *The Desire to Abolish Capital Punishment: A Psychoanalytically Oriented Analysis*, 11 J. PSYCHOLOGY & L. 151 (1983); *cf.* Perlin & Sadoff, *The Adversary System*, in I. KUTASH *et al*, VIOLENCE: PERSPECTIVES ON MURDER AND AGGRESSION 394, 402 (1978), quoting D. ABRAHAMSEN, THE PSYCHOLOGY OF CRIME 3 (1964) (law-abiding citizens "unconsciously identify with the criminal because of their latent anti-social tendencies and somehow vicariously demand and accept the punishment to relieve their own guilt feelings").

On the other hand, Schoenfeld has suggested that the continued support for the use of hypothetical questions (*see, e.g. Barefoot*, 463 U.S. at 903-05), may be "irrational and unconscious," a vestigial remnant of an earlier period when "word forms were endowed with powerful, magical qualities." Schoenfeld, *A Psychoanalytic Approach to the Law of Evidence*, 13 J. PSYCHIATRY & L. 109, 116 (1985).

905. Bradley, *supra* note 647, at 2 n.5. The phrase is borrowed from the Hysenberg Uncertainty Principle, a now-accepted theorem of nuclear physics: it is impossible to ascertain with complete accuracy both the position and velocity of a particle because the process of measuring one characteristic introduces great uncertainty in the measurement of the other.

> stitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles. *The process of rendering a decision will tend to distort the issue decided as well as the applicable precedents and doctrines.*[906]

As the Court's decisions "degenerate into incomprehensibility,"[907] and its efforts at clarification breed "obfuscation,"[908] the Court should abandon, in Professor Bradley's view, its beliefs in the "Wizard of Oz of legal certainty."[909] The Court should instead acknowledge that it cannot "take the place of God in this secular age,"[910] and attempt to act so as to "avoid insofar as possible, causing undue confusion in the legal community and society at large."[911] While this advice is probably salutary, until there is some effort at understanding the symbolic value of the trials that are the starting points of all of the doctrines being developed in these cases, it is likely that the uncertainty documented by Professor Bradley will continue unabated.

d) *Symbols of the Burger Court and the Warren Court*

The Court's sense of these cases must also be considered in light of the public's view of the Burger Court (and, circularly, the Burger Court's view of the public's view of itself) in contrast to how the public apparently perceived the Warren Court. If Professor Kurland is right when he suggests that the Warren Court "failed abysmally to persuade the people that its judgments have been made for sound reasons,"[912] it should be no surprise that the Burger Court's decisions appear to speak specifically to the public's "collective conscience."[913] Whereas the Warren Court was (and, perhaps more importantly, was *viewed as being*) "the storm center of creativity in American life"[914] or an "engine of social reform"[915] (thus becoming "a conspicuous target for criticism"),[916] the Burger Court (or, more accurately, the public's *perceptions* of the *Burger* Court)[917] reflected the view that "a majority of the country had had enough of judicial dynamism."[918]

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906. *Id.* at 2.

907. *Id.* at 7. *See id.* at 47-48, quoting from opinions of the court and of individual justices concurring and dissenting, describing court doctrine in fourth and first amendment cases, variously, as full of "mysteries," "intolerably confusing," "bizarre," and a "Tower of Babel."

908. *Id.* at 11.

909. *Id.* at 63.

910. *Id.* at 63; *see also, id.* at 64 n.365.

911. *Id.* at 3 n.9.

912. P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 205 (1970), *quoted in* Greenawalt, *supra* note 750, at 983 n.8.

913. The phrase is used in Holloway v. United States, 148 F.2d 665, 666 (D.C. Cir. 1945), *cert. denied* 334 U.S. 852 (1948). *See generally* on the "collective psyche," C. JUNG, COLLECTED PAPERS IN ANALYTICAL PSYCHOLOGY 462 (2d ed. 1922), on archetypal symbols, C. JUNG, PSYCHOLOGICAL TYPES 475-76 (Baynes trans. 1924). On the "collective unconscious," *see generally* C. JUNG, CONTRIBUTIONS TO ANALYTICAL PSYCHOLOGY 157 (Baynes & Baynes trans. 1928): "Political, social and religious conditions influence the unconscious, since all the factors which are suppressed in the conscious religious or philosophical attitude of human society accumulate in the unconscious." Jung's theories on the development of the collective unconscious are elaborated upon in NEUMANN, *supra* note 859, at xv-xvi, 90, 212-13, 249-50.

914. Frank, *supra* note 768, at 121.

915. Howard, *supra* note 771, at 8.

916. *Id.* at 7.

917. *See, e.g.*, BLASI, *supra* note 855.

918. Frank, *supra* note 768, at 128.

As Professor Saltzburg reminds us, the basic check on the Supreme Court is "public pressure";[919] the Court's institutional capital is "exhaustible,"[920] and its members are aware that the general public viewed the Warren Court as having "coddl[ed] criminals,"[921] as having "tilt[ed] the balance of advantage toward the suspect or the accused,"[922] and otherwise producing "intolerably confusing" doctrine.[923] This later theme has been explicitly articulated by Justice Rehnquist in his dissent in *Florida v. Royer*,[924] a fourth amendment case, where he noted that a search invalidated by the majority "would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of the Court's fourth amendment jurisprudence."[925]

Professor Nagel has suggested that the style in which the Burger Court majority has written many of its important opinions—reflecting a "self-absorption with formulae"[926]—has served as a conscious means of encouraging, yet simultaneously appearing to make more "natural and acceptable," the judiciary's "adversarial relationship with the general culture."[927] Such a style, Nagel had previously asserted, demonstrates a "stark" contrast "to the overt assertions of moral authority common in the famous Warren Court opinions."[928] Even in cases where the Burger Court has approved "potentially large increments in judicial power,"[929] it has used a "[l]egalistic style [suggesting] traditional judicial caution"[930] to defuse political opposition,[931] but with the result that "[l]awyers, judges, and scholars point sarcastically and hopelessly to the bewildering proliferation of concurring and dissenting opinions, and to the apparently inexplicable reversals of tone and reasoning."[932]

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919. Saltzburg, *supra* note 20, at 208.

920. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 138-39 (1980).

921. Stanford Note, *supra* note 338, at 479.

922. Saltzburg, *supra* note 20, at 152, and *see* sources cited *id.* at nn.6-10; *see also* Stanford Note, *supra* note 338, at 479 n.8.

923. Robbins v. California, 453 U.S. 420, 430 (1981) (Powell, J., concurring); *see also*, Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981) (Burger, C.J., dissenting).

924. 460 U.S. 291 (1983).

925. *Id.* at 520 (Rehnquist, J., dissenting).

926. Nagel, *supra* note 861, at 183. *Compare, e.g.*, the formulae announced in *Ake*, 105 S. Ct. at 1097 (defendant entitled to psychiatric assistance in preparing insanity defense where he can make an "ex parte threshold showing . . . that his sanity is likely to be a significant factor in his defense"), *with* the one suggested in *Ford*, 106 S. Ct. at 2610 (Powell, J., concurring) (state may presume defendant sane at sentence time and may require a "*substantial* threshold showing of insanity merely to trigger the hearing process") (emphasis added).

927. *Id.* at 210.

928. Nagel, *supra* note 19, at 235.

929. *Id.* at 233-34, discussing school desegregation cases—Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979)—which "substantially undercut the restrictions that the Court had earlier announced in its efforts to protect local governments from overreaching by federal district courts."

Prof. Nagel has implied that the school desegregation decisions were seen as somewhat less antagonistic to the "general culture" (and thus were more palatable to the general public) in that they instead "attack[ed] an aspect of a largely regional culture." Nagel, *supra* note 861, at 212.

930. Burger Comment, *supra* note 19, at 236.

931. *See* Greenawalt, *supra* note 750, at 1008 (hypothesizing on the impact that a judge's perception that a decision will cause "tremendous resentment and considerable resistance" will have on the language and scope of the ultimate drafted opinion).

932. Burger Comment, *supra* note 19, at 236 (footnotes omitted).

The opinions under consideration here seem to support Professor Nagel's gloomy positions.

2) *Conclusion*

What does all of this mean? The Court seems to agree (perhaps unconsciously) with Professor Nagel that it cannot "routinely assault [the general] culture,"[933] and that it must, in Professor Greenawalt's phrase, invoke sources "as symbolic assurances of truths about . . . legal continuity that are too complex to express literally in opinions."[934] It thus, in Professor Resnik's phrase, uses procedure, most importantly, in the *Smith* case,[935] as "a device for producing outcomes."[936]

In all cases, symbols, public perceptions, and internal, perhaps unconscious ambivalences, are shuffled, juggled, and eventually dealt out, as if all parties were playing the game memorialized by Mark Harris in *Bang the Drum Slowly* as TEGWAR: The Exciting Game Without Any Rules.[937] The Court, in the end, remains "a prisoner of external symbols and internal impulses."[938] Until it begins to understand this, its procedural and substantive decisions will continue to defy easy comprehension.

While the Court desires to give the illusion of alleviating confusion[939]

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933. Nagel, *supra* note 861, at 212.

934. Greenawalt, *supra* note 750, at 1011.

935. But also in *Jones* and *Barefoot* as well.

936. Resnik, *supra* note 703, at 840.

It is especially ironic that the Court has adopted such a repressive and punitive approach to this procedural question, when, in another context, it has sneeringly brushed aside as "Kafkaesque" an argument in a nuclear power case that failure on the part of the Atomic Safety and Licensing Board to require additional environmental impact reports by the Advisory Committee on Reactor Safeguards mandated supplemental administrative proceedings. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557 (1978).

Concluded Justice Rehnquist on this point:

> To say that the Court of Appeals' final reason for remanding is insubstantial at best is a gross understatement. Consumers Power first applied in 1969 for a construction permit—not even an operating license, just a construction permit. The proposed plant underwent an incredibly extensive review. The reports filed and reviewed literally fill books. The proceedings took years and the actual hearings themselves over two weeks. To then nullify that effort seven years later because one report refers to other problems, which problems admittedly have been discussed at length in other reports available to the public borders on the Kafkaesque. Nuclear energy may some day be a cheap, safe source of power or it may not, but Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. . . . [A] single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below, must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding.

Id. at 557-58.

The juxtaposition is startling: while it is "Kafkaesque" to require administrative hearings in a nuclear power case (where an administrative agency arguably omitted a portion of a statutorily-mandated report (*see* 42 U.S.C. § 4321)), it is not similarly "Kafkaesque" to sanction the execution of a criminal defendant (where it was, according to the dissenters, "absolutely clear" (*see Smith*, 106 S. Ct. at 2675 (Stevens, J., dissenting)), that the merits issue was decided incorrectly, and where there had been some attempts at issue preservation at both the trial and state appellate levels. (My thanks to my colleague David Schoenbrod for putting me on the trail of the *Vermont Yankee* case; I take full responsibility for the gloss put on it).

937. M. HARRIS, BANG THE DRUM, SLOWLY 8, 48 (1956); *see also*, M. HARRIS, THE SOUTHPAW (1953).

938. Perlin, *supra* note 9, at 169.

939. Bradley, *supra* note 647, at 3 n.9.

(as a palliative to the public's dissatisfaction with its frequently impossible-to-comprehend opinions),[940] because of its own ambivalence it is helpless to do so. Because it has not dealt with the *roots* of its ambivalence, it "mischaracterizes . . . precedents, obfuscates the central issues . . . [and] adopts startling and unprecedented methods of construing constitutional guarantees."[941]

Whether or not the Court has fallen into a "doctrinal abyss"[942] is not clear. Although most remain premised on what Professor Berger has called the Court's "rockbottom focus on 'fundamental fairness,' "[943] or what the majority of the Court itself has characterized as a "fundamental miscarriage of justice" rule,[944] there are *some* doctrinal threads that can be drawn from the decisions in question, as reflected by the Court's fear of executing the "truly insane" so as to "shock the [public's] conscience." Even here, however, the decision are laden by symbols which continue to imprison the Court.

Schoenfeld has suggested that the law can avoid imposing criminal liability upon the insane "because punishing them, unlike punishing criminals, fails to serve the public's inner needs."[945] On the other hand, if we believe that the defendant is *feigning* insanity (a belief which has permeated the American legal system for over a century, and which has been considered seriously by some of our most respected jurists),[946] it is not unreasonable to expect an even *more* punitive attitude toward *these* lawbreakers: they have made a "play" for our unconscious, and have come up short.[947]

If these symbols—and the unconscious feelings on the part of the Court's members that they reflect—can be acknowledged and weighed, then, perhaps, some sort of doctrinal consistency might emerge. Until that time, however, the cases will be decided as they have been all along: out of consciousness.

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940. *See* Burger Comment, *supra* note 19, at 236-37.

941. *Elstad*, 105 S. Ct. at 1299 (Brennan, J., dissenting).

This confusion may, surprisingly, satisfy one of the public's inner needs. Professor Howard, for instance, has suggested that our "eclectic[]" roots—reflecting a tension between constitutionalism and natural law—have led us to "abide a fair degree of contradiction," one of the earmarks of the Burger Court. Howard, *supra* note 771, at 28.

But see Wales, *supra* note 11, at 105 (Judge Bazelon—the "champion of candor in judicial decisionmaking"—dedicated his career to "preventing others from sweeping problems 'under the rug of a doctrine that saves our faces by hiding our troubles,' " quoting United States v. Carter, 436 U.S. 200, 211 (D.C. Cir. 1970) (Bazelon, C.J., concurring)). The battles between Judge Bazelon and Chief Justice Burger on the District of Columbia Circuit Court of Appeals are legendary. Perlin, *supra* note 9, at 168; *see, e.g.*, Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968); Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).

942. *See supra* note 18.

943. Berger, *supra* note 728, at 99.

944. Engle v. Isaac, 456 U.S. 107, 135 (1982).

945. C. SCHOENFELD, PSYCHOANALYSIS APPLIED TO THE LAW 31 (1984), discussing Schoenfeld, *Law and Unconscious Mental Mechanisms*, 28 BULL. MENNINGER CLINIC 23, 28 (1964).

946. *See, e.g.*, Lynch v. Overholser, 369 U.S. 705, 715 (1962) (Harlan, J.); United States v. Brown, 478 F.2d 606, 611 (D.C. Cir. 1973) (Leventhal, J.), quoting *Lynch*. See generally, for a thorough and helpful discussion of this phenomenon, Margulies, *supra* note 33, at 806-07 n.85.

947. *See* Rodriguez, LeWinn & Perlin, *supra* note 9, at 401-02, and *id.* at 402 n.32 (defendants whose insanity defense was rejected received disproportionately longer terms of imprisonment that defendants convicted of similar offenses who did *not* raise the defense).