The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence

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INTRODUCTION

The relationship between mental disability and the death penalty has always been a troubling and contentious one. It has spawned some of the most pervasive and perplexing myths in all of criminal procedure jurisprudence. It has occupied an important place on the Supreme Court’s docket for the past decade.

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The author wishes to express his thanks to Lori Kranzer and Ilene Sacco for their invaluable research help, and Camille Brossard of the NYLS Library for her equally invaluable assistance.


2. For instance, despite reams of empirical evidence to the contrary, it is taken for granted that both the insanity defense and the incompetency to stand trial status exist primarily (if not solely) to “cheat the hangman,” that is, to enable individuals facing the death penalty to avoid capital punishment because of their mental status. Compare, e.g., Perlin, Barefoot’s Ake, supra note 1, at 95-97 (on this explanation of the insanity defense) and 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 14.01-17.17.

3. See generally Perlin, Doctrinal Abyss, supra note 1; Perlin, Barefoot’s Ake, supra note 1; 3 PERLIN, MENTAL DISABILITY LAW, supra note 2, §§ 14.01-17.17. Since 1990, the Court has decided three additional cases with inconsistent results: Riggins v. Nevada, 112 S. Ct. 1810 (1992) (violation of competent,
The decisions in these cases appear, at times, internally inconsistent, self-contradictory, random, and reflective of a "doctrinal abyss." Most importantly, the relationship has reflected our overwhelming societal ambivalence about the extent to which we are willing to punish, to mitigate punishment of, or in some cases to more enthusiastically punish, mentally disabled criminal defendants.

The jurisprudence that has developed in this areas reflects many of the same tensions that permeate our insanity defense jurisprudence,

between our desire and need to punish individuals who threaten our social order, our fear and loathing of the mentally disabled individual who is "factually guilty," our fear that behavioral explanations are inherently too exculpatory, our attempt to throw off the shackles of the medievalist and punitive spirit that still dominates us, and our desperate thirst for a mechanism that can accurately identify those few individuals whose mental disabilities are "so extreme" that their exculpation "bespeaks no weakness in the law." It reflects our intensified fears of "those people," fears that are exaggerated when the underlying criminal charge stems from a

insanity-pleading capital defendant's fair trial rights to subject him to administration of antipsychotic medication during pendency of trial); Medina v. California, 112 S. Ct. 2572 (1992) (state statute placing burden of proof on defendant in determination of incompetency to stand trial where defendant had been sentenced to death not unconstitutional); Godinez v. Moran, 113 S. Ct. 2680 (1993) (standard of competency for acceptance of guilty plea or waiver of counsel where defendant had been sentenced to death not higher than standard for competency to stand trial). In addition, another recent case involving a mentally disabled criminal defendant will likely have an important impact on this jurisprudence. See Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (statute allowing for continued institutionalization of non-mentally ill insanity acquittee unconstitutional). For discussions of these cases, see 2 PERLIN, MENTAL DISABILITY LAW, supra note 2, § 5.65A (Supp. 1993) (Riggins); 3 id. § 14.07A (Supp. 1993) (discussing Medina); 3 id. § 14.20A (Supp. 1993) (discussing Godinez), and 3 id. § 15.25A (Supp. 1993) (discussing Foucha). On the relationship between Foucha and Riggins, see Michael L. Perlin & Deborah A. Dorfman, Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence, 11 BEHAV. SCI. & L. 47 (1993).

4. See generally Perlin, Doctrinal Abyss, supra note 1.

5. On the way that this "culture of punishment" has, to a large part, driven our insanity defense policies, see MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE, ch. 2 (1994) [hereinafter PERLIN, JURISPRUDENCE].

6. See id. at 187 (quoting, in part, Sanford H. Kadish, The Decline of Innocence, 26 CAMBRIDGE L.J. 273, 284 (1968) (other footnotes omitted)).
seemingly inexplicable or random act. This "plays to" all of the worst "sanist" stereotypes that bedevil our attempts to craft a coherent jurisprudence in any aspect of the law that affects mentally disabled persons. Our fear of mentally disabled criminal defendants is thus reflected in court decisions, statutes, and lawyering decisions that punish defendants for raising mental status defenses, that reject the notion that it is morally appropriate for mental disability to exempt some defendants from criminal responsibility, and that perpetuate a series of cognitive distortions (heuristics) about mentally disabled persons and the way they act, premising these distortions on a false kind of "ordinary common sense."

This behavior arises in the face of a series of Supreme Court decisions that appear to say that that court has just the opposite expectation in a capital punishment context: that it expects that evidence of mental disability is a mitigating factor that can be raised by the defendant in an effort to persuade fact-finders that he should not be put to death. This series of cases is an outgrowth of the Supreme Court's apparent (or perhaps ostensible) attempts to insure fairness and individualization in death penalty cases. The court's decisions in these cases are silently based on at least three assumptions: (1) that it is appropriate for mental disability to be such a mitigating factor (an assumption with which Justice Scalia has recently taken sharp issue); (2) that jurors are capable of understanding the significance of such evidence; and (3) that jurors can be counted on to apply the law in this area conscientiously and fairly.

It is the third assumption that I will challenge in this paper. A review of case law, controlled behavioral research and

9. See generally Perlin & Dorfman, supra note 3.
11. See infra part I.
"real life" research not only casts grave doubt on its validity, but tends to reveal the opposite: that jurors generally distrust mental disability evidence, that they see it as a mitigating factor only in a handful of circumscribed situations (most of which are far removed from the typical scenario in a death penalty case), that lawyers representing capital defendants are intensely skeptical of jurors' ability to correctly construe such evidence, and that jurors actually impose certain preconceived schemas in such cases that, paradoxically, result in outcomes where the most mentally disabled persons (those regularly receiving doses of powerful antipsychotic medications) are treated the most harshly, and that jurors ten to over-impose the death penalty on severely mentally disabled defendants.14

Why is this? I argue that it results from a combination of important factors: jurors' use of cognitive simplifying devices (heuristics) in which vivid, negative experiences overwhelm rational data (and a death penalty case is a fertile environment for such cognitive distortions)15 and which reify their sanist attitudes,16 courts' pretextuality in deciding cases involving mentally disabled criminal defendants,17and courts' teleological decision-making in reviewing such cases.18

In Part I of this paper, I will (briefly) trace the Supreme Court's development of the law in this area, focusing on its Penry decision. In Part II, I will review the behavioral literature that has developed in this area, as well as the meager data base that looks at "real juror" behavior, along with a brief consideration of


14. See infra part II.
16. See Perlin, Sanism, supra note 8. See generally infra parts IV. C, IV. F.
18. See Perlin & Dorfman, supra note 3. See generally infra parts IV. E, IV. F.
how defense lawyers implicitly construe this evidence. In Part III, I will discuss the implications of the Supreme Court's 1992 decision of *Riggins v. Nevada,* with special attention to Justice Thomas's dissent and Justice Kennedy's concurrence. In Part IV, I will try to explain why jurors and judges act the way they do. In Part V, I will examine the Court's decisions in *Medina v. California* and *Godinez v. Moran* to weigh their possible impact on this body of law. Finally, in my conclusion, I will attempt to demonstrate the depths of the problem under consideration and will focus on the actual animators on juror and judicial behavior in these cases.

I. THE SUPREME COURT AND MITIGATION

Contemporary death penalty jurisprudence requires the sentencing authority to consider any relevant mitigating evidence that a defendant offers as a basis for a sentence less than death. This holding flows from the Court's initial "modern" decisions upholding the death penalty, in which it mandated that the sentencing authority be provided with adequate individualized information about defendants, and guided by clear and objective standards. These cases led Professor James Liebman and a colleague to craft a four-part test to be employed in determining the degree to which mitigation based on mental disorder would be proper in a capital case:

[1] whether the offender's suffering evidences expiation or inspires compassion;
[2] whether the offender's cognitive and/or volitional impairment at the time he committed the crime affected his responsibility for his actions, and thereby diminished society's need for revenge;
[3] whether the offender, subjectively analyzed, was less affected than the mentally normal offender by the deter-

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rent threat of capital punishment at the time he committed the crime; and
[4] whether the exemplary value of capital punishment, as objectively perceived by reasonable persons, would be attenuated by the difficulty those persons would have identifying with the executed offender.24

In Penry v. Lynaugh, the Court's most recent substantive decision on this question involving a mentally disabled defendant, the Supreme Court held that evidence as to the defendant's mental retardation was relevant to his culpability and that, without such information, jurors could not express their "reasoned moral response" in determining the appropriateness of the death penalty.25 There, the court found that assessment of the defendant's retardation would aid the jurors in determining whether the commission of the crime was "deliberate": without a special instruction as to such evidence, a juror might be unaware that his evaluation of the defendant's moral culpability could be informed by his handicapping condition.26 Also, in attempting to grapple with questions of future dangerousness or of the presence of provocation (both questions that must be considered under the Texas state sentencing scheme), jurors were required to have a "vehicle" to consider whether the defendant's background and childhood should have mitigated the penalty imposed.27 Without such testimony, the jury could not appropriately express its "reasoned moral response" on the evidence in question.28

Notwithstanding Justice Scalia's bitter attack on this requirement29 and the general tepidity of lower court responses,30 the

27. Id. at 322-26.
29. See Penry, 492 U.S. at 359 (Scalia, J., concurring in part and dissenting in part) ("It is an unguided, emotional, 'moral response' that the Court demands to be allowed — an outpouring of personal reaction to all the
Supreme Court continues to pay at least lip service to this doctrine.31

II. SOCIETY'S AMBIVALENCE32

Scholars have expressed their skepticism about the use of a mental illness defense in a capital punishment penalty phase, suggesting that such testimony raises issues of unpredictability and dangerousness to potentially suggest to the jury that the defendant "poses a continuing risk to society."33 While expert circumstances of a defendant's life and personality, an unfocused sympathy.") On the role of "empathy" evidence in death penalty litigation, see William S. Geimer, Law and Reality in the Capital Penalty Trial, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 285-86 (1990-91).

30. Compare, e.g., Demouchette v. Collins, 972 F.2d 651 (5th Cir.), cert. denied, 113 S. Ct. 27 (1992) (Texas statute not unconstitutional on grounds that it made it impossible for jury to give full mitigating effect to defendant's personality disorder), Coleman v. Saffle, 912 F.2d 1217 (10th Cir.), cert. denied, 497 U.S. 1053 (1990) (as medical records of defendant's competency evaluation were not "material," their disclosure was not required as exculpatory evidence) and DeLuna v. Lynaugh, 890 F.2d 720, 722 (5th Cir. 1989) (no Penry mitigation charge required where defendant deliberately failed to introduce mitigating evidence) with Ex parte Goodman, 816 S.W.2d 383, 1386 (Tex. Crim. App.) (1991) (court's failure to inform jury that it could consider mitigating evidence even were it not directly related to deliberateness or future dangerousness violated Eighth Amendment) and Klokoc v. Florida, 589 So. 2d 219 (Fla. 1991) (vacating death sentence in case of defendant with bipolar disorder who was under extreme emotional distress at time of murder).


On Penry's potential "real life" impact in Texas, see Lisa L. Havens-Cortes, Comment, The Demise of Individual Sentencing in the Texas Death Penalty Scheme, 45 BAYLOR L. REV. 49, 50 (1993) ("If Penry is applied literally, all inmates in Texas sentenced to receive the death penalty between 1976 and 1991 have a claim that the state imposed their death sentences in violation of the Eighth Amendment.").

32. This section is largely adapted from Perlín, JURISPRUDENCE, supra note 5, at 213-20.

witnesses have predicted (with near unanimity) that such a defense would be successful, research with mock jurors (and archival research in cases involving actual jurors) has revealed that (1) a defendant’s unsuccessful attempt to raise an insanity defense positively correlates with a death penalty verdict; (2) a mental illness defense is rated as a less effective strategy than other alternatives at the penalty phase (even including the alternative of raising no defense at all), and (3) jurors who are “death qualified” are more likely to convict capital defendants who suffer from nonorganic mental disorders.

Fact-finders demand that defendants conform to popular, common-sensical visual images of “looking crazy.” This further “ups the ante” for defendants raising such a defense. On the other hand, some empirical evidence suggests that a mental illness defense may be successful where the defendant presents expert testimony, where he has a history of psychiatric impairment (especially where he has sought treatment), and where he is able to present “objective” evidence of psychopathology.


34. See White, supra note 33, at 414-15 (discussing findings reported in Lawrence White, Trial Consultants, Psychologists, and Prediction Errors, CT. CALL 1 (Spring 1986)).


37. See, e.g., Lockhart v. McCree, 476 U.S. 162, 171-83 (1986) (upholding process of “death qualifying” jurors by which potential jurors with “conscientious scruples” against the death penalty are excluded from jury service).


39. See, e.g., State Farm Fire & Casualty Co. v. Wicka, 474 N.W.2d 324, 327 (Minn. 1991) (both law and society always more skeptical about putatively mentally ill person who has a “normal appearance” or “doesn’t look sick”). See generally Perlin, Myths, supra note 2, at 724-27. On the role of “ordinary common sense” in cases involving mentally disabled criminal defendants, see generally Perlin, Psychodynamics, supra note 10.

40. See White, supra note 33, at 416-18; Ellsworth, supra note 38, at 90; see also White, supra note 36, at 125 (besides simply feeling that “mental illness is no excuse,” jurors hostile to a mental illness defense focused on the possibility that the defendant was malingering, and on his prior failure to seek help for his problems). But cf. Louisiana v. Perry, 610 So. 2d 746, 781 (La. 1992) (Cole, J., dissenting) (“Society has the right to protect itself from those who would
Also, empirical evidence reveals that fact-finders will be more receptive to a mental status defense that does not involve "pliant" behavior, and that, in coming to their conclusions, jurors are likely to rely upon "implicit theories about the causes of violence."\(^{42}\)

Reconciliation of jurors' attitudes with court doctrine is made even more difficult by juror confusion over the proper role of mitigating evidence, their lack of recognition of mitigating evidence when presented with it, and their misunderstanding of its expected impact on their death penalty deliberations.\(^{43}\) In cases such as Penry where the defendant is mentally retarded, the problems may be further exacerbated due to jurors' miscomprehension of mental retardation, their use of stereotypes of mentally retarded persons, and their inability to understand the impact of retardation on a defendant's culpability.\(^{44}\)

The dilemma here is compounded further by the fact that many mental disorders of death row inmates are never identified:

[e]ither no one looks for them, or the defendants do not consider themselves impaired, so they never request specialized evaluations. Even when defendants are examined, they often are unaware of what symptoms might mitigate their sentences. Their inadequacies may make them less capable than other defendants of obtaining competent


\(^{43}\) Diamond, supra note 13, at 426-28.

representation or assisting their attorneys in documenting types of neurological impairments that might be important for purpose of mitigation.\(^{45}\)

It is thus no surprise to learn that many death row inmates exhibit signs of serious mental illness or significant mental retardation.\(^{46}\)

The riskiness of a mental illness defense must be considered in the context of yet other evidence that a significant percentage of actual jurors saw certain aspects of a defendant's demeanor — whether he looked passive, unremorseful, or emotionless — as a critical operative factor in determining whether or not to return a death sentence.\(^{47}\) Other studies reveal that a defendant's *attractiveness* is a significant trial variable (with jurors treating attractive defendants more leniently than unattractive defendants)\(^{48}\) and that a defendant's "emotionless appearance" will have negative trial consequences.\(^{49}\)

These findings are particularly problematic in light of the fact that a significant percentage of mentally disabled criminal defendants receive powerful psychotropic medication while awaiting trial.\(^{50}\) Among the side effects of such medications are akinesia and akathesia, conditions that may mislead jurors by

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\(^{45}\) Berkman, *supra* note 22, at 299 (footnotes omitted).


making the defendant appear either apathetic and unemotional or agitated and restless. Another important side effect, tardive dyskinesia — marked by “tic-like movements of the lips,” “worm-like contractions of the tongue,” “pouting, sucking, smacking and puckering lip movements,” and “expiratory grunts and noises,” — will inevitably make defendant appear less “attractive” to jurors.

It is precisely behaviors of this sort that “fit” into jurors’ pre-existing “schemas,” and it is one of the questions that must be considered in this context following the Supreme Court’s decision in *Riggins v. Nevada*, that raises, but only partially addresses, the scope of the underlying problem.

III. THE MEANING OF RIGGINS

The Supreme Court was confronted with this issue recently in *Riggins v. Nevada*, a case that may have signaled a shift in the court’s jurisprudence in this area. *Riggins* presented the court with the dilemma of whether involuntary administration of antipsychotic drugs to a criminal defendant during the pendency of his trial violates his right to a fair trial by impeding his ability to consult with counsel, by interfering with the content of his own medical and psychiatric treatment which may involve the . . . use of psychotropic drugs.”

51. See United States v. Charters, 829 F.2d 479, 494 (4th Cir. 1987), remanded 863 F.2d 302 (4th Cir. 1988) (en banc), cert. denied, 494 U.S. 1016 (1990) (heavily medicated defendant might give jury “false impression of defendant’s mental state at the time of the crime”); see also Claudine W. Ausness, Note, The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat From Those Who Are Fit, 66 Ky. L.J. 666, 669-70 (1978) (defendant can alienate jury “if he displays such inappropriate demeanor as grinning when gruesome details are discussed, losing his temper when witnesses maintain he is a violent man, or acting indifferent to the proceedings”).


testimony, or by negatively affecting his capacity to follow the proceedings.\textsuperscript{54}

Riggins had been charged with the murder of an acquaintance by multiple stab wounds. After he was arrested and jailed pending trial, he told a jail psychiatrist that he was “hearing voices in his head and having trouble sleeping,” and informed him that, in the past, he had been prescribed the antipsychotic drug, Mellaril.\textsuperscript{55} The psychiatrist then prescribed Mellaril, and subsequently increased the dosage to 800 mgs. per day, an unusually large amount (considered to be within the “toxic range”\textsuperscript{56} by one expert and a sufficient dosage to “tranquilize an elephant” by another).\textsuperscript{57} About ten weeks later, a competency to stand trial hearing was held (by which time Riggins’ dosage had been reduced to 450 mgs), and at which Riggins was found competent to stand trial.\textsuperscript{58}

The defendant then sought a court order that would have terminated the administration of antipsychotic drugs during the pendency of the trial, on the theory that, as the defendant was professing an insanity defense, he had a right to have the jury see him in “his ‘true mental state.’”\textsuperscript{59} After hearing conflicting expert testimony,\textsuperscript{60} the trial judge denied defendant’s motion; by this time, the defendant was receiving 800 mgs. again.\textsuperscript{61}

Defendant presented an insanity defense at trial, and testified that “voices in his head said that killing [the victim] would be justifiable homicide.”\textsuperscript{62} He was found guilty and sentenced to death.\textsuperscript{63} The Supreme Court reversed, holding that the use of

\textsuperscript{55} Riggins, 112 S. Ct. at 1812.
\textsuperscript{56} Id. at 1816.
\textsuperscript{57} Id. at 1819 (Kennedy, J., concurring). Other experts testified that the drug could make the defendant “uptight,” or could cause “drowsiness or confusion”; as amicus, the American Psychiatric Association stated that in extreme cases, the sedative properties of the drug might even “affect thought processes.” Id. at 1816.
\textsuperscript{58} Id. at 1812.
\textsuperscript{59} Id. On the ways that jurors make stereotypic assumptions about mentally disabled individuals based on visual imagery. See Perlin, Sanism, supra note 8; Perlin, Myths, supra note 2; Perlin, Psychodynamics, supra note 10; Perlin & Dorfman, supra note 3.
\textsuperscript{60} Riggins, 112 S. Ct. at 1813.
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
antipsychotic drugs violated defendant's right to fair trial, citing language from the Court's previous opinion in Washington v. Harper\(^{64}\) as to the impact of drug side-effects on constitutional decisionmaking, and construing Harper to require an "overriding justification and a determination of medical appropriateness" prior to forcibly administering antipsychotic medications to a prisoner.\(^{65}\)

The Riggins court focused on what might be called the "litigational side-effects" of antipsychotic drugs, and discussed the possibility that the drug use might have compromised "the substance of [the defendant's] trial testimony, his interaction with counsel, [and] his comprehension [at the] trial."\(^{66}\) In a concurring opinion, Justice Kennedy (the author of Harper) took an even bolder position. He would not allow the use of antipsychotic medication to make a defendant competent to stand trial "absent an extraordinary showing" on the state's part, and noted further that he doubted this showing could be made "given our present understanding of the properties of these drugs."\(^{67}\)

Justice Thomas dissented, suggesting (1) the administration of the drug might have increased the defendant's cognitive ability,\(^{68}\) (2) since Riggins had originally asked for medical assistance (while a jail inmate, he had "had trouble sleeping" and was "hearing voices"), it could not be said that the state ever "ordered" him to take medication,\(^{69}\) (3) if Riggins had been aggrieved, his proper remedy was a § 1983 civil rights action,\(^{70}\) and (4) under the majority's language, a criminal conviction might be reversed in cases involving "penicillin or aspirin."\(^{71}\)

Riggins is the Court's most expansive reading of the effect of psychotropic drugs' side-effects on an individual's functioning.\(^{72}\) Justice Kennedy's concurrence highlights the ways that such side-effects could imperil a fair trial:

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64. 494 U.S. 210 (1990) (limited right to refuse treatment for prison inmates). See generally 2 Perlin, Mental Disability Law, supra note 2, § 5.64A (Supp. 1993).
65. Riggins, 112 S. Ct. at 1815.
67. Riggins, 112 S. Ct. at 1817 (Kennedy, J., concurring) (emphasis added).
68. Id. at 1822-23 (Thomas, J., dissenting).
69. Id. at 1823-24 (Thomas, J., dissenting).
70. Id. at 1825-26. At his trial, Riggins had been sentenced to death.
71. Id. at 1826.
At all stages of the proceedings, the defendant’s behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility, his persuasiveness, and on the degree to which he evokes sympathy.\textsuperscript{73}

This is the clearest articulation of this position in any opinion by any Supreme Court justice.

Kennedy’s observations as to jurors’ responses to defendants who fail to display the proper “remorse and compassion” is also telling. Here he continues:

The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies.\textsuperscript{74}

His reliance here on a law review article that reports on the experiences of \textit{real} jurors in \textit{real} cases\textsuperscript{75} reflects an important sensitivity to the ways that jurors process clues and cues about the \textit{persona} of capital defendants. His integration of that data into an analysis of the ways that jurors may potentially respond to medicated defendants demonstrates a similar sensitivity to the way that visual images of mentally disabled defendants may be dispositive of juror decisionmaking on this question.

On the other hand, Justice Thomas’s opinion raises grave issues for defense counsel; had his position prevailed, would concerned and competent defense lawyers feel as if they were assuming a risk in \textit{ever} seeking psychiatric help for an awaiting-trial defendant?\textsuperscript{76} His analogizing antipsychotic drug side effects to

\textsuperscript{73} Riggins, 112 S. Ct. at 1819.
\textsuperscript{74} Id. at 1819-20.
\textsuperscript{75} Id. at 1820 (citing Geimer & Amsterdam, \textit{supra} note 47). \textit{See also} Zientek, \textit{supra} note 48, at 228 n.80 (discussing research reported in Norbert L. Kerr & Robert M. Bray, \textit{The Psychology of the Courtroom} 97 (1982), that jurors’ perceptions of a defendant’s emotional tone and level of remorse may affect the likelihood of conviction).
\textsuperscript{76} Cf. Buchanan v. Kentucky, 483 U.S. 402 (1987) (no error to admit, in rebuttal of defendant’s “extreme emotional disturbance” defense, report prepared following pretrial detainee’s request to be treated at state hospital pending trial), discussed in 3 Perlin, \textit{Mental Disability Law}, \textit{supra} note 2,
penicillin or aspirin may be disingenuous or it may be cynical. What is clear is that nowhere in the lengthy corpus of “right to refuse treatment” litigation is this position ever seriously raised. Its use here appears, again, to reflect the sanist use of “social science.”

Riggins may augur a shift in the Supreme Court’s mental disability/death penalty jurisprudence. On the other hand, Riggins’ victory could be seen as the triumph of a different kind of sanism: even though the court agreed that the involuntary imposition of medication violated his fair trial rights, it may be that the justices’ internal, visual images of a person who “looked crazy” inspired the decision. Also, the case did not give the court an opportunity to express an opinion on either the operative substantive insanity test, or the procedures employed either at trial or following an insanity acquittal. Perhaps the court’s reading of the case as a “fair trial” case allowed it to avoid the cognitive dissonance7 that would have been caused had the case been seen as an “insanity defense” case.

It is also not clear how subsequent judicial responses to cases such as Riggins will affect jurors in later cases. Will it have an impact on the use of mental disability as a mitigating factor in death penalty cases in general? Specifically, will it make it any less risky for capital defendants to raise mental illness in mitiga-


77. The only case in which a similar issue is raised is In re Salisbury, 524 N.Y.S.2d 352, 354 (Sup. Ct. 1988), holding that prior court authorization was not necessary before a state mental hospital could administer antibiotics to a patient, citing “[o]verwhelming public policy considerations” that made it “imperative” that hospitals could perform such “routine, accepted, non-major medical treatment which poses no significant risk, discomfort, or trauma to the patient.” Salisbury has never been cited in any subsequent case nor has it been mentioned in the law review literature.

78. See generally Perlin, Morality, supra note 17.
tion? In short, it is not clear what wider impact Riggins will eventually have on insanity defense jurisprudence.79

IV. Why Jurors Do What They Do

A. Introduction

I believe that it is impossible to understand the underlying dilemmas here without considering a bundle of motivating factors that affect behaviors of jurors and judges. Specifically, it is necessary to "unpack" juror "schemas"80 in an effort to determine why jurors so frequently misuse rational data in decision-making, especially in cases involving mentally disabled criminal defendants. I contend that the schemas that jurors employ are driven by the use of heuristics. These heuristic devices reflect jurors' sanist attitudes. These attitudes are shared by judges who decide cases pretextually, and justify those decisions teleologically. In this part, I will first explore the meanings of each of these concepts and will then consider how they "play out" in this context in two different dimensions: in the ways that lay persons rely inordinately on visual imagery as the most persuasive evidence of mental illness, and in the ways that the question of mental disability as a mitigating factor in death penalty cases is a Rohrsharch test for these attitudes.

B. Heuristics81

"Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks.82 The use of heuristics fre-

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79. As of yet, there have been few important constructions of Riggins by the lower courts. In one case, a District of Columbia appellate court judge dissented from a rehearing denial arguing — unsuccessfully — that Riggins compelled reconsideration of a decision allowing for the administration of forcible medication of a presently-incompetent to stand trial defendant. Khiem v. United States, 612 A.2d 160, 175 (D.C. 1992) (Ferren, J., dissenting from denial of petition for en banc rehearing), cert. denied, 113 S. Ct. 1293 (1993). In another, the Seventh Circuit relied in part on Riggins to find that parolees had a qualified liberty interest in remaining free from the administration of unwanted antipsychotic drugs. Felce v. Fiedler, 974 F.2d 1484, 1494 (7th Cir. 1992). In perhaps its most important application, the Louisiana Supreme Court read Riggins to confirm its broad reading of Harper that such drugs "may not be used as a tool for punishment." State v. Perry, 610 So. 2d 746, 747-50, 755 (La. 1992) (violation of state constitution to involuntarily medicate death row prisoner so as to make him competent to be executed).

80. See supra note 53.

81. The text infra accompanying notes 82-86 is generally adapted from Perlin, Pretexts, supra note 2, at 659-61.

82. See Perlin, Psychodynamics, supra note 10, at 12-17.
sequently leads to distorted and systematically erroneous decisions, and causes decisionmakers to "ignore or misuse items of rationally useful information."83 One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.84 Empirical studies reveal jurors’ susceptibility to the use of these devices.85

Thus, through the “availability” heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it. Through the “typification” heuristic, we characterize a current experience via reference to past stereotypic behavior; through the “attribution” heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes. Through the “hindsight bias,” we exaggerate how easily we could have predicted an event beforehand. Through the “outcome bias,” we base our evaluation of a decision on our evaluation of an outcome.86


Research confirms that heuristic thinking dominates all aspects of the mental disability law process whether the question is one of involuntary civil commitment law, medication refusal, questions of diagnostic accuracy, the insanity defense, incompetency to stand trial procedures, the relation-


89. See also Arkes, supra note 85; David Faust, Data Integration in Legal Evaluations: Can Clinicians Deliver on Their Premises?, 7 BEHAV. SCI. & L. 469, 480 (1989) (discussing results found in Robyn Dawes et al., Clinical Versus Actuarial Judgment, 243 SCIENCE 1668 (1989); Baruch Fischhoff, Debiasing, in JUDGMENT, supra note 85, at 442; Lichtenstein et al., Calibration of Probabilities: The State of the Art, in JUDGMENT, supra note 85 at 305.; Michael J. Saks, Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts, 14 LAW & HUM. BEHAV. 291, 294 (1990).

90. See PERLIN, JURISPRUDENCE, supra note 5, at 263-331; Perlin, Psychodynamics, supra note 10.

91. See Perlin, Facade, supra note 15; Perlin, Pretexts, supra note 2.
ship between homelessness and deinstitutionalization, or the scope of a therapist's duty to protect a third party from a tortious act by the therapist's patient or client (the so-called Tarasoff obligation).

C. Sanism

"Sanism" is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

Judges, legislators, attorneys and laypersons all exhibit sanist traits and profess sanist attitudes. It is no surprise that jurors reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes. Thus, one important stereotype is that "[m]ental illness can easily be identified by lay persons, and matches up closely to popular media depictions . . . and "comports with our common sense notion of crazy behavior." Another is that "it is and

94. The text infra accompanying notes 94-98 is generally adapted from Perlin & Dorfman, supra note 3, at 51-52.
96. The phrase "sanism" was, to the best of my knowledge, coined by Dr. Morton Birnbaum. See Morton Birnbaum, The Right to Treatment: Some Comments on its Development, in Medical, Moral and Legal Issues in Health Care 97, 106-07 (Frank J. Ayd, Jr., ed., 1974); see also Koe v. Califano, 573 F.2d 761, 764 (2d. Cir. 1978).
97. See generally Perlin, Sanism, supra note 8; Perlin & Dorfman, supra note 3.
should be socially acceptable to use pejorative labels to describe and single out the mentally ill; this singling out is not problematic in the way that the use of other pejorative labels to describe women, blacks, Jews or gays and lesbians might be.\textsuperscript{99} In partial recognition of the pervasiveness of jurors' myths about the insanity defense and insanity defense pleaders, for example, the courts of at least two states have sanctioned the expansion of \textit{voir dire} jury questioning specifically to determine of prospective jurors exhibit bias toward the use of a mental non-responsibility defense.\textsuperscript{100}

The entire criminal trial process caselaw is similarly riddled with other sanist stereotypes and myths. Examples include the omnipresent obsessive fear of feigned mental states,\textsuperscript{101} and the presumption of an absolute linkage between mental illness and

M. Cleckley, \textit{The Medico-Legal Dilemma: A Suggested Solution}, 42 J. CRIM. L. \& CRIMINOLOGY 729, 738 (1952) (contrasting lay perceptions of "insanity" with actual attributes of schizophrenia); Perlin, \textit{Myths}, supra note 2, at 727 n.608 (discussing Battalino \textit{v.} People, 199 P.2d 897, 901 (Colo. 1948) (defendant not insane where there was no evidence of a "burst of passion with paleness, wild eyes and trembling")).

99. Perlin, \textit{Sanism}, supra note 8, at 395. On the ways that negative characterization of mental illness and the mentally ill are used by prosecutors in criminal trial summations, see Randy V. Cargill, \textit{"Hard Blows" Versus "Foul Ones": Restrictions on Trial Counsel's Closing Argument}, \textit{ARMY LAw.}, Jan. 1991, at 20, 26; Thomas M. Fleming, Annotation, \textit{Negative Characterization or Description of Defendani, by Prosecutor During Summation of Criminal Trial, As Ground for Reversal, New Trial, or Mistrial — Modern Cases}, 88 A.L.R. 4th 8 (1991). On the descriptions used by members of Congress to describe mentally disabled individuals ("the demented," "the deranged," "lunatics," "madmen," "idiots and morons," "psychopaths and nincompoops"), see Motion for Leave to File and Brief for the New Jersey Department of the Public Advocate, Division of Mental Health Advocacy and American Civil Liberties Union of New Jersey as Amici Curiae, United States Dep't of Treasury (U.S. 1986) (No. 84-1904) (quoting legislative debate on 1968 gun control legislation).


dangerousness. Underlying these myths is one constant: the extraordinary fear of mentally disabled criminal defendants.

In this environment, it is easy to see how evidence of mental illness — ostensibly introduced for mitigating purposes — can be construed by jurors (or by judges) as aggravating instead. In one notorious Florida case, for example, a trial judge concluded that, because of the defendant's mental disability (paranoid schizophrenia manifested by hallucinations), "the only assurance society can receive that this man never again commits to another human being what he did to [the brutally murdered decedent] is that the ultimate sentence of death be imposed." 

D. Pretextuality

Sanist attitudes often lead to pretextual decisions. By this I mean simply that fact-finders accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decisionmaking, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blase judging, and, at times, perjurious and/or corrupt testifying. The reality is well known to frequent consumers of judicial services in this area: to mental health advocates and other public defender/legal aid/legal service lawyers assigned to represent patients and mentally disabled criminal defendants, to prosecu-


104. Berkman, supra note 22, at 299-300.


106. See generally Perlin, Pretexts, supra note 2; Perlin, Morality, supra note 17. This section is largely adapted from Michael L. Perlin, The ADA and Persons With Mental Disabilities: Can Sanist Attitudes Be Undone?, J. L. & Health (forthcoming 1994).

tors and state attorneys assigned to represent hospitals, to judges who regularly hear such cases, to expert and lay witnesses, and, most importantly, to the mentally disabled person involved in the litigation in question.

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of "morality" and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for a finding of incompetency to stand trial. Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the allure of simplifying cognitive devices in their thinking, and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.

Some pretextual decisions are based on phantasmic reasoning. In a recent case, turning on whether a defendant had the requisite specific intent to attempt to rob a bank, the trial court refused to allow the county jail psychiatrist to testify that he had been prescribing antipsychotic medication for the defendant for a specific time period, reasoning that such testimony might "be interfering with the treatment of [other] prisoners in jails


109. See, e.g., Cassia Spohn & Julia Homey, "The Law's the Law, But Fair Is Fair": Rape Shield Laws and Officials' Assessments of Sexual History Evidence, 29 Criminology: An Inter-Disciplinary J., 137, 139 (1991) (a legal reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law); cf. H. Richard Uviller, Tempered Zeal 116-18 (1988) (police sanction perjury in cases where Supreme Court has imposed constitutional rules that do not comport with officers' "own idea of fair play"); see also Tracey Maclin, Seeing the Constitution from the Backseat of a Police Squad Car, 70 B.U. L. Rev. 543, 580-82 (1990) (reviewing Uviller, supra, critically).

110. See, e.g., Perlin, Pretexts, supra note 2, at 644-52.

111. See, e.g., People v. Doan, 366 N.W.2d 593, 598 (Mich. App. 1985) (1985) (expert testified that defendant was "out in left field" and went "bananas").

112. See generally Perlin, Psychodynamics, supra note 10; Perlin, Pretexts, supra note 2; Saks & Kidd, supra note 86.
because [other] prisoners might ask for drugs to create the impression they need more drugs."\textsuperscript{113} Nothing in the case suggests that there was ever any evidence that spoke remotely to this issue; nonetheless, the Ninth Circuit affirmed as "not manifestly erroneous."\textsuperscript{114}

Testimony is then weighed and evaluated by frequently-sanist fact-finders.\textsuperscript{115} Judges and jurors, both consciously and unconsciously, frequently rely on reductionist, prejudice-driven stereotypes in their decisionmaking, thus subordinating statutory and caselaw standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' uses of the same sorts of heuristics as do expert witnesses further contaminate the process.\textsuperscript{116} Even when confronted with a clear body of contrary empirical evidence, judges often pretextually decide cases based on their vision of the socially-appropriate result.\textsuperscript{117}

\textbf{E. Teleology}\textsuperscript{118}

The legal system selectively — teleologically — either accepts or rejects social science evidence depending on whether or not the use of that data meets the \textit{a priori} needs of the legal system.\textsuperscript{119} In cases where fact-finders are hostile to social science teachings, such data thus often meets with tremendous judicial resistance, and courts express their skepticism about, suspicions of, and hostilities toward such evidence.\textsuperscript{120} Specifically, the skepticism toward statistical data and evidence about the behavioral sciences appears to stem directly from the belief that such data

\begin{itemize}
\item \textsuperscript{113} United States v. Still, 857 F.2d 671, 672 (9th Cir. 1988).
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{See generally} Perlin, \textit{Sanism}, supra note 8; Perlin & Dorfman, \textit{supra} note 3.
\item \textsuperscript{116} \textit{See generally} Perlin, \textit{Pretexts}, \textit{supra} note 2.
\item \textsuperscript{117} \textit{See, e.g.,} Gacy v. Welborn, 994 F.2d 305 (7th Cir.), \textit{cert. denied}, 114 S. Ct. 269 (1993) (affirming conviction in notorious multiple-homicide case notwithstanding body of evidence concluding jurors do not understand capital punishment instructions).
\item \textsuperscript{118} This section is largely adapted from Perlin & Dorfman, \textit{supra} note 3, at 52-54.
\item \textsuperscript{119} \textit{See, e.g.,} Paul Appelbaum, \textit{The Empirical Jurisprudence of the United States Supreme Court}, 13 AM. J.L. & MED. 335, 341-42 (1987).
\end{itemize}
are not "empirical" in the same way that "true" sciences are and therefore are not trustworthy. Social science data is seen as overly subjective and as falsifiable, and as being subject to researcher bias.

Courts are often threatened by the use of such data. Social science's "complexities [may] shake the judge's confidence in imposed solutions." Additionally, judges may be especially threatened by social science when it is presented to a jury, as such presentation may appear to undermine "judicial control" of trial proceedings.

Courts' general dislike of social science is reflected in the self-articulated claim that judges are unable to understand the data and are thus unable to apply it properly to a particular case. Courts tend to be shamefully poor in the application of such data; their track record has been "dreadful."

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122. Faigman, supra note 121, at 1016, 1026.


125. See, e.g., Perlin, Facade, supra note 15, at 986-93 (discussing decision in United States v. Charters, 863 F.2d 302 (4th Cir. 1988) (en banc), cert. denied, 496 U.S. 1016 (1990), which limited right of pretrial detainees to refuse medication). The Charters court rejected as incredulous the possibility that a court could make a meaningful distinction between competency to stand trial and competency to engage in medication decisionmaking:

[Such a distinction] must certainly be of such subtlety and complexity as to tax perception by the most skilled medical or psychiatric professionals. To suppose that it is a distinction that can be fairly discerned and applied even by the most skilled judge on the basis of an adversarial fact-finding proceeding taxes credulity.

Charters, 863 F.2d at 310.


at all clear, though, why courts should have such difficulty here when judges regularly decide complex cases in a wide array of social and scientific contexts.  

This dislike and distrust of social science data has led courts to be teleological in their use of this evidence. Social science literature and studies that enable courts to meet predetermined sanist ends are often privileged while data that would require judges to question such ends are frequently rejected. Judges often select certain proferred data that adheres to their pre-existing social and political attitudes, and use heuristic reasoning in rationalizing such decisions. Social science data is used pretextually in such cases and is ignored in other cases (especially death penalty cases) to rationalize otherwise baseless judicial decisions.

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130. On the courts' heuristic use of social science data, see Perlin, Pretexts, supra note 2, at 664-68.

131. James Acker, A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989, 27 Law & Soc'y Rev. 65, 80-81 (1993) ("The prevailing opinions in the Court's recent major capital punishment decisions have increasingly displayed an unwillingness to incorporate the results of relevant social science findings."); Phoebe Ellsworth, Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 177, 208 (Kenneth C. Haas & James A. Incardi eds., 1988) ("The parsimonious explanation for the failure of social science data to influence the Court in death penalty cases seems to be that the outcome of these cases is frequently a foregone conclusion.").

132. See Perlin, Pretexts, supra note 2, at 668-69 (discussing decisions in Barefoot v. Estelle, 463 U.S. 880 (1983) (testimony as to future dangerousness admissible at penalty phase in capital punishment case), McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting statistical evidence offered to show racial discrimination in death penalty prosecutions), and Charters, 863 F.2d 302 (curtailing rights of criminal defendant awaiting trial to refuse antipsychotic medication)).
Courts thus will take the literature out of context,\textsuperscript{133} misinterpret the data or evidence being offered,\textsuperscript{134} read such data selectively,\textsuperscript{135} and/or inconsistently.\textsuperscript{136} Other times, courts choose to flatly reject this data or ignore its existence.\textsuperscript{137} In other circumstances, courts simply "rewrite" factual records so as to avoid having to deal with social science data that is cognitively dissonant with their view of how the world "ought to be."\textsuperscript{138} Even when courts do acknowledge the existence and possible validity of studies that take a contrary position from their decisions, this

\begin{itemize}
\item \textsuperscript{133} Faigman, \textit{supra} note 129, at 577.
\item \textsuperscript{134} \textit{Id.} at 581.
\item \textsuperscript{135} Katheryn Katz, \textit{Majoritarian Morality and Parental Rights}. 52 ALB. L. Rev. 405, 461 (1988) (on courts' reading of impact of parents' homosexuality in child custody decisions); Tanford, \textit{supra} note 129, at 153-54. \textit{See}, \textit{e.g.}, Holbrook \textit{v.} Flynn, 475 U.S. 560, 571 n.4 (1986) (defendant's right to fair trial not denied where uniformed state troopers sat in front of spectator section in courtroom; court rejected contrary empirical study, and based decision on its own "experience and common sense").
\item \textsuperscript{137} \textit{See}, \textit{e.g.}, Barefoot \textit{v.} Estelle, 463 U.S. 880, 897-902 (1983); Faigman, \textit{supra} note 128, at 584 (discussing Parham \textit{v.} J.R., 442 U.S. 584 (1979)); \textit{see also} Watkins \textit{v.} Sowders, 449 U.S. 341 (1981) (refusal of courts to acknowledge social science research on ways that jurors evaluate and misevaluate eyewitness testimony).
\item \textsuperscript{138} The classic example is Chief Justice Burger's opinion for the court in \textit{Parham}, 442 U.S. at 605-10 (approving more relaxed involuntary civil commitment procedures for juveniles than for adults). \textit{See}, \textit{e.g.}, Gail Perry & Gary Melton, \textit{Precedential Value of Judicial Notice of Social Facts: Parham as an Example}, 22 J. Fam. L. 633 (1984):
\begin{quote}
The \textit{Parham} case is an example of the Supreme Court's taking advantage of the free rein on social facts to promulgate a dozen or so of its own by employing one tentacle of the judicial notice doctrine. The Court's opinion is filled with social facts of questionable veracity, accompanied by the authority to propel these facts into subsequent case law and, therefore, a spiral of less than rational legal policy making.
\end{quote}
\textit{Id.} at 645; \textit{see also} 1 \textit{PERLIN, MENTAL DISABILITY LAW, \textit{supra} note 2, § 3.72, at 423-37 (criticizing \textit{Parham} on these grounds); Winsor Schmidt, \textit{Considerations of Social Science in a Reconsideration of Parham \textit{v.} J.R. and the Commitment of Children to Public Mental Institutions}, 13 J. PSYCHIATRY \& L. 339 (1985) (same). On the Supreme Court's special propensity in mental health cases to base opinions on "simply unsupported" factual assumptions, see Stephen Morse, \textit{Treating Crazy People Less Specially}, 90 W. VA. L. Rev. 353, 382 n.64 (1987).
acknowledgement is frequently little more than mere "lip service." 139

F. Applying these principles

1. Introduction

Reliance on heuristics, sanist attitudes and pretextual and teleological decisionmaking all combine to distort the entire trial and conviction process in death penalty cases involving mentally disabled criminal defendants. In an attempt to make sense of the underlying problems, I will first look at some parallel findings that come from the behavioral and legal insanity defense literature, especially as they assess a defendant's visual appearance (an issue brought into sharp focus by Justice Kennedy's concurrence on Riggins v. Nevada). 140 Then, I will read the available relevant data on jury behavior and adequacy of counsel in similar factual contexts in an effort to better understand the true dimensions of this issue.

2. Visual imagery 141

Although the question under consideration here has not been widely studied, 142 there is an impressive data base looking at juror behavior in insanity defense cases that is certainly relevant here. First, and foremost, the public has always demanded that mentally ill defendants comport with its visual images of "craziness." 143 Yet, the lay public cannot, by using its intuitive

139. See, e.g., Washington v. Harper, 494 U.S. 210, 229-30 (1990) (prisoners retain limited liberty interest in right to refuse forcible administration of antipsychotic medications), in which the majority acknowledges, and emphasizes in response to the dissent, the harmful, and perhaps fatal, side-effects of the drugs. The court also stressed the "deference that is owed to medical professionals . . . who possess . . . the requisite knowledge and expertise to determine whether the drugs should be used." Id. at 230 n.12. Cf. id. at 247-49 (Stevens, J., concurring in part & dissenting in part) (suggesting that the majority's side effects acknowledgement is largely illusory).


140. 112 S. Ct. 1810, 1817 (1992). See supra part III.

141. This section is generally adapted from Perlin, Jurisprudence, supra note 5, at 252-58.

142. Valerie Hans, Death By Jury, in Haas & Inciardi, supra note 131, at 149, 169 ("We really know little about how jurors evaluate mitigating evidence.").

143. See generally, Sander Gilman, Seeing The Insane (1982) for a full historical overview. On the role of this demand in the development of mental disability law in general, see Perlin, Sanism, supra note 8.
"common sense" effectively determine who is or is not criminally responsible by whether or not the individual "looks crazy." 144

Thus, cases hinge on witnesses' failure to describe defendants as "raving maniacs," on lay testimony that "there was nothing unusual about defendant's appearance" in the days before the murder, or on police testimony that the same defendant "was neatly dressed and . . . seemed aware and mentally alert," 145 or on jail or sheriff personnel's testimony that the defendant exhibited no "unusual" behavior. 146 Revealingly, in describing the procedures that must be followed in pretrial psychiatric evaluations, a New York trial court judge set up this juxtaposition:

If the physician examines the defendant within hours or days of the event, he or she may observe that the defendant was disoriented and agitated or, at the other extreme, composed or feigning symptoms. 147

Jury studies have shown "pervasive judicial hostility" toward the insanity defense where it was not founded on "flagrant psychotic symptomatology." 148 To the lay person (the juror or the judge), the temporarily delirious patient "leaping over chairs and taking the broom-stick to hallucinatory monsters" still looks more genuinely psychotic than "a deeply disordered but calm and brittle schizophrenic." 149 In a decision that I can only characterize as bizarre, the New Mexico Supreme Court affirmed a conviction rejecting an insanity defense despite a post-verdict statement by a juror that "he could see the devil" in the defendant. Continued the juror:

144. State Farm Fire & Casualty Co. v. Wicka, 474 N.W.2d 324, 327 (Minn. 1991). See, e.g., Sheldon Glueck, Mental Disorder and the Criminal Law 31 (1925) (quoting John E. Lind, The Cross-Examination of the Alienist, 13 J. Crim. L., Criminology & Pol. Sci. 228, 229 (1922) (setting out "typical" juror response in cases of conflicting expert testimony: "the man doesn't look very crazy to us, anyhow").


146. Fulgham v. Ford, 850 F.2d 1529, 1532 (11th Cir. 1988).


THE SANIST LIVES OF JURORS

I saw in her right away. I saw in her witchcraft. I saw in her rebellion. I saw in her murder . . . I saw in her all these things because I am a spirited man.\textsuperscript{150}

Jurors "look for bizarre acts, sudden episodes, a defendant's genuine obliviousness to his own best concerns, and a pervasive inability to lead an ordinary life."\textsuperscript{151} A paper prepared by a former Texas Attorney General for the National District Attorneys Association notes anecdotally, "Our verdicts in Dallas indicate that if a man can earn a living, support himself and perhaps family, up to time of crime \textit{without drawing attention to self by crazy acts, they'll find him sane}.\textsuperscript{152} In short, for the insanity defense to be successful, the defendant must still appear "mad to the man on the street."\textsuperscript{153}

Insanity claims are also generally rejected where jurors find any significant measure of "planfulness" in the defendants' pre-crime actions:\textsuperscript{154}

The closer a defendant is to normality, the more public opinion is outraged by insanity acquittals. People are unwilling to excuse conduct that appears to have a rational criminal motive. Evidence of the ability to plan and premeditate a crime flies in the face of the public's perception of mental disease.\textsuperscript{155}

Chief Justice Rehnquist's vision duplicates popular sentiment. He concurred in \textit{Estelle v. Smith},\textsuperscript{156} urging a limited read-

\begin{footnotesize}
\begin{enumerate}
\item[150.] State v. Pierce, 788 P.2d 352, 354, 356 (N.M. 1990) (finding that defendant failed to demonstrate "actual prejudice," and characterizing these remarks as merely "eccentric").
\item[151.] THOMAS MAEDER, CRIME AND MADNESS 109 (1985).
\item[152.] W. Alexander, How To Meet the Insanity Defense 4 (undated manuscript).
\item[153.] ALAN STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 219 (1976). To some extent, it may be necessary for a defendant to look like this to convince a forensic psychiatrist as well. See White, \textit{supra} note 33, at 416-17 (discussing Anasseril Daniel et al., \textit{Factors Correlated With Psychiatric Recommendations of Incompetency and Insanity}, 12 J. PSYCHIATRY & L. 527 (1984) (psychiatrists more likely to recommend diminished capacity when defendant exhibits "bizarre behavior"). Cf. People v. Jackson, 199 Cal. Rptr. 848, 850 (Ct. App. 1984) (expert testified that defendant "can look and function in a controlled manner to the point where most other people wouldn't take notice").
\item[154.] Roberts et al., \textit{supra} note 41, at 209-10.
\item[156.] 451 U.S. 454 (1981) (holding that \textit{Miranda} applies to statements given to psychiatric expert witnesses called by the state to testify either as to a
\end{enumerate}
\end{footnotesize}
ing of the Court's holding.\footnote{157} Using reasoning "reveal[ing] a vision of mental disability that virtually mirrors public perceptions,"\footnote{158} Justice Rehnquist stressed the \textit{Estelle} defendant's failure to "invoke . . . [his] rights when confronted with [the state's expert's questions]";\footnote{159} in short, "since [the defendant] wasn't 'really crazy,' his failure to complain would be seen as probative."\footnote{160} In \textit{Wainwright v. Greenfield},\footnote{161} holding that defendant's request for counsel following the administration of \textit{Miranda} warnings was not probative of sanity, he again concurred:

[The request for counsel] is a perfectly straightforward statement tending to show that an individual is able to understand his rights and is not \textit{incoherent} or obviously \textit{confused} or \textit{unbalanced}.\footnote{162}

Again, Rehnquist focuses strictly on the defendant's external appearance.\footnote{163} Like the defendant described by Drs. Bromberg

defendant's sanity or the appropriate penalty to be imposed following conviction). \textit{See generally} Perlin, \textit{Doctrinal Abyss, supra}, note 1, at 23-28.


158. Perlin, \textit{Doctrinal Abyss, supra} note 1, at 82.


160. Perlin, \textit{Doctrinal Abyss, supra} note 1, at 82.


A better understanding of mental illness was demonstrated nearly two centuries ago by Thomas Erskine, counsel for defendant in James Hadfield's treason trial:

Delusions, Erskine continued, unaccompanied by "frenzy or raving madness [were] the true character of insanity." A person may reason with great skill and subtlety, but if the "premises from which they reason" are uniformly false, and cannot be shaken even with the clearest evidence, then it can be said that he is suffering from the disease of insanity . . .


163. The judicial roots of the Chief Justice's vision may partially be found in the writings of former Chief Justice Burger when he was a District of Columbia Court of Appeals judge. These writings reflect Burger's sense of "normalcy":

[The presumption of sanity] is grounded on the premise that the generality of mankind is made up of persons within the range of "normal," rational human beings and can be said to be accountable or responsible for their conduct; this premise is rooted in centuries of experience, [and] has not been undermined by contemporary medical knowledge.

and Cleckley who did not "leap over chairs," the defendant in *Greenfield* did not, by lay concepts, "look" "clearly and totally" crazy.

Rehnquist's opinions reveal a fixed, unidimensional vision of the sort of externalities that must be present if mental disability is to be an exculpatory defense. His views—consonant with false "common sense"—reject the notion that a defendant who does not conform to the visual images of a "madman" or who is not a "raving maniac or complete imbecile" can avail himself of the insanity defense.

Other judges reflect the same vision. Thus, in a "textbook classic" case, a Tennessee intermediate appellate court affirmed a conviction where a jury rejected defendant's insanity defense in light of police testimony that, upon apprehension, the defendant "was sitting with his head down and looked okay," despite the presentation of "overwhelming, even staggering evidence" of an overtly-psychotic, paranoid schizophrenic, actively-hallucinating defendant. Similarly, the Indiana Supreme Court affirmed a conviction in another rejected-insanity defense case where victim's girlfriend testified that, while defendant was first acting "nervous" with a "'weird' facial expression," she subsequently

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168. See Quen, *supra* note 166 (quoting I. RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 46-47 (3d ed. 1953): "[I]f in the disturbance of your moral and intellectual perceptions you take a step for which a sane man would have been punished, insanity will be no bar to your punishment.") (emphasis added).

Although it is certainly permissible to introduce evidence of mental disability for mitigating purposes that does not rise to the level of non-responsibility necessary for an insanity finding, *see*, e.g., Mines v. State, 390 So. 2d 352, 337 (Fla. 1980) (finding of sanity does not eliminate consideration of statutory mitigating factors concerning mental condition), there is absolutely no evidence that fact-finders will rely less on heuristic devices or be less tainted by sanism in such inquiries.

found his speech and actions "calmer" and testified he did not act "crazy."\textsuperscript{170}

In a recent study, Professors Valerie Hans and Dan Slater concluded that so many individuals see the insanity defense as a "loophole" because of their insistence "on a near total lack of comprehension" as an insanity defense standard, a test not unlike the "wild beast" inquiry of the early 18th century.\textsuperscript{171} The Colorado Supreme Court thus focused on the lack of such evidence in an opinion rejecting defendant's argument that his mental state should have served to reduce the degree of homicide:

\begin{quote}
[W]e find that here there was no evidence of the defendant suddenly going berserk . . . no evidence of mental weakness . . . no[r] evidence of burst of passion with paleness, wild eyes and trembling . . .  
\end{quote}

The court refused to reverse as erroneous a jury charge cautioning jurors "not to confuse . . . mental disease [amounting to insanity] with moral obliquity, mental depravity, or . . . kindred evil conditions."\textsuperscript{172}

Society is also confident that it is accurate in its assessment of serious mental illness.\textsuperscript{174} This failure to acknowledge "shades of gray" reinforces more subtly our fixed image of "crazy behavior," especially in assessments of criminal responsibility.

\begin{footnotes}
\textsuperscript{170} Gardner v. State, 514 N.E.2d 1259, 1260 (Ind. 1987). See also State v. Alley, 776 S.W.2d 506, 513 (Tenn. 1989) (not error to allow testimony by "psychiatric technician" that "defendant was malingering and . . . did not act like persons who were really insane").

\textsuperscript{171} Valerie Hans & Dan Slater, "Plain Crazy": Lay Definitions of Legal insanity, 7 INT'L J.L. & PSYCHIATRY 105, 111 (1984). Of 434 Delaware residents surveyed, only one "gave a reasonably good approximation" of the definition of legal insanity then operative in that jurisdiction. \textit{Id.} at 105-06. See also Roberts et al., supra note 41, at 226; Daniel et al., supra note 153, at 527 (bizarre behavior at time of offense among the most influential factors in forensic finding of nonresponsibility).

\textsuperscript{172} Battalino v. People, 199 P.2d 897, 901 (Colo. 1948) (emphasis added).

\textsuperscript{173} \textit{Id.} at 902.

\textsuperscript{174} Louis H. Swartz, Mental Disease: The Groundwork for Legal Analysis and Legislative Action, 111 U. PA. L. REV. 389, 413 (1963), quoting Frederick Redlich, Milbank Memorial Fund, Interrelations Between the Social Environment and Psychiatric Disorders 120-21 (1953):

\begin{quote}
We know what the seriously ill person in a given culture is. That we do know. In this respect we agree, incidentally, with the policeman, with the clerk in the drug store. Our crude diagnostic criteria are reasonably similar . . . .
\end{quote}
\end{footnotes}
3. Is the mitigation doctrine a pretextual hoax?

a. Juror behavior

All of this data must be read in the context of other information that we know about the insanity defense, mental disability, criminal law, and jury behavior. We know that jurors adhere firmly to the belief that insanity is overused in the face of a unanimous empirical database as to the rarity of the plea, the greater rarity of its success, and the high risk to defendants pleading the defense.\textsuperscript{175} We know that defendants are more likely to feign sanity rather than insanity (even where the evidence of their mental disability might qualify as mitigating evidence under Supreme Court doctrine).\textsuperscript{176} We know how, as a result of the vividness heuristic, one salient case can lead to the restructuring of an entire body of jurisprudence.\textsuperscript{177} We know how jurors overpredict future dangerousness in death penalty cases.\textsuperscript{178} We know how the Supreme Court’s “death qualification” jurisprudence for jury selection makes it more likely that seated jurors will see mental nonresponsibility defenses “as a ruse and as an impediment to the conviction of criminals.”\textsuperscript{179} We know that there is “a clear ‘fit’ between the retribution-driven punitive response favored by authoritarians and the authoritarian’s resentment of the insanity defense and his general hostility toward psychiatry.”\textsuperscript{180}

\textsuperscript{175}. See Perlin, Myths, supra note 2, at 648-55. For a recent case example, see People v. Seuffer, 582 N.E.2d 71, 79 (Ill. 1991).

\textsuperscript{176}. See Perlin, Myths, supra note 2, at 715-17 (reporting on the research of, inter alia, Dorothy Lewis et al., Psychiatric and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 AM. J. PSYCHIATRY 838, 841 (1986); Dorothy Lewis et al., Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death, 145 AM. J. PSYCHIATRY 584, 588 (1988); Resnick, supra note 155, at 841; P.J. Taylor, Motives for Offending Among Violent and Psychotic Men, 147 BRIT. J. PSYCHIATRY 491, 496-97 (1985)).


\textsuperscript{179}. Ellsworth et al., supra note 38, at 92. See generally Perlin, Jurisprudence, supra note 5, at 369-75.

\textsuperscript{180}. Perlin, Jurisprudence, supra note 5, at 372 (citing, inter alia, Neil Vidmar & Dale T. Miller, Socialpsychological Processes Underlying Attitudes Toward Legal Punishment, 14 LAW & SOC’Y REV. 565, 591 (1980)). On the ways that death penalty supporters are motivated by “vindictive revenge,” see Robert
This data must be further read side-by-side with what we know about juror use of schemas: that they are especially confused and confusing in death penalty cases,\textsuperscript{181} that they "play to" menacing and dangerous stereotypes of mentally disabled persons,\textsuperscript{182} and that, when there are dissonances in these schemas, they are interpreted in ways "consistent with criminality."\textsuperscript{183} It must be read further against the backdrop of ongoing judicial hostility toward mental disability-based excused for crime and toward mental disability evidence in general.\textsuperscript{184}

As a result of these factors, application of the mitigation doctrine is revealed, in certain individual cases, to be a pretextual hoax. Consider the Florida case of \textit{Mason v. State}.\textsuperscript{185} Mason was convicted of murder after the trial court failed to inform the jury about his "long history of mental illness, the fact that he suffered from organic brain damage, that he suffered from mental retardation, had a history of drug abuse, that he attempted suicide on four occasions during [the year prior to trial], and that he has a history of suffering from depression and hallucinations."\textsuperscript{186} The dissonance between the trial court's behavior in this case and the Supreme Court's line of cases from \textit{Eddings} and \textit{Lockett} to \textit{Penry} suggests that doctrinal analysis and recalibration can never be a solution to the underlying problems.

The conceptual issues presented here are even more befuddled by the jurisprudence that has developed around an equally troubling question: that of a capital defendant's competency to be executed. Beyond the seeming-incoherence of the court's positions in \textit{Ford v. Wainwright}\textsuperscript{187} and \textit{Penry v. Lynaugh},\textsuperscript{188} and its


\textsuperscript{182} Diamond, \textit{supra} note 13, at 429-30.

\textsuperscript{183} Hayman, \textit{supra} note 44, at 47, and see \textit{id.} at 48 ("Tragically, the full range of stereotypes victimizes the mentally retarded defendant at the capital sentencing stage.").

\textsuperscript{184} \textit{Id.} (relying on HANS TOCH \\& KENNETH ADAMS, THE DISTURBED VIOLENT OFFENDER 18-19 (1989)).

\textsuperscript{185} \textit{See generally PERLIN, JURISPRUDENCE, supra note 5, 143-229; Perlin, Sanism, supra note 8, at 400-05.}

\textsuperscript{186} \textit{id.} at 780.

\textsuperscript{187} 477 U.S. 399 (1986) (Eighth Amendment bars execution of the mentally ill). See also Perlin, \textit{Doctrinal Abyss, supra note 1, at 49-62; 3 PERLIN, MENTAL DISABILITY LAW, supra note 2, § § 17.05-17.06

\textsuperscript{188} 492 U.S. 309 (1989) (Eighth Amendment does not bar execution of all mentally retarded persons). See \textit{S PERLIN, MENTAL DISABILITY LAW, supra note 2, § 17.06(A) (Supp. 1993).}
refusal to answer the "next question" in *Perry v. Louisiana*189 (of the state's right to medicate an incompetent defendant so as to make him competent to be executed), lies the empirical reality that a significant number of seriously mentally disabled persons are sentenced to death, that, in specific cases (some of which have been carefully documented by the public press), those executions have been carried out,190 and that, in the words of the researchers who carefully studied the aftermath of the *Ford* case, "it remains all but impossible for defense attorneys to prove that psychotic death row clients are incompetent for execution."191 Again, it is necessary to acknowledge the dissonance between Supreme Court pronouncement and the application of doctrine in "real life."

b. Counsel behavior

Here we must confront yet another overlay: the appallingly substandard level of counsel made available to mentally disabled criminal defendants.192 This inadequacy has been further heightened in the aftermath of the Supreme Court's "sterile and perfunctory" adequacy of counsel standard in *Strickland v. Washington*.193 Most courts adhere to a minimalist reading of *Strickland*, and the Supreme Court has countenanced this reading, even in death penalty cases.194 Although occasionally, a conviction is reversed based on counsel's failure to raise mitigating evi-

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193. Perlin, Barefoot's Ake, supra note 1, at 53. In Strickland, 466 U.S. 668, 687-88 (1984), the court found there to be no constitutional violation if counsel provided "reasonably effective assistance" to be measured objectively by "prevailing professional norms."

dence, courts’ refusal to acknowledge the regularly substandard job done by counsel in this most demanding area of the law is simply pretextual.\textsuperscript{195}

In short, mental illness — rather than serving as a mitigating factor — can be seen as an aggravating factor.\textsuperscript{196} If competent counsel is present, the dilemma may, paradoxically, be even further confounded: if she should rely on certain kinds of “empathy” evidence — evidence of abuse, stress, retardation, institutional failure, and substantive abuse” — she runs the risk of putting before the jury the evidence that “has the greatest potential for turning into evidence in aggravation.”\textsuperscript{197} In the hands of sanist fact-finders, the presentation of such evidence can be deadly to the defendant.

V. \textsl{Medina} and \textsl{Godinez}: Magnifying the Problem\textsuperscript{198}

The problems raised in this paper have become even more difficult in the aftermath of the Supreme Court’s decisions in \textsl{Medina v. California}\textsuperscript{199} and \textsl{Godinez v. Moran}.\textsuperscript{200} These cases make it more likely that seriously mentally ill criminal defendants will face trials in capital cases. Intuitively, this will mean that more juries will be faced with the dilemma of “mitigating” mental disability evidence. The problem will be further compounded by the likelihood that, after \textsl{Godinez}, a significant number of these cases will be litigated \textit{pro se} by such defendants.


\textsuperscript{196} Berkman, \textit{supra} note 22, at 299-300; Hayman, \textit{supra} note 44, at 47-49.

\textsuperscript{197} Geimer, \textit{supra} note 29, at 286 (emphasis in original).

\textsuperscript{198} See generally 3 \textsc{Perlin, Mental Disability Law, supra} note 2, §§ 14.05A, 14.20A, 14.21 (Supp. 1993).

\textsuperscript{199} 112 S. Ct. 2572 (1992).

\textsuperscript{200} 113 S. Ct. 2680 (1993).
On their surface, neither of these cases speaks to the issues addressed in this paper. *Medina* upheld the constitutionality of a California state statute that had placed the burden of proof on a criminal defendant in an incompetency to stand trial proceeding.201 *Godinez* found, as a matter of federal constitutional law, that the tests for assessing a defendant’s competency to plead guilty or to waive counsel were identical to that for competency to stand trial, and specifically rejected the argument that a more searching inquiry was required in the former instances.202 In both cases, Justice Blackmun dissented, taking sharp issue with what he saw as the majority’s formalistic and arid methodologies.203 These arguments are of special importance to the questions under consideration here.

Justice Blackmun examined the trial records in both *Medina* and *Godinez* to demonstrate the impact the Court’s new rules would have on mentally disabled criminal defendants. In *Medina*, he warned that allowing defendants to be subjected to trial where the evidence was inconclusive as to their competency introduces a “systemic and unacceptably high risk” that persons will be tried and convicted “who are unable to follow or participate in the proceedings determining their fate.”204 In *Godinez*, he specifically linked this line of attack to the same question that concerned Justice Kennedy concurring in *Riggins* (but left him strangely untouched here):205 the impact of psychotropic drugs at this stage of the proceedings.

Here, Blackmun focused squarely on what he saw as the likely potential that the defendant’s decision to plead guilty was the product of “medication and mental illness.”206 He reviewed the expert testimony as to the defendant’s state of depression, a colloquy between the defendant and the trial judge in which the court was informed that the defendant was being given medication, the trial judge’s failure to inquire further and discover the psychoactive properties of the drugs in question, the defendant’s subsequent testimony as to the “numbing” state of the drugs, and the “mechanical character” and “ambiguity” of the defendant’s answers to the court’s questions at the plea stage.207

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203. See *Godinez*, 113 S. Ct. at 2691-92; *Medina*, 112 S. Ct. at 2585.
205. Justice Kennedy voted with the majority in *Godinez*.
207. *Id.* at 2692-93. See also *id.* at 2696 (“[S]uch drugs often possess side effects that may ‘compromise the right of a medicated criminal defendant to receive a fair trial . . . by rendering him unable or unwilling to assist counsel
Godinez makes other concerns raised by Blackmun in his Medina dissent even more troubling. The Medina majority had conceded that an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, but reasoned that that inability, by itself, might constitute probative evidence of incompetence, noting further that defense counsel will often have "the best informed view" of the defendant's ability to participate in his defense. Justice Blackmun had concluded that this confidence in defense counsel's role was misplaced for three reasons. In making a "societal judgment" about how the risk of error should be allocated, the majority should have—according to Justice Blackmun—recalled the teaching of Addington v. Texas that 'the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is greater than any possible harm to the state.'

These concerns become more alarming, of course, in the situation that will most likely be confronted far more frequently in the post-Godinez universe: where uncounseled defendants (perhaps found to be competent to stand trial in a setting where the fact-finder had found that the competing testimony and observations were simply in equipoise) attempt to provide self-representation in a capital case that potentially may turn on the presentation (or lack of presentation) of mitigating mental disability evidence.

V. Conclusion

How can these finding all be reconciled? If jurors are suspicious of mental disability evidence, if they misread cues given off

208. Medina, 112 S. Ct. at 2580.
209. First, the state generally has much better direct access to pretrial defendants, especially when they (as Medina was) are under locked psychiatric security observation. Second, psychiatric testimony is generally dispositive at competency hearings; in over 90% of cases, courts agree with expert conclusions. Experts' opinions are thus generally privileged over those of trial counsel. Third, the testimony of trial counsel will often be seen as self-serving and biased, and may implicate ethical considerations. In fact, in Medina's six-day trial, neither of his two counsel testified. Id. at 2587-88, (citing Robert A. Nicholson & William G. Johnson, Prediction of Competency to Stand Trial: Contribution of Demographics, Type of Offense, Clinical Characteristics, and Psychololgical Ability, 14 INT'L J. L. & PSYCHIATRY 287 (1991)).
by defendants on trial (both on the witness stand and at counsel table) who are receiving psychotropic drugs, employ heuristics in dealing with mentally disabled criminal defendant cases, and decide such cases in sanist and pretextual manners (decisions that are frequently teleologically reified by appellate courts), what additional impact will Medina and Godinez have? My tentative answer is that these cases have the potential to deal a crippling, and, inevitably, in some cases, fatal blow to the fair administration of justice in cases involving seriously mentally ill criminal defendants. My fear is increased by the fact that the issues under discussion here are never considered by the majority in either Medina or Godinez.

While the Supreme Court continues to reaffirm the Eddings/Lockett line of cases, Justice Scalia’s dissent in Penry — coupled with the majority opinions in Medina and Godinez (along with Justice Thomas’s dissent in Riggins) — suggests that there is a major fissure in this body of jurisprudence. The threat to dismantle the mitigation doctrine becomes even more troubling when considered in light of both the empirical findings (as to juror rejection of mental disability as a proper mitigator and as to the reality of what happens to mentally disabled criminal defendants facing the death penalty), the unheralded caselaw (mental disability issues are often ignored or poorly presented; counsel’s failures here will rarely be seen as reversible error), and the theoretical perspectives that I have pointed out in this essay (the ways that sanist jurors use heuristic cognitive devices to shape their schemas about these defendants, acts sanctioned explicitly or implicitly by pretextual or teleological courts).

This is all exacerbated both by the “wild card” of antipsychotic medication and by what we can safely assume will be the denouement of Medina and Godinez.211 Jurors miscomprehend the impact of antipsychotic medication on defendants. Medication side-effects often lead them to attribute negative personality traits such as apathy or lack of remorse — exactly those traits that make it more likely that a death penalty verdict will be returned — to such defendants. As a result of Medina and Godinez, it appears inevitable that more drugged defendants (a universe that implicitly will include more overdrugged defendants) will stand trial on capital charges. Lawyers — assuming that they meet an authentic threshold level of competency (not the sterile Strickland v. Washington formulation) — will immediately recognize the dimensions of their conundrum: should they explain to jurors why their client appears to be apathetic or agitated, or

211. Riggins is not mentioned in the majority opinion in Godinez.
should they simply remain silent (for fear that testimony about the defendant's mental illness might further inflame the jury)? This appears by its very terms to be an insoluble dilemma.

Of course, in post-Godinez cases where defendants waive counsel or in cases where counsel is apathetic, disinterested or even hostile, these issues will never be articulated. And, if the Scalia Penry partial dissent (buttressed by the Thomas Riggins dissent) appears to pick up additional support, the entire area of the law will need to be restructured. But, assuming the "best case" scenario (competent counsel, defendants who are not inappropriately overdrugged, trial judges who bring a measure of thoughtfulness and sensitivity to post-Godinez waiver inquiries, and no further dilution of the substantive competency standard), the specter of sanist and pretextual decisionmaking still haunts the legal landscape.

One potential solution is to turn to therapeutic jurisprudence (TJ) for some answers. TJ studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.\(^{212}\) Therapeutic jurisprudence looks at a variety of mental disability law issues in an effort to both shed new light on past developments and to offer new insights for future developments. Recent articles and essays have thus considered such matters as the insanity acquitted conditional release hearing, juror decisionmaking in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed.\(^{213}\)

If therapeutic jurisprudence principles are applied to the questions raised in this essay, several inquires immediately surface. First, if mental disability evidence can be seen as aggravating rather than mitigating, what a powerful disincentive this may

\(^{212}\) See, e.g., Wexler, supra note 76; WEXLER & WINICK, ESSAYS, supra note 76; David Wexler, Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence, 16 L. & HUM. BEHAV. 27 (1992); David Wexler, Justice, Mental Health, and Therapeutic Jurisprudence, 40 CLEV. ST. L. REV. 517 (1992); 1 PERLIN, MENTAL DISABILITY LAW, supra note 2, § 1.05A (Supp. 1993); Perlin, Therapeutic Jurisprudence, supra note 76; Perlin, Underdstanding, supra note 76.

\(^{213}\) See, e.g., articles cited in 1 PERLIN, MENTAL DISABILITY LAW, supra note 2, § 1.05A, at 6-9 nn.156.6-156.24A (Supp. 1993).
be for mentally disabled criminal defendants to deny their mental illness and simultaneously refuse to seek ameliorative treatment. If jurors especially turn "empathy" evidence into evidence of aggravating circumstances, how will that affect the already-compromised relationship between counsel and her mentally disabled client? Next, if jurors continue to "translate" a defendant's medicated state into evidence of non-remorse (thus enhancing the chances that a death penalty will be meted out), what impact should this have on the right of criminal defendants to refuse such treatment? If Godinez leads to more severely mentally disabled defendants being tried in life-or-death cases without the aid of counsel, what will the impact be on penal settings (especially death row settings) if there is a significant influx of additional mentally ill prisoners? These questions are but a few that must be considered through the therapeutic jurisprudence filter if that interpretive tool is to be looked to as a potential sources of answers.

In the mean time, the landscape is a bleak one. "Mitigating' evidence is often interpreted as aggravating. Often other potentially-mitigating evidence is ignored (either through counsel ignorance, negligence, or through a conscious choice that jurors will in fact find such evidence to be aggravating). The ideal expressed in Eddings and Lockett, and reaffirmed in Penry, fades into the background. Sanist jurors rely on stereotypes of mental disability and criminality in deciding cases. Pretextual courts reify these sanist decisions. And our death penalty jurisprudence continues to be stupifyingly incoherent.

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215. See Perlin, supra note 192.
216. See Perlin, Decoding, supra note 50; Perlin, Tea Leaves, supra note 50.
217. See Perlin, Jurisprudence, supra note 5, at 419-29.