

The Supreme Court and the Mentally Disabled Criminal Defendant: Recent Developments

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Introduction

Since 1972,¹ like the moth to the flame,² the United States Supreme Court has remained irresistibly drawn to the full range of issues affecting mentally disabled individuals facing criminal trials,³ especially when they arise in the context of a capital punishment case.⁴ There are many possible explanations: Chief Justice Burger's long-time preoccupation⁵ with such issues; the Court's fear that a defendant will feign insanity to "cheat the death penalty"; its obsessiveness with *narrowing* the universe of potential new issues which could be raised in death penalty appeals⁶; contrarily, its historic fear⁷ of punishing—and executing—a person who is "genuinely insane"⁸; or, perhaps, more simply, "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" toward the mentally ill individual charged with crime.⁹

Initially, the eight relevant cases decided since 1981 appear to defy categorization, but reflect either result-oriented jurisprudence or random decision-making, with no doctrinal cohesiveness whatsoever. Dr. Paul Appelbaum thus sees the court's "tortuous"¹⁰ reasoning as purely outcome-determinative, reflecting its "unwillingness to confront directly the problems of psychiatric testimony [in such cases.]"¹¹

This paper will attempt to examine afresh the eight cases—four decided in the most recent term (*Wainwright v. Greenfield*,¹² *Allen v. Illinois*,¹³ *Smith v. Murray*,¹⁴ and *Ford v. Wainwright*)¹⁵ and four decided in the previous five years (*Estelle v. Smith*,¹⁶ *Barefoot v. Estelle*,¹⁷ *Jones v. United States*,¹⁸ and *Ake v. Oklahoma*)¹⁹—through sets of multiple filters in an effort to determine whether, to any significant measure, any doctrinal consistency exists.

I have arbitrarily categorized the key cases into three groupings that cover an important spectrum of the procedural

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issues relevant to the criminal trial process: (1) the role and weight of expert testimony;²⁰ (2) the privilege against self-incrimination and the interplay between *Miranda* and mental disability;²¹ and (3) competence to be executed.²²

The Cases

Role and Weight of Expert Testimony *Barefoot v. Estelle* In *Barefoot v. Estelle*, the Supreme Court²³ sanctioned the use of psychiatric expert testimony—by the well-known Dr. Grigson²⁴ and another—as to further dangerousness at the penalty phase of such a case, even where the evidence is offered in response to a hypothetical question where the witness did not personally examine the defendant.²⁵

In the course of this argument, the court rejected the views presented by the American Psychiatric Association (APA) as *amicus* that (1) such testimony was invalid due to “fundamentally low reliability,”²⁶ 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.”²⁷

Justice Blackmun made five main points in dissent: (1) no “single, reputable source” was cited by the majority for the proposition that psychiatric predictions of long-term violence “are wrong more often than they are right”; (2) laymen can do “at least as well and possibly better” than psychiatrists in predicting violence”; (3) it is “crystal-clear” from the literature that the state’s witnesses “had no expertise whatever.”²⁸; (4) such “baseless” testimony cannot be recon-

ciled with the Constitution’s “paramount concern for reliability in capital sentencing”; and (5) because such purportedly scientific testimony—“unreliable [and] prejudicial”²⁹—was imbued with an “aura of scientific infallibility,”³⁰ it was capable of “shroud[ing] the evidence [, leading] the jury to accept it without critical scrutiny.”³¹

Jones v. United States In *Jones v. United States*,³² a shoplifting case presenting a fact pattern as diametrically opposed to that before the court in *Barefoot* as one could imagine, the court upheld the constitutionality of the District of Columbia’s post-not guilty by reason of insanity (NGRI) acquittal automatic commitment statute, reasoning that because an insanity acquittal establishes beyond a reasonable doubt the fact that the defendant committed a criminal act,³³ this provides “concrete evidence” as to the patient’s dangerousness that generally “as persuasive as any predictions about dangerousness” made regularly in commitment proceedings.³⁴

Rejecting Jones’ arguments based on the lack of predictive value of prior dangerous acts as an indication of future dangerousness,³⁵ the court concluded that it was appropriate to “pay particular deference to reasonable legislative judgments” made by Congress in this context.³⁶ Significantly, the court refused to distinguish between acts of violence and crimes such as the one with which Jones was charged,³⁷ quoting from an opinion of the Chief Justice’s from when he sat on the District of Columbia Court of Appeals:

[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.³⁸

Dissenting for himself and Justices Marshall and Blackmun, Justice Brennan³⁹ charged that the court "pos[ed] the wrong question," and restated the issue as:

[W]hether 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.⁴⁰

He concluded that indefinite commitment "without the due process protections adopted in *Addington [v. Texas]*⁴¹ and *O'Connor [v. Donaldson]*⁴² is not reasonably related to any of the Government's purported interests in continuing insanity acquittees for psychiatric treatment."⁴³

*Ake v. Oklahoma*⁴⁴ Less than two years later, the court looked at an entirely different aspect of expert witness issue in *Ake v. Oklahoma*: the scope of a defendant's right to expert assistance in the context of an insanity defense trial.⁴⁵

There, in a case in which defense counsel had characterized his client to the trial judge as "goofier than hell,"⁴⁶ the Supreme Court reversed defendant's conviction (where his request for an expert witness to aid in the preparation of an insanity defense had been turned down),⁴⁷ holding that "when [an indigent] 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. . . ."⁴⁸

Access to a psychiatrist is one of the "basic tools of an adequate defense,"⁴⁹ because of the "pivotal role" of psychiatry in criminal proceedings⁵⁰ and 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 marshal his defense."⁵¹ If the defendant were to make an "ex parte threshold showing . . . that his sanity is likely to be a significant factor in his defense,"⁵² the state must thus assure him access to a "competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense."⁵³

Privilege against Self-incrimination and Interplay between Miranda and Mental Disability *Estelle v. Smith*⁵⁴ In *Estelle v. Smith*, another death penalty case involving Dr. Grigson, the Court ruled that failure to inform (1) a criminal defendant that he had a right to remain silent at a pretrial psychiatric examination—ordered by the court in a case in which defense counsel neither pled not guilty by reason of insanity nor raised the issue of his client's competency to stand trial—and (2) defense counsel of the examination violated the defendant's Fifth Amendment rights under *Miranda*⁵⁵ and his Sixth Amendment right to counsel. Because the evaluation was a "life and death" matter, the defendant should not be forced to resolve such an important matter without the "guiding hand of counsel."⁵⁶

In a concurring opinion, Justice Rehnquist concluded:

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 is not necessary to decide this case, I would not extend the *Miranda* requirements to cover psychiatric examinations such as the one involved here.⁵⁷

*Wainwright v. Greenfield*⁵⁸ An entirely different aspect of the privilege against self-incrimination was before the court in the first of this year's four cases, *Wainwright v. Greenfield*, which focused on *police* behavior rather than *psychiatric* behavior, on the question of whether *silence* in the face of *Miranda* warnings can be used as evidence of a defendant's sanity.⁵⁹

After Greenfield was arrested, charged with sexual battery, and given his *Miranda* warnings, he indicated that he wished to speak to a lawyer and further thanked the policeman for giving him the warnings.⁶⁰ Defendant then pled not guilty by reason of insanity⁶¹; at trial, the prosecution introduced police testimony as to defendant's silence and request for a lawyer at the time he was given his *Miranda* warnings.⁶² Defendant did not testify, but called two psychiatrists, both of whom testified that he demonstrated "classic symptoms of paranoid schizophrenia"⁶³ and did not know right from wrong (the insanity test in Florida)⁶⁴ at the time of the crime. On rebuttal, the state called a psychiatrist who disagreed sharply with each of these conclusions.⁶⁵

In his summation and over defense counsel's objections,⁶⁶ 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. . . . 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. . . .⁶⁷

The jury found defendant guilty and sentenced him to life imprisonment.⁶⁸

Writing for a seven-justice majority,⁶⁹ Justice Stevens drew on a line earlier Supreme Court cases, holding that, in response to *Miranda* warnings, "silence will carry no penalty,"⁷⁰ and that "breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires."⁷¹ He specifically rejected the state's argument that, since "proof of sanity is significantly different from proof of the commission of the underlying offense,"⁷² these earlier cases were distinguishable in an insanity defense case such as *Greenfield*.

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,"⁷³ as "fail[ing] entirely to meet the problem of fundamental unfairness that flows from the state's breach of implied assurances."⁷⁴ Here, it quoted a state supreme court decision⁷⁵: "Silence in the face of an accusation is an enigma and should not be determi-

native of one's mental condition just as it is not determinative of one's guilt."⁷⁶

Justice Rehnquist concurred,⁷⁷ differing 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 made near the time of the crime, is certainly relevant.⁷⁸

*Smith v. Murray*⁷⁹ *Smith* appeared to pose an important question: when a criminal defendant facing the death penalty seeks a pretrial psychiatric evaluation to explore the possibility of the insanity defense or to be used potentially 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?⁸⁰

Upon being arrested, Smith confessed that he raped and murdered the victim.⁸¹ Appointed counsel immediately asked that Smith be examined to determine if he were competent to stand trial; the examiner concluded that he was. Because of the seriousness of the offense and the possibility of a death sentence, counsel then sought more comprehensive psychiatric evaluations, and asked the trial court to appoint a private psychiatrist (Dr. Pile) to evaluate the defendant.⁸² Counsel had warned the defendant not to discuss the offense with

which he had been charged (or any prior offense) with anyone else.⁸³ Dr. Pile, however, did not tell defendant that a copy of his report would be sent to the prosecutor⁸⁴ and that it could be used against him at trial as part of the state's affirmative case.

In his written report, Dr. Pile noted that the defendant told him that 13 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." Defendant had never been charged with this crime; neither defense counsel nor the prosecutor had any knowledge of it.⁸⁵ Dr. Pile concluded that defendant was a "sociopathic personality; sexual deviation (rape)."⁸⁶ At the sentencing hearing that followed defendant's murder conviction, Dr. Pile was called by the state, and testified about the "school bus incident" and his diagnosis.⁸⁷

After Smith's death sentence conviction was affirmed through the state court system, he applied for a writ of habeas corpus, which was turned down in federal court on what has come to be known as the "procedural default" theory, first explicitly articulated by the Supreme Court in a non-mental disability case, *Wainwright v. Sykes*⁸⁸: where an argument is not properly raised at trial or preserved on appeal, habeas corpus will not be available as a remedy unless the petitioner can prove "cause" (for failure to raise the claim) and "prejudice" (from the court's failure to hear the claim).

Thus, although the substantive question posed by *Smith* appeared to draw

into focus a persistent problem—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)?—a significant procedural hurdle would have to be vaulted prior to the Court's consideration of the merits. Was review precluded by the *Sykes* doctrine?

The court, per Justice O'Connor, in a sharply-split 5-4 opinion, ruled that it was and that the defendant failed to demonstrate "cause" for noncompliance with state procedures,⁹⁰ thus barring subsequent consideration of his claim.⁹¹

Justice Stevens,⁹² on behalf of the dissenters,⁹³ criticized the majority for failing to reach the merits of the case,⁹⁴ which (*unquestionably demonstrate* that [defendant's] constitutional claim is meritorious, and that there is a significant risk that he will be put to death⁹⁵ *because* his constitutional rights were violated."⁹⁶

The dissenters found that the introduction of defendant's comments to the court-appointed psychiatrist "clearly violated the Fifth Amendment"⁹⁷ under *Estelle*, which made it "absolutely clear" that the introduction of this evidence by the prosecution at the sentencing stage⁹⁸—thus making the defendant the "deluded instrument of his own conviction"⁹⁹—was constitutionally impermissible.¹⁰⁰

Allen v. Illinois The Supreme Court had not chosen to consider either the substantive or procedural limitations on the use of sex offender laws¹⁰¹ for nearly 15 years¹⁰² before it agreed to hear *Allen*

v. Illinois, posing the question of the availability of the privilege against self-incrimination to an individual facing commitment under such state statutes.¹⁰³

After Allen was indicted for certain sexual crimes,¹⁰⁴ the state filed a petition to have him declared a "sexually dangerous person" under state law,¹⁰⁵ and the trial court ordered the defendant to submit to psychiatric examinations¹⁰⁶; at trial, the state presented the testimony of two psychiatrists over the defendant's objection that the statements were elicited from him in violation of his privilege against self-incrimination.¹⁰⁷

Both witnesses testified that the defendant was mentally ill and, in accordance with the statute, that he had "criminal propensities to commit sexual assault."¹⁰⁸ 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.¹⁰⁹

The Supreme Court affirmed,¹¹⁰ holding, per Justice Rehnquist, that the proceedings in question were essentially civil in nature.¹¹¹ First, it stressed that the privilege was available only in criminal proceedings,¹¹² or in other circumstances "where the answers might incriminate [a defendant] in future criminal proceedings."¹¹³ Next, it noted 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.¹¹⁴

Under the statute,¹¹⁵ the state is obliged to provide care and treatment in a facility for psychiatric care;¹¹⁶ when the individual is no longer dangerous,

the court shall order him discharged.¹¹⁷ Under these circumstances, the court found that the act—geared to provide treatment—thus “does not appear to promote either of the ‘traditional aims of punishment—retribution and deterrence.’”¹¹⁸

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.¹¹⁹

Further, 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.’”¹²⁰ If the sexually dangerous person proceeding may escape characterization as criminal simply because “a goal is ‘treatment,’ . . . nothing would prevent the State from creation of an entire corpus of ‘dangerous person’ statutes to shadow its criminal code,” resulting in the “evisceration of criminal law and its accompanying protections.”¹²¹

Execution of the Insane Ford v. Wainwright Alvin Ford was convicted in 1974 of murdering a police officer during an attempted robbery,¹²² and sentenced to death.¹²³ While there was no suggestion that he was incompetent at the time of the offense, his trial or his sentencing, he began to manifest behavioral changes in 1982, nearly 8 years after his conviction. He developed delusions and hallucinations, and his letters, focusing on the local activities of the Ku Klux Klan, revealed “an increasingly pervasive delusion that he had be-

come the target of a complex conspiracy, involving the Klan and assorted others, designed to force him to commit suicide.”¹²⁴ Counsel requested that a psychiatrist continue to see Ford and recommend appropriate treatment; after 14 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.’”¹²⁵

Ford’s lawyer then invoked Florida procedures governing the determination of competency of an inmate sentenced to death.¹²⁶ 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.”¹²⁷ After a single 30-minute meeting, each psychiatrist reported separately to the governor: while each produced a different diagnosis,¹²⁸ all found Ford to have sufficient capacity to be executed under state law.¹²⁹

The Governor subsequently signed Ford’s death warrant.¹³⁰ After much procedural maneuvering,¹³¹ 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.”¹³²

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,¹³³ Justice Marshall¹³⁴ concluded that the Eighth Amendment did so pro-

hibit the imposition of the death penalty on an insane prisoner,¹³⁵ finding that there was "virtually no authority condoning the execution of the insane at English common law,"¹³⁶ and that "this solid proscription was carried to America."¹³⁷ This "ancestral legacy" has not "outlived its time," the court added.¹³⁸ No state currently permits execution of the insane¹³⁹ 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."¹⁴⁰

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.¹⁴¹ In a four-justice opinion, Justice Marshall concluded that, in most instances, a *de novo* evidentiary hearing on sanity would be required.¹⁴² In such cases, in which fact-finding procedures must "aspire to a heightened standard of reliability,"¹⁴³ 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,"¹⁴⁴ a particularly demanding standard inasmuch as "the present state of the mental sciences is at best a hazardous guess however conscientious."¹⁴⁵

Justice Powell concurred, joining fully in the majority's opinion on the substantive Eighth Amendment issue,¹⁴⁶ but differing substantially from Justice Marshall's opinion on the issue of the appropriate procedures which states must follow.¹⁴⁷ Further, Justice Powell considered an issue not addressed by the court:

the meaning of "insanity" in the context of the case before it¹⁴⁸ Here, he 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," a category into which Ford "plainly fit."¹⁴⁹

On the procedural question, Justice Powell would have sanctioned less elaborate procedures. 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,"¹⁵⁰ thus making inapplicable earlier court decisions imposing heightened procedural requirements on capital trials and sentencing proceedings.¹⁵¹

Second, as the defendant's competency to stand trial was never seriously in question, the state can presume that the defendant remained sane when the sentence is to be carried out, and may thus require "a substantial threshold showing of insanity merely to trigger the hearing process."¹⁵² Third, the sanity issue here is not like the basic "historical fact" issues at trial or sentencing; rather, it calls for a "basically subjective judgment"¹⁵³ depending substantially on "expert analysis in a discipline fraught with 'subtleties and nuances.'"¹⁵⁴

Writing for herself and Justice White, Justice O'Connor concurred in part and dissented in part. As Florida did not provide "even those minimal procedural protections required by due process"¹⁵⁵—because it failed to consider defendant's written submissions—she would vacate the judgment and remand for a state court hearing in a manner

"consistent with the requirements of the Due Process Clause."¹⁵⁶ She warned, however, that "substantial caution" was warranted in such cases where the potential for false claims was "obviously enormous."¹⁵⁷

Finally, Justice Rehnquist dissented on behalf of himself and the Chief Justice.¹⁵⁸ 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," in an area in which yet another adjudication "offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity."¹⁵⁹

Random Decisions or Doctrinal Cohesion?

The opinions under consideration here seem to reflect what Professor LaFave has called "a labyrinth of judicial uncertainty."¹⁶⁰ *Ake* appears virtually irreconcilable with *Barefoot* and *Jones*; *Smith* seems equally inconsistent with *Estelle*. The proliferation of *Ford* opinions makes comprehension of a profoundly difficult issue nearly impossible. Language in decisions such as *Barefoot* and *Jones* sanctions questionable legislative judgments; *Ford* and *Ake* hold other questionable judgments constitutionally impermissible. *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."

Is death, any more, different? *Estelle*

says "yes"; *Smith* implies "no." 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* pays it less than lip service.

After consistently making earlier 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 light of the APA's strongest possible disclaimer and then demurs to the fact that the statutory scheme it upholds in *Jones* flies in the face of virtually unanimous psychiatric knowledge.¹⁶¹ Yet, it turns around and recognizes in *Ake* that this ambiguity risks an "inaccurate resolution of sanity issues,"¹⁶² thus compelling expert assistance to indigents.

Can these cases be meaningfully sorted out? Are these more than "ad hoc, episodic opinions"?¹⁶³ Perhaps the use of several filters may help us to understand what is at work here. First, if we "factor" the cases, we find that five of the eight are death penalty cases. To some extent, the Court's decision *not* to reach the psychiatric issue in *Smith* best reflects the court's attitude towards the penalty: although the consequences may be death, the fact that an argument which appeared substantively virtually unassailable—that the introduction of

the psychiatric evidence violated the constitution by making the defendant the "deluded instrument of his own conviction"¹⁶⁴—was improperly preserved below is dispositive of the case. This decision may be a significant clue to understanding the Court's true view of these cases.

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 defendant—*Greenfield*,¹⁶⁵ *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*'s, *Ake*'s, and *Ford*'s major mental illnesses—*Jones*' insanity defense was not contested¹⁶⁶; 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 concerned with the "fear of faking."¹⁶⁷

Although the perils of diagnosis are well-known,¹⁶⁸ 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 *not* as a sociopath to "lose" was *Jones* (a 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).

Next, it might be helpful to look at

those extralegal principles that guide the court in its decision making. *First*, the court remains fearful of ordering the execution of a "truly insane" person.¹⁶⁹ Writing in an entirely different context,¹⁷⁰ 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 persons¹⁷¹ who seem clearly and totally crazy."¹⁷² While courts and jurors are suspicious of most insanity claims,¹⁷³ the Supreme Court still shies away from ordering the execution of the "clearly and totally crazy defendant" or, in the words of Glenn Ake's trial counsel, one who is "goofier than hell."¹⁷⁴

On the other hand, the available empirical data also reflect 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 15 death row inmates done by Dr. Dorothy Lewis and her colleagues revealed that *all* the prisoners had histories of severe head injuries; of the 15, 12 had neurological impairments ("major" in five of the cases), six were chronically psychotic, and two manic-depressive.¹⁷⁵ Most importantly, malingering was ruled out because "almost all of the abnormalities identified could be confirmed with objective evidence [e.g., hospital records, CAT scans, paralysis]."¹⁷⁶

However, not all of these inmates *appeared* "totally crazy." Dr. Lewis notes that, at first glance, "none of the subjects seemed flamboyantly schizophrenic,"¹⁷⁷ 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.¹⁷⁸ Both Justices Rehnquist's and O'Connor's *Ford* opinions, contrarily, remain obsessed with the fear that defendants will raise "false"¹⁷⁹ or "spurious claims"¹⁸⁰ in desperate attempts to stave off execution, a charge answered in 1838 by Dr. Isaac Ray:

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.¹⁸¹

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 will be offered. On one hand, psychiatrists are viewed as competent experts (in the area where all of the leading psychiatrists speak with a unified voice, saying "We're not"); on the other, they are perceived as little more than shamanistic wizards.¹⁸²

These cases (and the issues they decide) are rich with multiple symbols: the death penalty¹⁸³ and the insanity defense,¹⁸⁴ *Miranda*,¹⁸⁵ the trial process,¹⁸⁶ and, finally, the conflicting symbols of the "Warren Court"¹⁸⁷ and the "Burger Court."¹⁸⁸ Perhaps an examination of how the court views each of the key symbols will shed some helpful light on

the major issues with which this paper is concerned.

The "doctrine" which can be mined from these cases seems to reflect broad principles which portray, reasonably accurately, contemporaneous public opinion: because there is a profound suspicion of the use of mental illness to exculpate criminal behavior and a concomitant fear that extension of additional legal protections to mentally ill criminals might either (1) "open the floodgates" to spurious claims or (2) encourage duplicity, stringent procedural rules are adopted as a "safety net" to ensure that mental illness is not used to subvert commonly held social values as to punishment or free will.

However, because there is still a significant fear of sanctioning state behavior that "shocks the conscience" or violates community standards of "fundamental fairness,"¹⁸⁹ 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 that allow such an individual, but *only* such an individual, to "cheat the chair,"¹⁹⁰ thus mirroring the overwhelming ambivalence shown by the public¹⁹¹ toward the role of psychiatry and psychiatrists.¹⁹²

This must be considered in light of the public's view of the Burger Court, in contrast to its apparent view of the Warren Court. Whereas the Warren Court was viewed as "the storm center of creativity in American life"¹⁹³ or an "engine of social reform,"¹⁹⁴ the Burger Court—or, more accurately, the public's *perceptions* of the Burger Court¹⁹⁵—reflected

the view that "a majority of the country had had enough of judicial dynamism."¹⁹⁶ As Professor Saltzburg reminds us, the basic check on the Supreme Court is "public pressure"¹⁹⁷; the Court's institutional capital is "exhaustible,"¹⁹⁸ and its members are aware that the general public viewed the Warren Court as having "coddl[ed] criminals,"¹⁹⁹ "tilt[ed] the balance of advantage toward the suspect or the accused,"²⁰⁰ and otherwise produced "intolerably confusing" doctrine.²⁰¹ The doctrinal confusion present in *this* group of cases seems to reflect the Burger Court's desire to defuse political opposition,²⁰² but in such a way that breeds, in Professor Nagel's words, a "bewildering proliferation of concurring and dissenting opinions."²⁰³

What does this mean? There are *some* doctrinal threads that can be drawn from the decisions—mostly remaining premised on the Court's "rockbottom focus on 'fundamental fairness,'"²⁰⁴ or the "fundamental miscarriage of justice" rule²⁰⁵—as reflected by the Court's fear of executing the "truly insane" so as to "shock the [public's] conscience." Even these, however, are laden by symbols that continue to imprison the Court.

C. G. 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."²⁰⁶ On the other hand, if we believe that the defendant is *feigning* insanity (a belief that has permeated the American legal system for over a century and that has been considered seriously by some of our most respected jurists),²⁰⁷ 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.²⁰⁸

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.

References

1. In 1972, Mr. Justice Blackmun observed, in *Jackson v. Indiana*, 406 US 715, 737 (1972): "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."
See also *Humphrey v. Cady*, 405 US 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); *McNeil v. Director, Patuxent Institution*, 407 US 245 (1972) (denial of due process to continue to confine patient at institution for "defective delinquents" without procedural safeguards mandated in *Jackson*); *Murel v. Baltimore City Criminal Court*, 407 US 355 (1972), dismissing *cert.* as improvidently granted in *Tippett v. Maryland*, 436 F. 2d 1153 (4 Cir. 1971) (habeas corpus challenge to constitutionality of Maryland's Defective Delinquency Law); see also, *id.* at 358 (Douglas J. dissenting).
2. Since this paper was prepared, the Supreme Court has decided *Colorado v. Connelly*, 107 S.Ct. 515 (1986), rejecting an argument by a severely mentally disabled defendant that his confession—not the product of coercive police activity—was involuntary under the terms of *Miranda v. Arizona*, 384 US 436 (1966). See Perlin, "*Colorado v. Connelly*: Farewell to free will?" 14 Search & Seizure Law Rep 121 (1987).
3. In addition to those cases discussed *infra*, see also, *Drope v. Missouri*, 420 US 162, 171–172 (1975) (prohibition against trying

- presently incompetent defendant is "fundamental to an adversary system of justice"); *Maggio v. Fulford*, 462 US 111 (1983) (establishing appropriate standard for review of trial court determination of competency to stand trial).
4. For an empirical study, concluding that support for the death penalty springs mainly from a "symbolic perspective" reflecting society's "basic values," see Tyler and Weber, "Support for the death penalty: instrumental response to crime or symbolic attitude?" 17 *Law & Society Rev* 21, 43 (1982). See generally, 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 *New York Law School Hum Rights Ann* 91-93, 96-97 (1985) (*Barefoot's Ake*).
 5. Burger, "Psychiatrists, lawyers and the courts," 28 *Fed Prob* 3 (1964).
 6. Rodriguez, Perlin, Apicella, "Proportionality review in New Jersey: an indispensable safeguard in the capital sentencing process," 15 *Rutgers Law J* 399, 417 n.121 (1983).
 7. See sources cited in *Barefoot's Ake*, *supra* note 4, at 92-93 n.4; see generally, *Ford v. Wainwright*, 106 S.Ct. 2595, 2600-2602 (1986).
 8. For a clinical discussion of this population, see Rachlin, Halpern, Portnow, "The Volitional Rule, Personality Disorders and the Insanity Defense," 14 *Psychiatr Ann* 139, 147 (1984).
 9. *Barefoot's Ake*, *supra* note 4, at 168. The classic expression of this argument is found in Goldstein and Katz, "Abolish the 'insanity defense'—why not?" 72 *Yale Law J* 853, 868-869 (1963). See also sources cited in *Barefoot's Ake*, *supra* note 4, at 168 n.504.
 10. "Dr. Appelbaum replies," 142 *Am J Psychiatry* 387, 388 (1985).
 11. Appelbaum: "Death, the expert witness, and the dangers of going *Barefoot*," 34 *Hosp Community Psychiatry* 1003, 1004 (1983).
 12. 106 S.Ct. 634 (1986)
 13. 106 S.Ct. 2988 (1986)
 14. 106 S.Ct. 2678 (1986)
 15. 106 S.Ct. 2595 (1986)
 16. 451 US 454 (1981)
 17. 463 US 880 (1983)
 18. 463 US 354 (1983)
 19. 105 S.Ct. 1087 (1985)
 20. *Barefoot*; *Jones*; *Ake*, all *supra*
 21. *Estelle*; *Greenfield*; *Smith*; *Allen*, all *supra*
 22. *Ford*, *supra*. While one case probably does not make a "grouping," the legal and symbolic significance, see *Barefoot's Ake*, *supra* note 4, at 91-92 n.3, of this case demands separate consideration. See also *Alvord v. Wainwright*, 105 S.Ct. 355-360 (1984) (Marshall and Brennan JJ, dissenting from denial of *cert.*), discussed in Ward, "Competency for execution: problems in law and psychiatry," 14 *Florida State Univ Law Rev* 35, 42, 44-45 (1986), and Radelet and Barnard, "Ethics and the psychiatric determination of competency to be executed," 14 *Bull Am Acad Psychiatry Law* 37, 52-53 n.38 (1986).
 23. The Court first approved of the general use by the Courts of Appeals of expedited hearing schedules to resolve the merits of habeas appeals in death penalty cases. *Barefoot*, 463 US at 893-894.
 24. A psychiatrist 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 Law Med* 407, 410 (1983); Dix, "Participation by mental health professionals in capital murder sentencing," 1 *Int J Law Psychiatry* 283 (1978); Dix, "Expert prediction testimony in capital sentencing evidentiary and constitutional considerations," 19 *Am Crim Law Rev* 47 (1981); Dix, "The death penalty, 'dangerousness,' psychiatric testimony, and professional ethics," 5 *Am J Crim Law* 151, 172 (1977) (suggesting that Dr. Grigson operates "at the brink of quackery").
 25. *Barefoot*, 463 US at 896-899
 26. Amicus Brief of American Psychiatric Association, *Barefoot v. Estelle*, 463 US 880 (1983), at 14
 27. *Id.* See *Barefoot*, 463 US at 916, 920-923 (Blackmun J, dissenting), sources cited at nn. 1-5
- 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 US at 917-919—are discussed comprehensively in Dix, "Clinical evaluation of the 'dangerousness' of 'normal' criminal defendants," 66 *Virginia Law Rev* 523, 532-550 (1980); see also, Davis, "Texas capital sentencing procedures: the role of the jury and the restraining hand of the expert," 69 *J Crim Law Criminol* 300 (1978).
- In one of his analyses of the *Barefoot* case, Dr. Appelbaum points out that, as-

- suming 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 of Mental Disorders (3rd ed) 320-321 (1980)], it was "clear" that the expert had inadequate information upon which to base such a diagnosis. Appelbaum, "Hypotheticals, psychiatric testimony, and the death sentence," 12 Bull Am Acad Psychiatry Law 169, 173 (1984) ("Hypotheticals").
28. *Barefoot*, 463 US at 917 (Blackmun J, dissenting)
 29. *Id.* at 919
 30. *Id.*, quoting Gianelli, "The inadmissibility of novel scientific evidence: *Frye v. United States*, a half-century later," 80 Columbia Law Rev 1197, 1237 (1980); see generally, sources cited in *Barefoot*, 463 US at 919 n.8 (Blackmun J, dissenting).
 31. *Barefoot*, 463 US at 919
 32. 463 US 354 (1983)
 33. *Jones*, 463 US at 363-364
 34. *Id.* This also served to distinguish the case from *Jackson v. Indiana*, 406 US 715 (1972), which dealt with persons incompetent to stand trial, and thus were never judged culpable of the underlying offense. *Jones*, 463 US at 364 n.12.
 35. *Id.* at 362
 36. *Id.* at 364-365 n.13
 37. *Id.* at 365 n.14. But see, Gelwan, "Civil commitment and commitment of insanity acquittees," 11 N Engl J Crim Civil Confinement 328, 353 (1985) (legislatures should be permitted to retain the presumption of continuing dangerousness only as to defendants acquitted of violent crimes).
 38. *Id.*, quoting *Overholser v. O'Beirne*, 302 F. 2d 852, 861 (D.C. Cir. 1961)
 39. The three dissenting Justices in *Barefoot*
 40. *Jones*, 463 US at 371 (Brennan J, dissenting)
 41. 441 US, 418 (1979)
 42. 422 US, 563 (1975)
 43. *Jones*, 463 US at 386 (Brennan J, dissenting).
- 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." *Id.* at 384.
44. 105 S.Ct. 1087 (1985). See generally, *Barefoot's Ake*, *supra* note 4, at 121-139.
 45. See generally, Decker, "Expert services in the defense of criminal cases: the constitutional and statutory rights of indigents," 51 Univ Cincinnati Law Rev 574 (1982).
 46. See Brief of Petitioner, *Ake v. Oklahoma*, 105 S.Ct. 1087 (1985), at 10, quoting J.A. 27.
 47. *Ake*, 105 S.Ct. at 1091
 48. *Id.* at 1092
 49. See *Britt v. North Carolina*, 404 US 226, 227 (1971)
 50. *Ake*, 105 S.Ct. at 1092
 51. *Id.*
 52. *Id.* at 1097
 53. *Id.*
- The Chief Justice concurred, suggesting that nothing in the majority's opinion could be read to extend to noncapital cases, *id.* at 1099. Justice Rehnquist dissented, criticizing the majority for announcing "far too broad" a constitutional rule. *id.* at 1099.
54. 451 US 454 (1981)
 55. *Id.* at 461-469
 56. *Id.* at 469-471
 57. *Id.* at 475-476 (Rehnquist J. concurring)
 58. 106 S.Ct. 634 (1986)
 59. *Id.* at 636
 60. At trial, the arresting officer quoted Greenfield: "I appreciate that, thanks a lot for telling me that." *Id.* at 636-637 n.2.
 61. *Id.* at 636
 62. *Id.* At this time, defendant made no objection to the testimony. *Id.* at 637.
 63. Brief of respondent, *Wainwright v. Greenfield*, 106 S.Ct. 634 (1986), at 12-13 n.5 (*Greenfield* Respondent's Brief)
 64. See *Hall v. State*, 78 Fla. 420, 83 So. 513 (Sup. Ct. 1919)
 65. *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," a drug that, he testified, made defendant's symptoms "worse rather than better." *Greenfield v. Wainwright*, 741 F. 2d 329, 331 (11 Cir. 1984).
 66. *Id.*
 67. *Greenfield*, 741 F. 2d at 331
 68. *Greenfield* 106 S.Ct. at 636-637.
- After the defendant was unsuccessful in pursuing state appeals, and his petition for habeas corpus was denied by the federal district court, the Eleventh Circuit reversed, holding that defendant's post-*Miranda* silence was *inadmissible* as substantive evidence to rebut his sanity defense. *Greenfield*, 741 F. 2d at 333-334.
69. Chief Justice Burger and Justice Rehnquist concurred.
 70. *Greenfield*, 106 S.Ct. at 638, quoting *Doyle v. Ohio*, 426 US 610, 618-619 (1976)

71. *Greenfield*, 106 S.Ct. at 639
72. *Id.*
73. *Id.* at 640; see also *Greenfield* Respondent's Brief, *supra* note 63, at 17-20
74. *Id.*
75. See *State v. Burwick*, 442 So. 2d 944 (Fla. Sup. Ct. 1983), *cert. den.* 466 US 931 (1984)
76. *Greenfield*, 106 S.Ct. at 640 n.11, quoting *Burwick*, 442 So. 2d at 948
77. *Greenfield*, 106 S.Ct. at 641 (Rehnquist J, concurring)
78. *Id.* at 642 (footnote omitted; emphasis added)
79. 106 S.Ct. 2678 (1986)
80. Perlin: "Another 'incredible dilemma': psychiatric assistance and self-incrimination." [1985-1986] ABA Preview, 10 (March 14, 1986), at 288 ("Another 'Dilemma'")
81. *Smith*, 106 S.Ct. at 2663
82. Brief of Petitioner, *Smith v. Sielaff* (decided by the Supreme Court *sub. nom. Smith v. Murray*), 106 S.Ct. 2661 (1986), at 4 (*Smith* Petitioner's Brief)
83. *Smith*, 106 S.Ct. at 2664
84. *Smith* Petitioner's Brief, *supra* note 82, at 5
85. *Id.*
86. *Smith*, 106 S.Ct. at 2664
87. *Id.* 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." *Smith* Petitioner's Brief, *supra* note 82, at 7.
88. 433 US 72 (1977)
89. See, e.g., "Another 'Dilemma,'" *supra* note 80, at 289
90. *Smith*, 106 S.Ct. at 2666
91. *Id.* at 2665, citing *Coppola v. Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S.E. 2d 10 (Sup. Ct. 1981); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E. 2d 680 (Sup. Ct. 1974).

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." *Smith*, 106 S.Ct. at 2666, quoting *Sykes*, 433 US at 84.
92. The author of the majority opinion in *Greenfield*.
93. *Smith*, 106 S.Ct. at 2669 (Stevens J, dissenting). On the psychiatric issues, Justices Marshall, Blackmun, and Brennan all joined in Justice Stevens' opinion. Justices Brennan and Marshall dissented separately. *Id.* at 2678.
94. *Id.* (Stevens J, dissenting)
95. Smith was executed on July 31, 1986.
96. *Smith*, 106 S.Ct. at 2669 (first emphasis added; second emphasis in original) (Stevens J, dissenting)
97. *Id.* at 2675 (Stevens J, dissenting)
98. *Estelle*, 451 US at 462
99. *Id.* quoting *Culombe v. Connecticut*, 367 US 568, 581 (1961), quoting 2 Hawkins. Pleas of the Crown 595 (8th ed. 1824). *Cf. Estelle*, 451 US at 462 (citing same references).
100. *Smith*, 106 S.Ct. at 2675-2676 (Stevens J, dissenting)
101. For a helpful history and survey of such laws, see Weiner, "Mental disability and the criminal law," in Brakel, Parry, Weiner, *The Mentally Disabled and the Law* 693, 739-743 (3rd ed. 1985), Forst, *Civil Commitment and Social Control* 17-29 (1978).
102. See, e.g., *Davis v. Connecticut*, 190 Conn. 327, 461 A. 2d 947 (Sup. Ct. 1983), *cert. den.* 104 S.Ct. 350 (1983); *Thrasher v. Illinois*, 106 S.Ct. 147 (1985) (denying *cert.*).
103. See Ill. Rev. Stat. ch. 38 ¶105-1.01 *et seq.* (1986 Supp.).
104. 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.*
105. See Ill. Rev. Stat. ch. 38 ¶105-1.01 (1986 Supp.)
106. *Allen*, 106 S.Ct. at 2990
107. *Id.* at 2990-2991.

The court ruled that while the defendant's statements were inadmissible, the psychiatrists could express their opinion of defendant, based on the interviews. *Id.* at 2991.
108. *Id.* See Ill. Rev. Stat. ch. 38 ¶105-1.01 (1986 Supp.)
109. *Allen*, 106 S.Ct. at 2991. In accordance with Illinois case law, 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 (Sup. Ct. 1976).
110. The state appellate court had reversed, relying on the Supreme Court's decision in *Estelle* for the proposition that the testi-

mony in question violated defendant's privilege against self-incrimination. 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." *People v. Allen*, 107 Ill. 2d 91, 481 N.E. 2d 690, 694-695 (Sup. Ct. 1985).

111. *Allen*, 106 S.Ct. at 2992-2993
112. See *Malloy v. Hogan*, 378 US 1 (1964)
113. *Allen* 106 S.Ct. at 2991-2992, quoting *Minnesota v. Murphy*, 465 US 420, 426 (1984), quoting *Lefkowitz v. Turley*, 414 US 70, 77 (1973)
114. *Id.* quoting *United States v. Ward*, 448 US 242, 248-249 (1980)
115. Although the proceedings in question were accompanied by certain strict procedural safeguards—counsel, jury trial, confrontation and cross-examination of witnesses—they nevertheless remained "civil in nature." *Id.* at 2993.
116. *Ill. Rev. Stat. ch. 38* ¶105-8 (1986 Supp.)
117. *Ill. Rev. Stat. ch. 38* ¶105-9 (1986 Supp.)
118. *Allen*, 106 S.Ct. at 2992, quoting *Kennedy v. Mendoza-Martin*, 372 US 144, 168 (1963).

On the other hand, the court noted that nothing in the record before it 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." *Id.* at 2994-2995.

119. *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 US 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.* 520 F. 2d 931 (7 Cir. 1975), *cert. den.* 424 US 947 (1976).
120. *Id.* at 2998 (Stevens J, dissenting)
121. *Id.* at 2998-2999
122. *Ford v. State*, 374 So. 2d 496, 497 (Fla. Sup. Ct. 1979), *cert. den.* 445 US 972 (1980)
123. *Ford*, 106 S.Ct. at 2598
124. *Id.*
125. *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.'" *Id.* at 2599.

126. *Fla. Stat. Ann.* §922.07 (1985)
127. *Fla. Stat. Ann.* §922.07(2) (1985)
128. *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.*
129. *Id.*
130. *Id.*
131. After the state courts rejected Ford's application for a *de novo* hearing to determine competency, he applied for a writ of habeas corpus in federal court, seeking an evidentiary hearing on his sanity. *Id.* The District Court denied his petition without a hearing, but the Eleventh Circuit granted a certificate of probable cause, and stayed his execution. *Ford v. Strickland*, 734 F. 2d 538 (11 Cir. 1984); the Supreme Court then rejected the State's application to vacate the stay. *Wainwright v. Ford*, 467 US 1220 (1984). A divided panel of the Eleventh Circuit then affirmed the district court's denial of the writ, 752 F. 2d 526 (11 Cir. 1985).
132. *Ford*, 106 S.Ct. at 2599
133. 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.
134. The author of *Ake*, *supra*
135. *Ford*, 106 S.Ct. at 2598-2602
136. *Id.*
137. *Id.*: "[I]t was early observed that 'the judge is bound' to stay the execution upon insanity of the prisoner." *Id.*, citing 1 Chitty, A Practical Treatise on the Criminal Law *761 (5th Amer. ed. 1847), and 1 Wharton, A Treatise on Criminal Law §59 (8th ed. 1880).
138. *Ford*, 106 S.Ct. at 2601
139. *Id.* See *id.* at 2602-2602 n.2 (listing statutes)
140. *Id.* at 2601-2602

141. Recently, there has been significant scholarly attention paid to the meaning and interpretation of Supreme Court plurality decisions and their implication for the judicial process. See Davis and Reynolds, "Juridical cripples: plurality opinions in the Supreme Court," [1974] Duke Law J 59; Note, "Plurality decisions and judicial decisionmaking," 94 Harvard Law Rev 1127 (1981). Note, "The precedential value of Supreme Court plurality opinions," 80 Columbia Law Rev. 756 (1980).

Where multiple opinions appear to be of varying scope or breadth, the Court has indicated that the opinion concurring in the judgment on the "narrowest grounds" represents the highest common denominator of majority agreement and should thus be considered authoritative for future cases, *id.* at 761; see *Gregg v. Georgia*, 428 US 153, 520 F.2d 931 (7 Cir. 1975), *cert. den.* 424 US 947 (1976).
169 n.15 (1976) (plurality opinion).
142. The only exception would come if "the state-court trier of fact has after a full hearing reliably found the relevant facts." 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, or insufficient, or if the applicant did not receive a "full, fair and adequate hearing" in state court. See *Townsend v. Sain*, 372 US 293, 312-313 (1963).
143. *Ford*, 106 S.Ct. at 2603
144. *Id.*
145. *Sollesbee v. Balkcom*, 339 US 9, 23 (1950) (Frankfurter J., dissenting). See also, *O'Connor v. Donaldson*, 422 US 563, 584 (1975) (Burger CJ, concurring) ("there are many forms of mental illness that are now understood"); *Addington v. Texas*, 441 US 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").

Justice Marshall relied upon 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' when a defendant's sanity is at issue in a criminal trial." *Ford*, 106 S.Ct. at 2604.
146. *Id.* at 2606 (Powell, J., concurring)
147. *Id.* at 2607
148. *Id.* at 2608
149. *Id.*
150. *Id.* (emphasis in original)
151. *Id.* He noted that "some defendants may lose their mental facilities and never regain them, and thus avoid execution altogether." *Id.* n.5.
152. *Id.* at 2610. In a "cf" reference, he cited to *Ake*, *supra*.
153. *Id.* at 2611, citing *Addington*, *supra*, with a "cf" reference to *Barefoot*, *supra*.
154. *Id.* at 2611, quoting *Addington*, 441 US at 430.

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." *Id.*
155. *Id.*
156. *Id.*
157. *Ford*, 106 S.Ct. at 2612. See *Nobles v. Georgia*, 168 US 398, 405-406 (1897); *cf.* Rodriguez, LeWinn, Perlin, "The insanity defense under siege: legislative assaults and legal rejoinders," 14 Rutgers Law J 397, 404 (1983) ("Defense Under Siege") (no question as to presence of serious mental illness in 138 of 141 successful insanity defense cases studied).
158. *Ford*, 106 S.Ct. at 2613 (Rehnquist J., dissenting)
159. *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.
160. 2 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 J Law Psychiatry 9, 15 (1982) (Supreme Court "embraces incoherence").
161. See *Jones*, 463 US at 364-365 n.13. 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*.
162. 105 S.Ct. at 1096
 163. Howard, "The Burger Court: a judicial no-net plays the enigma variations," 43 *Law Contemp Problems* 7, 24 (Summer 1980)
 164. *Estelle*, 451 US at 462, quoting *Culombe*, 367 US at 581; see also, *Smith*, 106 S.Ct. at 2675, quoting *id.* (Stevens J. dissenting).
 165. 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 63.
 166. *Jones*, 463 US at 360.
 167. 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.
 168. See "Hypotheticals," *supra* note 27, at 173-174 (critiquing use of "sociopath" diagnosis).
 169. *Barefoot's Ake*, *supra* note 4, at 166
 170. Morse, "Crazy behavior, morals, and science: an analysis of mental health law," 51 *Southern Cal Law Rev* 527, 640-652 (1978)
 171. He defines "crazy" generally as "an intuitive or commonplace meaning of abnormal that reflects social evaluations and values." *Id.* at 549.
 172. *Id.* at 654.
 173. See, e.g., *Barefoot's Ake*, *supra* note 4, at 166 n.482; Ellsworth *et al.* "The death qualified jury and the defense of insanity," 8 *Law Hum Behav* 81, 91 (1984) (in controlled, simulated study, death-qualified jurors estimated that only 31% of defendants who pled insanity "really are" insane); *Ake*, 105 S.Ct. at 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 642 (Rehnquist J. concurring) (defendant's request for lawyer tends to show he "is not incoherent or obviously confused or unbalanced"); see also, *Ford* 106 S.Ct. at 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").
 174. See also Black, *Capital Punishment: The Inevitability of Caprice and Mistake* 52-54 (1974):
[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.
 175. Lewis *et al.* "Psychiatric and psychoeducational characteristics of 15 death row inmates in the United States," 143 *Am J Psychiatry* 838 (1986) (Lewis). *Cf.* Adler, "The cure that kills," *Am Lawyer* (Sept. 1986), at 1, 32 ("After *Ford*, the detection of malingering is going to have to be something that is really salient").
 176. Lewis, *supra* note 175, at 842-843.
Elsewhere, Ward has cited evidence that as many as 50 percent of Florida's death row inmates "become intermittently insane." Ward, *supra* note 22, at 42. See also Johnson, "Life under sentence of death," in Johnson and Toch, eds., *The Pains of Imprisonment* 129 (1982).
 177. Lewis, *supra* note 175, at 840
 178. *Id.* at 840-841
 179. *Ford*, 106 S.Ct. at 2612 (O'Connor J. concurring in part and dissenting in part)
 180. *Id.* at 2615 (Rehnquist J. dissenting)
 181. Ray, *A treatise on the medical jurisprudence of insanity* §247, at 243 (1962 ed.)
 182. See, e.g., 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 the earliest form of psychotherapy"); see also, Bazelon, "Psychiatrists and the adversary process," *Sci Am* Vol. 230, No. 6 (June 1974), at 18 ("Psychiatry . . . is the ultimate wizardry"); Steadman, "Predicting dangerousness among the mentally ill: art, magic, and science," 6 *Int J Law Psychiatry* 381, 382 (1983); Gunn, "An english psychiatrist looks at dangerousness," 10 *Bull Am Acad Psychiatry Law* 143, 147 (1982)
See also, *Barefoot*, 463 US at 926-927 n.8 (Blackmun, J., dissenting), quoting *United States v. Alexander*, 526 F. 2d 161, 168 (8 Cir. 1975) (scientific evidence is "likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi").
 183. See Tyler and Weber, *supra* note 4
 184. See Bazelon, "The dilemma of criminal re-

- sponsibility," 72 Kentucky Law J 263 (1982-83) ("the insanity defense has become a scapegoat for the entire criminal justice system").
185. Saltzburg, "Foreward: the flow and ebb of constitutional criminal procedures in the Warren and Burger Courts," 69 Georgia Law J 151, 199 n. 335 (1980), citing White, *The American Judicial Tradition* 354-365 (1976) (*Miranda* engendered more public furor than any other Warren Court decision).
186. See generally, Frank, *Law and the Modern Mind* 18-20 (1935).
187. For a variety of relevant sources about the symbolic significance of the Warren Court, see, e.g., Saltzburg, *supra* note 185, at 151-152 nn.1-10.
188. See, e.g., Blasi, ed., *The Burger Court: The Counterrevolution That Wasn't* (1983).
189. *Smith*, 106 S.Ct. at 2672-2674 (Stevens J. dissenting) (criticizing majority for its cramped interpretation of "fundamental fairness" doctrine).
190. Again, Justice Rehnquist's lament as to the allegedly mentally disabled defendant who does not appear to be "incoherent or obviously confused or unbalanced," *Greenfield*, 106 S.Ct. at 642 (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," *supra* note 174, at 840 (emphasis added), almost all suffered from serious psychiatric and/or neurological disability, *id.* at 841.
191. See Steadman, *supra* note 182, 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?
192. See Bazelon, *supra* note 184, at 276-277
193. Frank, "The Burger Court—The first ten years," 43 *Law Contemp Problems* 101, 121 (1980) ("Ten Years").
194. Howard, *supra* note 163, at 8
195. See, e.g., Blasi, *supra* note 188
196. "Ten Years," *supra* note 193, at 128.
For analyses of the significance of the Burger Court's specific ambivalence about the *Miranda* doctrine—in the words of Professor Bradley, "an enigma wrapped in a mystery," Bradley, "The uncertainty principle in the Supreme Court," [1986] *Duke Law J* 1, 53—see, e.g., White, "Defending *Miranda*: a reply to Professor Caplan," 39 *Vanderbilt Law Rev* 1 (1986); Wingo, "Rewriting *Mapp* and *Miranda*: a preference for due process," 31 *Univ Kansas Law Rev* 219 (1983).
- On the ritualistic and religious meanings of the criminal trial process as a "moral parable," see Roche, *The Criminal Mind* 245 (1958); see generally, Tribe, "Trial by Mathematics," 84 *Harvard Law Rev* 1329, 1376 n.151 (1971).
197. Saltzburg, *supra* note 185, at 208
198. Choper, *Judicial Review and the National Political Process* 138-139 (1980)
199. Note, "Procedural default at the appellate stage and federal habeas corpus review," 38 *Stanford Law Rev* 463, 479 (1986) ("Stanford Note")
200. Saltzburg, *supra* note 185, at 152, and see sources cited *id.* at nn.6-10; see also, "Stanford Note," *supra* note 199, at 479 n.8
201. *Robbins v. California*, 453 US 420, 430 (1981) (Powell J, concurring); see also, *Metromedia, Inc. v. San Diego*, 453 US 490, 555 (1981) (Burger CJ, dissenting)
202. See Greenawalt, "The enduring significance of neutral principles," 78 *Columbia Law Rev* 982, 1008 (1978) (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).
203. Nagel, "A Comment on the Burger Court and 'Judicial Activism,'" 52 *Univ Colorado Law Rev* 223, 236 (1981) (footnotes omitted).
204. Berger, "The Supreme Court and defense counsel: old roads, new paths—a dead end?" 86 *Columbia Law Rev* 9, 99 (1986)
205. *Engle v. Isaac*, 456 US 107, 135 (1982)
206. Schoenfeld, *Psychoanalysis Applied to the Law* 31 (1984), discussing Schoenfeld, "Law and unconscious mental mechanisms," 28 *Bull Menninger Clinic* 23, 28 (1964).
207. See, e.g., *Lynch v. Overholser*, 369 US 705, 715 (1962) (Harlan, J.); *United States v. Brown*, 478 F.2d 606, 611 (D.C. Cir. 1973), quoting *Lynch* (Leventhal, J.). See generally, for a thorough and helpful discussion of this phenomenon, 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 Law Rev* 793, 806-807 n.85 (1984).
208. See "Defense Under Siege," *supra* note 157, at 401-402, and *id.* at 402 n.32 (defendants whose insanity defense claims were rejected received disproportionately longer terms of imprisonment than defendants convicted of similar offenses who did not raise the defense).