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"No Direction Home:" The Law and Criminal Defendants With Mental Disabilities

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I. INTRODUCTION

Nearly a decade ago, I suggested that the U.S. Supreme Court was attracted to cases involving criminal defendants with mental disabilities and the criminal trial process "like the moth to the flame."[1] It seemed to me that the Court was inexorably drawn to those criminal law and procedure cases that turned on questions of a defendant's mental state in a variety of settings extending far beyond the relatively simple conceptual questions of determining, for example, which substantive test to employ in assessing whether a defendant is responsible for a criminal act or competent to stand trial.

It was not entirely clear to me *why* the Court was so attracted. At one time, I speculated that there might be a psychodynamic explanation for the Court's preoccupation with this relatively narrow area of the law, and I hinted that the Court remained a "prisoner of external symbols and internal impulses,"[2] "[shuffling and juggling] symbols, public perceptions, and internal, perhaps unconscious ambivalences."[3] I concluded that the court's "random decisions" led to a "doctrinal abyss" in which opinions were handed down "out of consciousness."[4] As in Bob Dylan's paradigm-shattering song, *Like A Rolling Stone*,[5] litigators, scholars and judges were offered "no direction home" by the Court's doctrinally-incoherent decisions.

Little has changed. The Supreme Court has frequently returned to this area of the law in the intervening decade, as have state and other federal courts and legislatures. Case law and statutory developments proliferate. Many of these developments flow directly from the most discussed mental disability case in American history: the shooting of then-President Ronald Reagan by John W. Hinckley on March 30, 1981. It was Hinckley's "successful" use of the insanity defense that unleashed political and social "fury"[6] that led to a "passionate"[7] debate that became a "surrogate"[8] for all that was allegedly "wrong" with our criminal justice system. Senators and conservative think-tank spokespersons declaimed that insanity defense abolition was the Maginot line at which "nothing less than the credibility of our Federal justice system [was] at stake."[9]

Although insanity defense opponents fell short of their immediate goal—abolition of the defense in the federal courts—the legislative firestorm that followed the entry of a not guilty by reason of insanity (NGRI) verdict in Hinckley's case dramatically and irrevocably altered the legal landscape for the foreseeable future. Notwithstanding several important (and in some cases startling) victories for criminal defendants with mental disabilities in the Supreme Court, the post-*Hinckley* world is still one in which nonresponsibility verdicts are rare, incompetency inquiries limited, and explorations of the ways that a defendant's mental illness contributed to the commission of an otherwise-inexplicable act are cramped.[10]

What lessons can be learned from the past two decades? Is there, finally, any doctrinal coherence in this area? Are there "bright lines" that can be drawn to help illuminate this difficult area of the law, and aid us in predicting the future? Can we profitably read the Supreme Court's "tea leaves,"[11] or, is there still "no direction home"? This essay attempts to address these overriding questions by examining the insanity defense, competency to stand trial, the death penalty, and the right to refuse treatment, recognizing that there are other important issues that will not be covered.[12]

II. THE INSANITY DEFENSE

A. Statutory Developments

The jury's NGRI verdict in *United States v. Hinckley*[13] overshadows (and to a great extent preordains) all other developments in this area of the law. In the wake of that verdict, Congress enacted the Insanity Defense Reform Act of 1984,[14] which dramatically changed the insanity defense in the federal circuits.[15] The law:

- Shifted the burden of proof to defendants by a quantum of clear and convincing evidence;[16]
- Articulated, for the first time, a version of the *M'Naghten* test even more restrictive than the one handed down by the British House of Lords in 1843 (that a defendant with a *severe* mental disease or defect, either did not know the nature and quality of his act, or did not know the wrongfulness of his act);[17]
- Established strict procedures for the hospitalization and release of defendants found NGRI;[18] and
- Severely limited the scope of expert testimony admissible in insanity trials, by barring opinion evidence on "whether the defendant did or did not have the mental

state or condition constituting an element of the crime charged or of a defense thereto."[19]

State legislatures quickly followed suit. In the six years after Hinckley's assassination attempt, two-thirds of all states made changes in their insanity defense statutes. Seven states narrowed the substantive test (by replacing the American Law Institute (ALI) test with the M'Naghten formulation), 16 shifted the burden of proof to the defendant, and 25 tightened release procedures in cases of defendants found to be NGRI.[20] Several states "abolished" the insanity defense, retaining only a limited *mens rea* defense,[21] and the Supreme Court denied a defendant's petition for *certiorari* stemming from an unsuccessful challenge to one of the abolition statutes.[22]

Other states—in an effort to insure that mentally ill defendants did not "slip through the cracks"—enacted guilty but mentally ill (GBMI) legislation. These laws allowed for the criminal conviction and imprisonment of defendants with mental illnesses who did not meet the insanity standard. These laws have been almost universally criticized as doing little to ensure effective treatment for offenders with mental disabilities, providing only a cosmetic "reform" that assuages jurors and legislators.[23]

B. Case Law

The Supreme Court has considered insanity acquittee retention procedures twice in the past 15 years. In *Jones v. United States*,[24] it clarified the federal constitutional limits on the disposition of insanity acquittees, sanctioning automatic commitment based on an insanity acquittal, allowing both for a far less stringent standard of proof at NGRI commitment proceedings than in involuntary civil commitment cases (where the burden must be on the state by at least clear and convincing evidence)[25] and for post-insanity commitments to last for longer terms than the underlying crime's maximum sentence.[26] And state courts quickly followed *Jones* by approving similar limitations in state cases.[27] *Jones* and its progeny appeared to be responsive to the public's furious reaction to the *Hinckley* verdict[28] and it seemed highly unlikely that *any* insanity acquittee would be successful at the Supreme Court level at any time in the indefinite future.

In 1992, the Supreme Court returned to insanity acquittee issues in *Foucha v. Louisiana*,[29] addressing the question of whether an insanity acquittee could be retained if he no longer had a mental illness, but was potentially dangerous. In that case, there was no evidence that the defendant continued to have a mental illness, although he was diagnosed with an anti-social personality disorder and once had a drug-induced psychosis.[30]

In a sharply split opinion, the Supreme Court reversed a Louisiana supreme court decision that had found that the continued retention of an insanity acquittee who was potentially dangerous, but had no mental illness, did not offend the constitution. According to Justice White's majority opinion, which relied on *O'Connor v. Donaldson*, since the basis for holding Foucha as an insanity acquittee had disappeared, the state could no longer hold him on that basis.[31] The Court rejected the state's argument that Foucha's anti-social personality disorder provided a permissible rationale for future institutionalization. First, because the disorder was not considered a mental illness under Louisiana law, Foucha could not be civilly committed. Second, if he could no longer be held as an insanity acquittee, he was entitled, per *Jones*, to constitutionally adequate procedures to establish permissible grounds for his confinement. Third, because of the "fundamental nature" of his "right to liberty,"[32] Foucha—who had never been convicted of a crime—could not be punished. As the state had not shown by clear and convincing evidence that he had a mental illness and was dangerous, he could no longer be institutionalized.[33]

Justice Thomas dissented, raising the possibility of "calculated abuse of the insanity defense" by feigning defendants, and speculated on how the public might react to the release of a serial killer immediately after trial.[34]

C. Empirical Realities

Our insanity defense jurisprudence has always been shrouded in myth. Perhaps the most important meta-legal development in the past 20 years has been the publication of data disproving each of the basic myths that have provided much of the basis for legislative "reform." It is now clear that the insanity defense is *not* overused, that its use is *not* limited to murder cases, that there *is* a significant risk to the defendant who pleads insanity, that insanity acquittees are *not* quickly released from custody, that insanity acquittees generally spend *more* time in custody than defendants convicted of like offenses, and that there is *rarely* any question as to the presence of major mental illness in an insanity-pleading defendant.[35] Ground-breaking research published by Henry Steadman and his associates provides a comprehensive data base of the actual use of the plea and its consequences.[36] The challenge that faces decisionmakers is in incorporating Steadman's research into future legislative and administrative change in this area.

D. Conclusion

The development of the insanity defense has always tracked the tensions between psychodynamics and punishment, and has reflected our most profound moral ambivalence about both. We are especially punitive toward defendants who successfully plead insanity (whom we perceive as the most "despised" and most "morally repugnant" group of individuals in society);[37] yet, we recognize that, in some narrow and carefully circumscribed circumstances, exculpation is both proper and necessary. This ambivalence has traditionally driven criminal justice policy, not simply toward insanity-pleading defendants, but toward nearly all other criminal defendants with mental disabilities as well.[38]

The paradox, though, is that just as we are learning—beyond cavil—that our beliefs about the misuse and overuse of the insanity defense are nothing more than myth, we rewrite legislation to make it even more

unlikely that the defense will be successfully pled. Although *Foucha* drew at least one clear line (barring the further institutionalization of an insanity acquittee who currently has no mental illness), Justice Thomas' dissent articulates the fears and the worries that continue to drive policymakers. Here, there is clearly "no direction home."

III. INCOMPETENCY

A. Introduction

The incompetency inquiry remains—numerically—the most important intersection between mental disability and the criminal law process. Many of the significant issues appear well-settled—*e.g.*, the substantive standard,[39] the constitutional dimensions,[40] and the procedures governing retention of defendants found incompetent to stand trial.[41] Nonetheless, the Supreme Court has revisited this area of the law on three separate occasions in the past four years. Two of the decisions illustrated the constitutional limits on the burden of proof at the incompetency to stand trial proceeding. The third—by far the most controversial—addressed the question of whether the competency standard for assessing guilty pleas or counsel waivers need be any higher than that for standing trial.

B. Burden of proof

In *Medina v. California*,[42] the Supreme Court upheld a California statute that placed the burden of proof on the defendant to prove incompetency by a preponderance of the evidence. According to the majority, this allocation did not "offend[] some principle of justice so rooted in traditions and conscience of our people as to be ranked as fundamental."[43] As there was neither a "settled tradition" on the proper allocation of the burden nor a "historical basis" for suggesting that its allocation to the defendant violated due process, the court rejected the defendant's argument that fundamental fairness required that the burden be placed on the state.[44]

In its most recent term, the Court struck down an Oklahoma statute that had allocated this burden to the defendant by a quantum of clear and convincing evidence in *Cooper v. Oklahoma*.[45] In a unanimous opinion, the Supreme Court, per Justice Stevens, reversed, emphasizing that the trial of an incompetent defendant violated due process.[46]

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.[47]

Justice Stevens concluded that a heightened standard "offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.' "[48]

The court then turned to the question of fundamental fairness, and concluded that the Oklahoma rule imposed "a significant risk of an erroneous determination that the defendant is competent," a risk that carries with it "dire consequences."[49] On the other hand, the court characterized the potential harm to the state—if the defendant were malingering—as no more than "modest."[50]

C. A Unitary Standard

In 1993, the Supreme Court, per Justice Thomas, resolved a lower court split on whether a single competency standard governed all competence inquiries in the criminal trial process, ruling, in *Godinez v. Moran*,[51] that such a unitary standard was all that was required, since a defendant who was found competent to stand trial would have to make a variety of decisions: whether to testify; whether to seek a jury trial; whether to cross-examine his accusers; and in some cases, whether to raise an affirmative defense.[52] While the decision to plead guilty, for example, is a "profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial."[53]

Using the same reasoning, it also found that the standard for waiving counsel was the same one as for being competent to stand trial, concluding that there was "no reason" to believe that the decision to waive counsel required an "appreciably higher level of mental functioning than the decision to waive other constitutional rights."[54]

Justice Blackmun dissented, arguing that "competence" had multiple meanings:

> [T]he majority cannot isolate the term "competent" and apply it in a vacuum, divorced from its specific context. A person who is "competent" to play basketball is not thereby "competent" to play the violin. The majority's monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose.[55]

He concluded:

> To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive "choice" of a person who was so deeply medicated and who might well have been severely mentally ill.[56]

D. Conclusion

The decisions in *Medina* and *Cooper* are not surprising, and their most important legacy may be their reliance on history and tradition in assessing whether a due process violation is to be found, a reliance that is curious in this area given the dizzying speed with which new research continues to illuminate the underlying clinical and behavioral issues.[57] The contrast between the formulaic majority and the textured dissent in *Godinez* reflects all the tension that exists in this area of the law.[58] Although the Supreme Court has spoken definitively in *Godinez*, it has not enlightened us on the underlying issues.

IV. THE DEATH PENALTY[59]

A. Introduction

Society has always feared that extending procedural due process protections to mentally ill criminals in death penalty cases might either "open the floodgates" to spurious claims or encourage malingering as a means of "cheating the electric chair." On the other hand, a significant fear remains of judicial rules that would sanction state behavior that "shocks the conscience" or violates "fundamental fairness" in cases involving profoundly and clearly psychotic defendants who are subject to capital punishment.[60] This ambivalence is reflected in all developments in this area of the law.

B. "Aggravators" and "Mitigators"

1. Definitions

Contemporary death penalty statutes require findings of "mitigating" and "aggravating" factors. This is ostensibly done to ensure that the death penalty is reserved for only the vilest of crimes (for which there is no reasonable excuse or justification). "Mitigators" include a finding that the "defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution," and that his "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired as a result of mental disease or intoxication, but not to a degree sufficient to constitute a defense to prosecution."[61]

The critical importance of mitigating evidence at the penalty stage cannot be overstated. The sentencing authority thus must consider any relevant mitigating evidence that a defendant offers as a basis for a sentence less than death,[62] according to *Gregg v. Georgia*[63] and other initial "modern" decisions upholding the death penalty, which mandated that the sentencing authority be provided with adequate individualized information about defendants, and guided by clear and objective standards.[64]

2. The Importance of Lockett and Eddings

In *Lockett v. Ohio*, the Supreme Court substantially widened the scope of mitigating evidence allowed at the penalty phase of a capital case, concluding:

> The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record . . . that defendant proffers as a basis for a sentence less than death.[65]

Four years later, the Court expanded on its *Lockett* rule in *Eddings v. Oklahoma*,[66] holding that the sentencing authority must consider *any* relevant mitigating evidence.[67]

3. Penry *and Mitigation*

Finally, in *Penry v. Lynaugh*, the Court's most recent merits decision on this question involving a defendant with mental disabilities, the Supreme Court held that evidence of a 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.[68] 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 based on the defendant's retardation.[69] Justice Scalia flayed the majority in his concurrence/dissent, characterizing it as countenancing "an unguided, emotional, 'moral response' . . . an outpouring of personal reaction . . . an unfocused sympathy."[70]

C. Mental Disability and Execution

Mental disability is important in the death penalty process in other ways as well. The issue of executing the insane has plagued the legal system for centuries, and attempts at prescribing appropriate standards "have proved incoherent because they failed to confront the reality that law and psychiatry rarely, if ever, exist separately from culture and politics."[71]

The Supreme Court's 1986 decision in *Ford v. Wainwright*[72] brought limited doctrinal coherence to this question. In *Ford*, a fractured court[73] concluded that the eighth amendment did prohibit the imposition of the death penalty on an insane prisoner.[74] On this point, Justice William Rehnquist dissented on behalf of himself and Chief Justice Burger.[75] In his view, the Florida procedures were "fully consistent with the 'common-law heritage' and current practice on which the Court purport[ed] to rely," and, in their reliance on executive-branch procedures, "faithful to both traditional and modern practice."[76] He thus rejected the majority's conclusion that the eighth amendment created a substantive right not to be executed while insane.[77]

Ford is especially perplexing in light of the Court's subsequent decision in *Penry v. Lynaugh*,[78] in which it rejected the argument that the defendant's mental *retardation* barred capital punishment.[79] Although she conceded that the execution of the "profoundly or severely retarded" might violate the Eighth Amendment, Justice Sandra Day O'Connor suggested that such persons were unlikely to be convicted or face that penalty in light of "the protections afforded by the insanity defense today,"[80] an observation astonishing either in its naivete or its cynicism.[81]

D. Conclusion

While the Supreme Court continues to adhere to the *Eddings/Lockett* line of cases, Justice Scalia's opinion on mitigation in *Penry*—coupled with the majority in *Godinez* and Justice Thomas' dissent in *Riggins* (discussed below)—suggests a potentially major fissure in this area of jurisprudence.[82] This conflict becomes even more

pronounced in light of the seemingly-irreconcilable opinions on capacity-to-be-executed in *Ford* and *Penry*. Here, yet again, the Court offers us "no direction home."

V. THE RIGHT TO REFUSE TREATMENT

A. Introduction

No area of civil mental disability law has been more contentious than that of the right to refuse treatment. The question of the right to refuse antipsychotic medication remains the most important and volatile aspect of the legal regulation of mental health practice. The issues that are raised—the autonomy of institutionalized individuals with mental disabilities to refuse the imposition of treatment that is designed (at least in part) to ameliorate their symptomatology, the degree to which individuals subjected to such drugging are in danger of developing irreversible neurological side effects, the evanescence of such terms as "informed consent" or "competency," the practical and administrative considerations of implementing such a right in an institutional setting, and the range of the philosophical questions raised—mark the litigation that has led to the articulation of the right to refuse treatment as "a turning point in institutional psychiatry" and "the most controversial issue in forensic psychiatry today."[83] In the past decade, attention has turned to the application of this doctrine to the criminal trial process. Three Supreme Court decisions and a pair of Fourth Circuit opinions reflect the lack of direction of the jurisprudence in this area of criminal law.

B. In Criminal Law Settings

1. Defendants Awaiting Trial

In 1987, a Fourth Circuit panel issued the first decision in *United States v. Charters*[84] (*Charters I*) on the right of a federal pre-trial detainee to refuse psychotropic medication. *Charters I* rejected the notion that the "exercise of professional judgment standard" articulated by the Supreme Court in *Youngberg v. Romeo* applied to antipsychotic medication cases, resurrected long-abandoned right-to-privacy and freedom-of-thought-process arguments, established a right to be free from unwanted physical intrusion as an integral part of an individual's constitutional freedoms, and articulated a complex substituted judgment-best interests methodology to be used in right to refuse treatment cases.[85]

On *en banc* rehearing, the full Fourth Circuit vacated the panel decision (*Charters II*), "suggesting that the panel was wrong about almost everything."[86] Although it agreed that the defendant possessed a constitutionally retained interest in freedom from bodily restraint that was implicated by the forced administration of psychotropic drugs and was protected "against arbitrary and capricious action by government officials,"[87] it found that informal institutional administrative procedures were adequate to protect the defendant's due process interests. It applied the "substantial professional judgment" test of *Youngberg*, and limited questioning of experts to one matter: "[W]as this decision reached by a process so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one?"[88] Although the court briefly acknowledged the possibility of side-effects (a factor stressed heavily in *Charters I*), it quickly dismissed the magnitude of their potential harm by noting that they were simply "one element" to be weighed in a best-interests decision. Here, the court conceded that it did not do an exhaustive analysis of the conflicting literature before it, demurring to that literature's importance:

> It suffices to observe that while there is universal agreement in the relevant professional discipline that side-effects always exist as a risk, there is wide disagreement within those disciplines as to the degree of their severity.[89]

2. Defendants Pleading Insanity

Mental disability law jurisprudence seemed to take a dramatic turn in the Supreme Court's decision in *Riggins v. Nevada*.[90] *Riggins* held that the use of antipsychotic drugs violated a defendant's right to a fair trial (at which he had raised the insanity defense), focusing on the drugs' potential side-effects, and construing its previous decision in *Washington v. Harper*[91] —which limited the rights of *convicted prisoners* to refuse medication—to require an "overriding justification and a determination of medical appropriateness" prior to forcibly administering antipsychotic medications to a prisoner.[92] It 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 of the trial.[93]

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."[94] Justice Thomas dissented, suggesting: (1) the administration of the drug might have *increased* the defendant's cognitive ability;[95] (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;[96] (3) if Riggins had been aggrieved, his proper remedy was a §1983 civil rights action;[97] and (4) under the majority's language, a criminal conviction might be reversed in cases involving "penicillin or aspirin."[98]

3. Convicted Prisoners

The Supreme Court's decision in *Washington v. Harper* abruptly limited the right of convicted felons to refuse treatment under the federal constitution. While the Court agreed that prisoners (like all other citizens) possessed a "significant liberty interest" in avoiding unwanted administration of antipsychotic drugs,[99] it found that the

need to balance this interest with prison safety and security considerations would lead it to uphold a prison rule regulating forced administration of drugs as long as it was "'reasonably related to legitimate penological interest,'" even where fundamental interests were otherwise implicated.[100] Thus, a state policy that provided for an administrative hearing (before a tribunal of mental health professionals and correctional officials) at which there was neither provision for the appointment of counsel nor regularized external review passed constitutional muster.[101]

In a sharply-worded opinion, Justice Stevens dissented, arguing that the refusal of medication was "a fundamental liberty interest deserving the highest order of protection," especially where the imposition of such medications might create "a substantial risk of permanent injury and premature death."[102] *Harper* clarifies an important strand of Supreme Court jurisprudence: "prison security concerns will, virtually without exception, trump individual autonomy interests."[103]

Perhaps the most interesting developments came in the way the Supreme Court chose to interpret *Harper* in *Riggins*, just two years later. The difference in outcomes may be traced to the difference in court perspectives; the Court treated *Harper* as a prison security case while it read *Riggins* as a fair trial case; yet, this difference in the litigants' *legal* status evidently has no effect on the potential physiological or neurological impact of the drugs in question. Nevertheless, side effects language in *Harper* (subordinated there because of security reasons) is privileged in *Riggins* (where such issues are absent) by nature of the court's consideration of the question in the context of a fair trial issue. Justice Thomas' 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 *ever* seeking psychiatric help for a defendant awaiting trial?[104]

4. Competency To Be Executed

Still undecided is the important question of whether a state can involuntarily medicate an individual under a death sentence so as to make him competent to be executed. After the Supreme Court determined that an incompetent defendant cannot be executed[105] (a holding that it did not extend to cases involving individuals with mental retardation),[106] it agreed to hear, in *Perry v. Louisiana*, a case that posed this precise question.[107]

In *Perry*, the Louisiana state courts had found that any due process right the capital defendant might have was outweighed by two compelling state interests: (1) the provision of psychiatric care; and (2) the carrying out of a valid death penalty.[108] After the Supreme Court originally decided to hear the case (to determine whether the Eighth Amendment's proscription against cruel and unusual punishment prohibits states from so medicating death row inmates), it ultimately vacated the lower court's decision and remanded for further proceedings in light of its decision in *Harper* on the scope of a convicted prisoner's right to refuse.[109]

On remand, the Louisiana supreme court found, under state constitutional law, that the state was prohibited from medicating Perry so as to make him competent to be executed,[110] a decision that was not re-appealed to the U.S. Supreme Court.

C. Conclusion

The right to refuse treatment as it applies to individuals in the criminal trial process defies categorization or organization. It provides us with virtually no guideposts or benchmarks, save the individual's legal status (*e.g.*, whether he is awaiting trial as in *Riggins* or is serving a sentence as in *Harper*).

VI. NO DIRECTION HOME

In a recent article about the ways that jurors construe mental disability evidence in capital punishment cases, I characterized our death penalty jurisprudence as "stupefyingly incoherent."[111] That lack of coherence can apply equally to our insanity defense jurisprudence, our incompetence jurisprudence, and our right to refuse treatment jurisprudence. The reasons for this incoherence are complex and often confusing.[112] The landscape remains "bleak."[113] In this area of the law, there is, truly, no direction home.

Endnotes

1. Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or "Doctrinal Abyss"?* 29 ARIZ. L. REV. 1, 3 (1987).

2. Michael L. Perlin, *The Supreme Court, the Mentally Disabled Criminal Defendant, Psychiatric Testimony in Death Penalty Cases, and the Power of Symbolism: Dulling the* Ake *in* Barefoot's *Achilles Heel*, 3 N.Y. L. SCH. HUMAN RTS. ANN. 91, 169 (1985).

3. Perlin, *supra* note 1, at 97.

4. *Id.* at 98.

5. Bob Dylan, *Like a Rolling Stone* (1965) (from HIGHWAY 61 REVISITED (1965)).

6. 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL §15.35 at 389 n. 675 (1989).

7. *Id.* at n. 673.

8. *Id.* at §15.42, at 407 n. 780.

9. MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 17 (1994) (quoting Congressional hearings), *and see* Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289, 306 n. 97 (1987) (abolition of insanity

defense the Heritage Foundation's highest criminal justice reform priority in 1985).

10. Beyond the scope of this article are inquiries into the ways that *sanism* and *pretextuality* have shaped our legislative and judicial policies in this area. *See e.g.*, Michael L. Perlin, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 N. ENG. J. CRIM. & CIV. CONFINEMENT 369 (1994); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J. L. & HEALTH 15 (1993-94); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993); Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373 (1992); Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993). On therapeutic jurisprudential implications, *see* Perlin, *supra* note 9, at 419-37; 1 PERLIN, *supra* note 6, §1.05A at 6-13 (1995 Supp.).

11. *See* Michael L. Perlin, *Reading the Supreme Court's Tea Leaves: Predicting Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENS. PSYCHIATRY 37 (1991).

12. Beyond the scope of this article are discussions of such related questions as: the privilege against self-incrimination; the federal sentencing guidelines; the admissibility of a confession; the admissibility of testimony as to potential future dangerousness in response to hypothetical questions in a death penalty case; the defendant's right to have the jury informed about the implications of an insanity acquittal; and an indigent's right to an expert witness.

13. Earlier aspects of the case are reported at 525 F. Supp. 1342 (D.D.C. 1981), 6 MDLR 69.

14. 18 U.S.C. §17.

15. At the time of the Hinckley trial, all but one federal circuit employed a version of the American Law Institute/Model Penal Code test (a defendant was not responsible if he lacked "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law"). MODEL PENAL CODE §4.01(1) (Tent. Draft No. 4 1955). Once insanity was raised, the burden of proof to disprove insanity was on the government by a burden of beyond a reasonable doubt. *See e.g., United States v. Andrew*, 666 F.2d 915 (5th Cir. 1982), 6 MDLR 162; *see generally*, 3 Perlin, *supra* note 6, §15.12 at 320.

16. 18 U.S.C. §17(b).

17. 18 U.S.C. §17(a).

18. 18 U.S.C. §§4243, 4247.

19. Fed. R. Evid. 704(b).

20. *See generally*, Lisa Callahan et al, *Insanity Defense Reform in the United States — Post Hinckley*, 11 MPDLR 54, discussed in this context in Michael L. Perlin, *The Insanity Defense: Deconstructing the Myths and Reconstructing the Jurisprudence*, LAW, MENTAL HEALTH AND MENTAL DISORDER 341, 347 (B. Sales & D. Shuman eds. 1996).

21. *See generally*, 3 PERLIN, *supra* note 6, §15.41 at 405-06.

22. *Montana v. Cowan*, 861 P. 2d 884 (Mont. 1993), 18 MPDLR 136, *cert. denied*, 114 S. Ct. 1371 (1994).

23. Perlin, *supra* note 9, at 92-95. The "slip through the cracks" metaphor was apparently first used in this context in *Michigan v. Seefeld*, 290 N.W. 2d 123, 124 (Mich. App. 1980).

24. 463 U.S. 354 (1983), 7 MDLR 299.

25. *Addington v. Texas*, 441 U.S. 418 (1979), 3 MDLR 164.

26. *Jones*, 463 U.S. at 363-38.

27. *See generally*, 3 Perlin, *supra* note 6, §§15.20 at 188-96 nn. 397.1-421 (1995 Supp.) (collecting cases).

28. MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY §4.36 at 611 (1994).

29. 504 U.S. 71 (1992), 16 MPDLR 266.

30. *Louisiana v. Foucha*, 563 So. 2d 1138, 1140-41 (La. 1990), *rev'd*, 504 U.S. 71 (1992), 16 MPDLR 266.

31. 422 U.S. 563, 574-75 (1975).

32. *See Youngberg v. Romeo*, 457 U.S. 307, 316 (1982), 6 MDLR 223.

33. *Foucha*, 504 U.S. at 81.

34. *Id.* at 109-110. Foucha had been originally charged with burglary and firearm offenses. *Id.* at 73.

35. *See* 3 Perlin, *supra* note 6, §15.37; Perlin, *supra* note 9, at 105-16.

36. HENRY STEADMAN ET AL, REFORMING THE INSANITY DEFENSE: AN ANALYSIS OF PRE- AND POST-HINCKLEY REFORMS (1993).

37. Deborah Scott et al., *Monitoring Insanity Acquittees: Connecticut's Psychiatric Security Review Board*, 41 HOSP. & COMMUN. PSYCHIATRY 980, 982 (1990).

38. Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 5, 22 (1996).

39. *See Dusky v. United States*, 362 U.S. 402 (1960) (defendant competent if he "has sufficient present ability to consult with his lawyer with a rational degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him").

40. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966) (conviction of an incompetent defendant violates due process).

41. *See Jackson v. Indiana*, 406 U.S. 715 (1972) (long-term indeterminate commitment of defendant, based solely on his incompetence to stand trial, violates due process).

42. 505 U.S. 437 (1992), 16 MPDLR 374.

43. *Id.* at 446.

44. *Id.* at 446 and 448.

45. 116 S. Ct. 1373 (1996), 20 MPDLR 314.

46. *Id.* at 1376, quoting *Medina*, 505 U.S. at 453.

47. *Cooper*, 116 S. Ct. at 1376 (citations omitted), quoting *Riggins v. Nevada*, 504 U.S. 127, 139-40 (1992) (Kennedy, J., concurring).

48. *Id.*, quoting *Medina*, 505 U.S. at 445.

49. *Id.* at 1381.

50. *Id.* at 1382.

51. 509 U.S. 389 (1993), 17 MPDLR 344.

52. *Id.* at 398.

53. *Id.*

54. *Id.* at 399.

55. *Id.* at 413.

56. *Id.* at 417.

57. *See e.g.*, Paul Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study. I: Mental Illness and Competence*

to Consent to Treatment, 19 LAW & HUM. BEHAV. 105, 118 (1995).

58. *See generally*, Michael L. Perlin, "*Dignity Was the First to Leave: Godinez v. Moran, Clarence Ferguson, and the Trial of Mentally Disabled Criminal Defendants*," 14 BEHAV. SCI. & L. 61 (1996).

59. *See generally*, Michael L. Perlin, *'The Executioner's Face Is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. (1996) (in press).

60. *See* Perlin, *supra* note 1, at 90-91.

61. *See e.g.*, N.J. STAT. ANN. §2C:11-3(c)(5).

62. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982), 6 MDLR 106. *See generally*, 3 PERLIN, *supra* note 6, §17.09, at 521-23. Statutes are collected in Ellen Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296-98 (1989).

63. 428 U.S. 153 (1976); *see* PERLIN, *supra* note 27, §4.47 at 640-42.

64. *See* James Liebman & Andrew Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 759-60 n. 17 (1978), discussing Court's decisions in *Gregg*; *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976).

65. 438 U.S. 586, 604 (1978).

66. 455 U.S. 104 (1982), 6 MDLR 106.

67. *Id.* at 114.

68. 492 U.S. 302, 304 (1989), 13 MPDLR 334. The defendant in *Penry* was mentally retarded. *See id.* at 307; *see generally*, 3 Perlin, *supra* note 6, §17.09, at 282-84 (1995 Supp.).

69. *Penry*, 492 U.S. at 322.

70. *Id.* at 359.

71. Barbara Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 100 (1986).

72. 477 U.S. 399 (1986), 10 MPDLR 278.

73. On the question of what procedures were appropriate to satisfy the constitution, three other justices joined Justice Marshall. *Id.* at 410. Justice Powell concurred on that issue, and wrote separately on the issue of the appropriate procedures to be followed in such a case. *Id.* at 418. Justice O'Connor (for herself and Justice White) concurred in part and dissented in part. *Id.* at 427. Justice Rehnquist (for himself and the Chief Justice) dissented. *Id.* at 431.

74. *Id.* at 402-10

75. *Id.* at 431 (Rehnquist, J., dissenting).

76. *Id.* at 431-33.

77. Writing for herself and Justice White, Justice O'Connor agreed fully with this aspect of Justice Rehnquist's two-justice dissent. *Id.* at 427 (O'Connor, J., concurring in part and dissenting in part).

78. 492 U.S. 302 (1989), 13 MPDLR 334.

79. *Id.* at 332-34. On the relationship between *Ford* and *Penry*, *see* 3 PERLIN, *supra* note 6, §17.06A, at 274-77 (1995 Supp.).

80. *Penry*, 492 U.S. at 333.

81. *See e.g.*, PERLIN, *supra* note 9, at 210-26, 372-74.

82. *See* Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 NOTRE DAME J. L., ETH. & PUB. POL'Y 239, 277 (1994).

83. Michael L. Perlin, *Decoding Right to Refuse Treatment*, 16 INT'L J. L. & PSYCHIATRY 151,151 (1993).

84. 829 F. 2d 479 (4th Cir. 1987), 11 MPDLR 396 (*Charters I*), *on rehearing*, 863 F. 2d 302 (4th Cir. 1988), 13 MPDLR 24, *(en banc) (Charters II), cert. denied*, 494 U.S. 1016 (1990).

85. *See generally*, Michael L. Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade From* United States v. Charters, 38 U. KAN. L. REV. 957 (1990).

86. *Id.* at 965.

87. *Charters*, 863 F. 2d at 306.

88. *Id.* at 313.

89. *Id.* at 310-11.

90. 504 U.S. 127 (1992), 16 MPDLR 268. *See generally*, Perlin & Dorfman, *supra* note 10.

91. 494 U.S. 210 (1990), 14 MPDLR 124; *see* 2 PERLIN, *supra* note 6, §5.64A, at 74-87 (1995 Supp.).

92. *Riggins*, 504 U.S. at 135.

93. *Id.* at 137-38.

94. *Id.* at 138-39 (Kennedy, J., concurring).

95. *Id.* at 147-48 (Thomas, J., dissenting). Trial testimony had indicated that Riggins' daily drug regimen (800 mgs. of Mellaril) was enough to "tranquilize an elephant." *Id.* at 127, 143 (Kennedy, J., concurring), quoting trial record.

96. *Id.* at 151 (Thomas, J., dissenting).

97. *Id.* at 153-54. At his trial, Riggins had been sentenced to death.

98. *Id.* at 155.

99. *Harper*, 494 U.S. at 221, quoting *Vitek v. Jones*, 445 U.S. 480, 491-94 (1980), 4 MDLR 152.

100. *Id.* at 223.

101. *Id.* at 223-24.

102. *Id.* at 241 (Stevens, J., concurring in part & dissenting in part).

103. 2 PERLIN, *supra* note 6, §5.64A, at 85-86 (1995 Supp.).

104. *Compare Buchanan v. Kentucky*, 483 U.S. 402 (1987) (no error to admit, in rebuttal of defendant's "extreme emotional disturbance" defense, report prepared following pre-trial detainee's request to be treated at state hospital pending trial).

105. *Ford v. Wainwright*, 477 U.S. 399 (1986), 10 MPDLR 278.

106. *See Penry v. Lynaugh*, 492 U.S. 302 (1989), 13 MPDLR 334.

107. 494 U.S. 1015 (1990); *see also*, 56 U.S.L.W. 3584 (1990).

108. *Louisiana v. Perry*, 543 So. 2d 487 (La. 1989), *rehearing denied*, 545 So. 2d 1049 (1989).

109. *Perry v. Louisiana*, 498 U.S. 38 (1990), *rehearing denied*, 498 U.S. 1075 (1991).

110. *Louisiana v. Perry*, 610 So. 2d 746 (La. 1992).

111. Perlin, *supra* note 81, at 279.

112. I offer tentative explanations in PERLIN, *supra* notes 9, 37, 57, 58, 81, 82, and 84, and in the articles cited *supra* note 10.

113. Perlin, *supra* note 81, at 279.