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"THE EXECUTIONER'S FACE IS ALWAYS WELL-HIDDEN":*
THE ROLE OF COUNSEL AND THE COURTS IN
DETERMINING WHO DIES

MICHAEL L. PERLIN**

I. INTRODUCTION

The common wisdom is that death penalty cases play out on a landscape that pits the forces of retribution and punishment against the forces of abolition and rehabilitation. Supporters, or so the simplified version goes, applaud the death penalty for insuring that the perpetrators of the most wanton and vilest murders receive the ultimate penalty. Opponents, again oversimplifying, argue both that the penalty is immoral (that the state does not have the moral authority to take the life of another, no matter how depraved the crime) and inherently inequitable (that for a combination of racial, class, and political biases, it is impossible to create a system in which only the truly worst-of-the-worst capital defendants are subject to a death sentence).

Arguments, both pro and con, vacillate between high-end theory and street anecdote. The pro-death penalty literature often appears to combine Immanuel Kant and the *New York Post*; the anti-literature substitutes Albert Camus and the *Village Voice*.

On September 1, 1995, New York joined thirty-seven other states¹ in allowing for legal executions.² Much of the debate over the passage of the death penalty act tracked these philosophical and anecdotal arguments. Yet, when the inevitable parade of death-eligible defendants comes before the trial courts, two issues—never mentioned by supporters, and rarely cited by opponents—often have the most significant impact on who is to be executed and who is not: (1) the adequacy of counsel provided to individuals facing the death penalty; and (2) the way that counsel, judges and juries develop and construe mental disability evidence in death penalty cases. Because these issues are so rarely discussed in public fora, the

* BOB DYLAN, *A Hard Rain's A-Gonna Fall*, on THE FREEWHEELIN' BOB DYLAN (Columbia Records 1963).

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1. See *Around the Nation*, Wash. Post, Sept. 2, 1995, at A2.

2. See N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1995).

public has little sense of their significance to ultimate death decision-making. As a result of so little attention being paid to these issues in so many cases where the death penalty is actually ordered and carried out, "the executioner's face," quoting from Bob Dylan's chilling song, *A Hard Rain's A-Gonna Fall*, "is often well hidden."

This paper will proceed in the following manner. First, I will provide a brief overview of what we know about both variables—that is, adequacy of counsel and the construction of mental disability evidence. Then, I will look at the New York statute and offer some predictions as to how these variables may likely play out in New York cases (with a few thoughts about how they *have* developed in New Jersey in the fourteen years since it reinstated the death penalty). Finally, I will seek to contextualize both of these variables through three jurisprudential filters to which my attention has increasingly turned in recent years: "sanism," "pre-textuality," and "therapeutic jurisprudence."

II. THE VARIABLES

A. *Provision of Counsel*

An examination of the full range of death penalty cases that have been litigated in the past twenty years since the United States Supreme Court's decision in *Gregg v. Georgia*,³ holding that the death penalty was not necessarily a violation of the Eighth Amendment's ban on cruel and unusual punishment,⁴ suggests one undeniable truth: in an amazingly high number of cases, the most critical issue in determining whether a defendant lives or dies is the quality of counsel. As suggested by one veteran death penalty litigator, "[t]he death penalty will too often be punishment not for committing the worst crime, but for being assigned the worst lawyer."⁵

3. 428 U.S. 153 (1976).

4. See *id.* at 187; James S. Liebman & Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757 (1978); see generally 3 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 17.08 (1989) (discussing the impact of mental disorder on the penalty phase of capital punishment litigation).

5. Stephen Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 695 (1990) [hereinafter Bright, *Death by Lottery*]; see Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); see also David Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 61 (1991) (noting that the correlation is statistically significant); Gary Goodpaster, *The*

The responsibilities of lawyers in death penalty cases are legion. The attorney must develop a meaningful relationship with a client who is likely the target of public and media animosity, and whose unpopularity may taint the quality of that relationship; thus, she must find a way to "humanize" her client.⁶ She must investigate for mitigating evidence,⁷ obtain expert defense witnesses,⁸ investigate to rebut aggravating evidence,⁹ and attempt to negotiate a plea bargain where appropriate.¹⁰ If a guilty verdict is rendered, she must be prepared to make informed strategic decisions about the penalty phase.¹¹

Look at cases randomly. Or, choose a group that involves, say, felony murder, or potentially biased jurors, or a tainted confession, or any other sorting device. If these cases are carefully read (in some cases, not very much care is needed, to be sure), the significance of counsel leaps off the page.¹² No one has seriously contradicted Professor Welsh White that "[t]he *single greatest problem* with our system of capital punishment is the quality of representation afforded capital defendants."¹³

Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 317 (1983) (explaining why counsel's role is even more critical in death cases than in other criminal prosecutions).

6. Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 361 (1993).

7. *See id.* at 340-41.

8. *See id.* at 342-43.

9. *See id.* at 344-45.

10. *See id.* at 368-74.

11. *See id.* at 356-68. *See generally* Laurin Wollan, *Representing the Death Row Inmate: The Ethics of Advocacy, Collateral Style*, in *FACING THE DEATH PENALTY: ESSAYS IN CRUEL AND UNUSUAL PUNISHMENT* 92 (Michael L. Radelet ed. 1989) (discussing the representation of death row inmates in collateral proceedings); James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417 (1996) (discussing the importance of shaping a client's image).

On the intractable question of an attorney's responsibility when her client desires to waive post-conviction proceedings in a capital case, see *State v. Martini*, 677 A.2d. 1106 (N.J. 1996) (holding that defendant could not waive post-conviction purview).

12. On the role of counsel generally in death penalty cases, see TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AMERICAN BAR ASS'N, *TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES* 49-76 (1990) [hereinafter ABA REPORT]; Panel Discussion, *The Death of Fairness: Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105 (1994). On the role of counsel generally, see Symposium, *Toward a More Effective Right to Assistance of Counsel*, 58 LAW & CONTEMP. PROBS. 1-138 (Winter 1995).

13. White, *supra* note 6, at 376 (emphasis added).

A *Harvard Law Review* survey article is blunt: "[t]he utter inadequacy of trial and appellate lawyers for capital defendants has been widely recognized as the single most spectacular failure in the administration of capital punishment."¹⁴ This inadequacy is so pervasive, the survey concludes, as to by itself make the death penalty "unconstitutionally arbitrary."¹⁵ Professor Bruce Green, relying on similar data, also reasons that—in reality—many of the defendants who have been tried, convicted and sentenced to death have been deprived of their constitutional right to counsel.¹⁶

Why is this? Many reasons have been offered, but one starting point is Douglas Vick's recent analysis:

The literature is replete with impressionistic, anecdotal, and empirical evidence that indigent capital defendants are routinely denied assistance of counsel adequate to put into practice the protections that on paper make the death penalty constitutional. This crisis in capital representation is caused by funding systems that discourage experienced and competent criminal attorneys from taking appointments in death penalty cases and prevent even the most talented attorneys from preparing an adequate defense, particularly for the penalty phase.¹⁷

Capital defendants are typically represented by "the bottom of the bar."¹⁸ Ten percent of death row prisoners in Alabama were represented by trial lawyers subsequently disbarred or disciplined.¹⁹ Almost thirteen percent of such inmates in Louisiana were represented by similar counsel;²⁰ almost twenty-five percent of Kentucky's death row inmates were represented by lawyers since disbarred or suspended.²¹ An

14. Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923 (1994) (emphasis added) (citing ABA REPORT, *supra* note 12, at 7); see also Goodpaster, *supra* note 5, at 302).

15. Note, *supra* note 14, at 1923.

16. See Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993).

17. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 397-98 (1995).

18. Stephanie Saul, *When Death Is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, N.Y. NEWSDAY, Nov. 25, 1991, at 8.

19. See Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30.

20. See *id.*

21. See Saul, *supra* note 18, at 8.

appointed counsel in a death case told the press, "I despise [being appointed], I'd rather take a whipping" ²² An American Bar Association (ABA) Report on the representation of Georgia defendants facing the death penalty concluded:

[The state's] recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase. ²³

And one often gets what one pays for. Professor Robert Weisberg, an appellate defense counsel in death cases, has mordantly noted: "The fees [at trial] were infamously low. The second capital appeal I worked on was a case where the defense lawyer was paid \$150 for the entire case, and, believe me, he earned every penny of it." ²⁴ Vick thus concludes on this point:

In sum, every shortcoming in the quality of capital defense—the disproportionate number of incompetent attorneys assigned to death cases, the lack of experience and expertise of defense counsel, the repeated failure of defense attorneys to investigate and present available mitigating evidence—is ultimately rooted in society's unwillingness to pay for a meaningful defense in death penalty cases. ²⁵

It does not appear as if there is any relief in sight. Since 1983, when the Supreme Court established a pallid, nearly-impossible-to-violate, adequacy standard in *Strickland v. Washington* ²⁶ (requiring simply that counsel's efforts be "reasonable" under the circumstances), courts have become less and less interested in the question at hand, and little evidence

22. *Coleman v. Kemp*, 778 F.2d 1487, 1522 (11th Cir. 1985).

23. ABA REPORT, *supra* note 12, at 52-53 (citations omitted).

24. Robert Weisberg, *Who Defends Capital Defendants?*, 35 SANTA CLARA L. REV. 535, 537 (1995). For examples of cases litigated on appeal by Weisberg, see *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985); *Holtan v. Parratt*, 683 F.2d 1163 (8th Cir. 1982); *People v. Cummings*, 850 P.2d 1 (Cal. 1993).

25. Vick, *supra* note 17, at 410.

26. 466 U.S. 668, 668 (1984).

disputes the failure of *Strickland* to insure that capital defendants truly receive adequate assistance of counsel.²⁷

Individual cases are striking. In one case, counsel was found to be effective even though he had failed to introduce ballistics evidence showing that the gun taken from the defendant was not the murder weapon.²⁸ In another case, an attorney was found constitutionally adequate to provide representation to a death-eligible defendant notwithstanding the fact that he had been admitted to the bar for only six months and had never tried a jury case.²⁹ Another lawyer was found constitutionally adequate even where during the middle of the trial he appeared in court intoxicated and spent a night in jail.³⁰ In a pre-*Strickland* case, defense counsel was not even aware that separate sentencing proceedings were to be held in death penalty cases.³¹ There is little evidence to contradict Welsh White's conclusion that "[l]ower courts' application of *Strickland* has produced appalling results."³²

Finally, the Supreme Court does not appear inclined to reconsider its *Strickland* doctrine. In *Alvord v. Wainwright*,³³ the Court denied *certiorari* in a case where defense counsel accepted his client's refusal to rely on the insanity defense with no independent investigation of his client's mental or criminal history, despite the fact that the record demonstrated unequivocally that the defendant had a history of mental illness and had been acquitted on insanity grounds six years prior to his

27. See Ivan K. Fong, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 461-62 (1987); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91, 93 (1995).

28. See *Graham v. Collins*, 829 F. Supp. 204, 209 (S.D. Tex. 1993).

29. See *Paradis v. Arave*, 954 F.2d 1483, 1490-92 (9th Cir. 1992).

30. See *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991).

31. See *Young v. Zant*, 677 F.2d 792, 797 (11th Cir. 1982).

32. Welsh S. White, *Capital Punishment's Future*, 91 MICH. L. REV. 1429, 1436 (1993) (reviewing RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* (1991)). For other examples, see Stephen Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive, and Corrupting*, 31 SANTA CLARA L. REV. 1068, 1078-84 (1996); Christine Wisermen, *Representing the Condemned: A Critique of Capital Punishment*, 79 MARQ. L. REV. 731, 742-44 (1996).

33. 469 U.S. 956 (1984).

indictment in the current case.³⁴ Justice Marshall concluded in his dissent from the *certiorari* denial:

The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully to assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney.³⁵

In short, *Strickland* is a nonstandard that provides virtually no safeguards for mentally disabled criminal defendants. In death penalty cases, *Strickland* is little more than an empty shell. Witnesses before an ABA Task Force characterized counsel's performance variously as "scandalous," 'shameful,' 'abysmal,' 'pathetic,' [and] 'deplorable.'" ³⁶ In the words of one commentator, *Strickland* serves merely as a "gatepost[] on the road to legal condemnation."³⁷

B. Construction of Mental Disability Evidence

1. Introduction

Nearly twenty years ago, when surveying the availability of counsel to mentally disabled litigants, President Carter's Commission on Mental Health noted the frequently substandard level of representation made available to mentally disabled criminal defendants.³⁸ Nothing that has happened in the past two decades has been a palliative for this problem; if anything, it is confounded by the myth that adequate counsel is available to represent both criminal defendants in general, and mentally disabled

34. See *id.* at 956 (discussing Michael L. Radelet & George W. Barnard, M.D., *Treating Those Found Incompetent for Execution: Ethical Chaos with Only One Solution*, 16 BULL. AM. ACAD. PSYCHIATRY & L. 297, 300 (1988)); cf. *People v. Frierson*, 705 P.2d 396 (Cal. 1985) (holding that defense counsel could not refuse to honor defendant's clearly expressed desire to present diminished capacity defense at guilt/special circumstances phase of death penalty case; question was not merely a tactical decision).

35. *Alvord*, 469 U.S. at 963.

36. ABA REPORT, *supra* note 12, at 55 (citation omitted).

37. Bright, *Death by Lottery*, *supra* note 5, at 683.

38. See *Mental Health and Human Rights: Report of the Task Panel on Legal and Ethical Issues*, 20 ARIZ. L. REV. 49, 62 (1978), discussed in Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 654 (1989-90).

litigants in particular.³⁹ And, as the importance of the construction of “mitigating” and “aggravating” evidence grows, so does the need for counsel to be able to understand and utilize this mental disability evidence.

2. “Aggravators” and “Mitigators”

Contemporaneous death penalty statutes require findings of what are called “mitigating” and “aggravating” factors.⁴⁰ This is done to insure (ostensibly) that the death penalty is reserved for only the vilest of crimes—ones for which there is no reasonable excuse or justification. IN New Jersey, for instance, “aggravators” include such circumstances as a prior murder conviction;⁴¹ the defendant’s purposeful or knowing creation of a grave risk of death to one other than the victim;⁴² the commission of a murder that was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim;⁴³ the commission of a murder for hire,⁴⁴ or one for the purposes of escape or during the commission of another felony.⁴⁵ In the same statutory scheme, “mitigators” involve the defendant’s age;⁴⁶ his being under “unusual duress;”⁴⁷ no record of prior significant criminal history;⁴⁸ the victim’s consent to the conduct that led to his death;⁴⁹ the rendering of substantial assistance to the state in the

39. See, e.g., Melody Martin, *Defending the Mentally Ill Client in Criminal Matters: Ethics, Advocacy, and Responsibility*, 52 U. TORONTO FAC. L. REV. 73 (1993) (discussing ethical issues facing counsel in cases involving mentally disabled criminal defendants); Kenneth B. Nunn, *The Trial as Text: Allegory, Myth, and Symbols in the Adversarial Criminal Process: A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1995) (discussing myth in criminal cases); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992) (discussing myth in mental disability cases); Vick, *supra* note 17 (discussing myth in criminal cases).

40. See, e.g., N.J. STAT. ANN. § 2C:11-3c(2)(a) (West 1995).

41. See *id.* § 2C:11-3c(4)(a).

42. See *id.* § 2C:11-3c(4)(b).

43. See *id.* § 2C:11-3c(4)(c).

44. See *id.* § 2C:11-3c(4)(d)-(e).

45. See *id.* § 2C:11-3c(4)(f)-(g).

46. See *id.* § 2C:11-3c(5)(c).

47. See *id.* § 2C:11-3c(5)(e).

48. See *id.* § 2C:11-3c(5)(f).

49. See *id.* § 2C:11-3c(5)(b).

prosecution of another on a murder charge;⁵⁰ and two others that are especially significant to this paper:

(a) The defendant was under the influence of extreme mental or emotional disturbance insufficient to constitute a defense to prosecution; [and]

. . . .
(d) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired as a result of mental disease or intoxication, but not to a degree sufficient to constitute a defense to prosecution.⁵¹

Aggravating factors in New Jersey must be proven beyond a reasonable doubt, and the state must also prove, beyond a reasonable doubt, that the aggravating factors outweigh the mitigating factors.⁵² On this point, the New Jersey Supreme Court is clear: "We can think of no judgment of any jury in this state in any case that has as strong a claim to the requirement of certainty as does this one."⁵³

The importance of mitigating evidence at the penalty stage "cannot be overestimated."⁵⁴ The sentencing authority must consider any relevant mitigating evidence that a defendant offers as a basis for a sentence less than death,⁵⁵ a holding that flows from *Gregg*⁵⁶ and the Court's other initial "modern" decisions upholding the death penalty, in which it mandated that the sentencing authority be provided with adequate individualized information about defendants and be guided by clear and

50. See *id.* § 2C:11-3c(5)(g).

51. *Id.* § 2C:11-3c(5)(a),(d).

52. See *State v. Biegenwald*, 524 A.2d 130, 156 (N.J. 1987).

53. *Id.* at 155-56.

54. White, *supra* note 32, at 1434; see also White, *supra* note 6, at 338 (quoting a leading capital defense lawyer as stating, "it's a rare case in which the capital defendant has no mental problems").

55. See *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); see generally 3 PERLIN, *supra* note 4, § 17.09, at 521-23 (discussing *Eddings* and *Lockett*). Statutes are collected in Ellen Fels Berkman, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 296-98 (1989).

56. *Gregg v. Georgia*, 428 U.S. 153 (1976).

objective standards.⁵⁷ These cases led Professor James Liebman and a colleague to craft a four-part test to be employed in determining the degree to which mitigation based on mental disorder would be proper in a capital case:

1. whether the offender's suffering evidences expiation or inspires compassion;
2. whether the offender's cognitive and/or volitional impairment at the time he committed the crime affected his responsibility for his actions, and thereby diminished society's need for revenge;
3. whether the offender, subjectively analyzed, was less affected than the mentally normal offender by the deterrent threat of capital punishment at the time he committed the crime; and
4. whether the exemplary value of capital punishment of the offender, as objectively perceived by reasonable persons, would be attenuated by the difficulty those persons would have identifying with the executed offender.⁵⁸

3. The Importance of *Lockett* and *Eddings*.⁵⁹

In *Lockett v. Ohio*,⁶⁰ the Supreme Court substantially widened the scope of mitigating evidence allowed at the penalty phase of a capital case, concluding that, "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

57. See Liebman & Shepard, *supra* note 4, at 759-60 n.17 (discussing the Court's decisions in *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976)). On the ways that jury instructions affect decision-making in this context, see Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 561 (1994) (criticizing the Supreme Court for relying on "intuitive assumptions of juror infallibility"). On factors that influence jurors in insanity defense cases, see Karen Whittemore & James R.P. Ogloff, *Factors That Influence Jury Decision Making: Disposition Instructions and Mental State at the Time of the Trial*, 19 LAW & HUM. BEHAV. 283 (1995).

58. 3 PERLIN, *supra* note 4, § 17.08, at 520 (quoting Liebman & Shepard, *supra* note 4, at 818).

59. This section is adapted from MICHAEL L. PERLIN, LAW AND MENTAL DISABILITY § 4.47(C), at 642-43 (1994).

60. 438 U.S. 586 (1978).

or record . . . that defendant proffers as a basis for a sentence less than death."⁶¹

Four years later, the Court expanded on its *Lockett* rule in *Eddings v. Oklahoma*,⁶² holding that the sentencing authority must consider *any* relevant mitigating evidence.⁶³ In *Eddings*, during the sentencing hearing, the defendant presented testimony that he was the product of a broken family and the victim of child abuse.⁶⁴ Psychological testimony also showed that Eddings was emotionally disturbed and that his mental and emotional development were at a level below his chronological age.⁶⁵ Further, a psychiatrist and a sociologist testified that Eddings could be treated and rehabilitated.⁶⁶ Despite this testimony, the trial judge considered only Eddings' youth as a mitigating factor, which, while important, did not outweigh the aggravating factors presented by the prosecution.⁶⁷

Reversing and remanding the sentence, the Supreme Court concluded that the sentencer must consider *all* mitigating evidence and *then* weigh this evidence against the aggravating circumstances.⁶⁸ Thus, *Eddings*' restatement of the *Lockett* rule requires the sentencing tribunal to "listen" to any relevant evidence proffered to mitigate in a death penalty case.⁶⁹ Testimony found relevant as to Eddings' mental disorder, then, could not be ignored. Read together, *Lockett* and *Eddings* thus "require the courts to admit into evidence, and to consider, *any* claim raised by the defendant in mitigation."⁷⁰

61. *Id.* at 604. For a thoughtful analysis of *Lockett*'s place on the Supreme Court's jurisprudential death penalty continuum, see Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980).

62. 455 U.S. 104 (1982).

63. *See id.* at 114.

64. *See id.* at 107-08.

65. *See id.* at 107.

66. *See id.* at 107-08.

67. *See id.* at 108-09. The state raised three aggravating circumstances in favor of imposing a death sentence: "that the murder was especially heinous, atrocious or cruel, that the crime was committed for the purpose of avoiding or preventing a lawful arrest, and that there was a probability that defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 106-07.

68. *See id.* at 113-17.

69. *See id.* at 115 n.10.

70. C. Richard Showalter & Richard Bonnie, *Psychiatry and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 159, 161 (1984) (emphasis added). For examples of more recent cases, see *Lackey v. State*, 819 S.W.2d 111 (Tex. Crim. App. 1991); and *State v. Fierro*, 804 P.2d 72

4. After *Lockett* and *Eddings*⁷¹

Building on the decisions in *Lockett* and *Eddings*, subsequent cases have considered the guidance that must be given to juries in determining whether mitigating circumstances have been presented, including both statutory and nonstatutory factors.⁷² In most cases, the judge must tell the jury what a mitigating circumstance is, and what its function is in the jury's sentencing deliberation.⁷³ This responsibility is not fulfilled simply by telling the jurors that they may "consider" such circumstances.⁷⁴

As testimony of mental disorder at the penalty phase is warranted by the serious responsibility that devolves on the fact finder (usually the jury) in a capital case, it is not strictly relegated in some jurisdictions to mitigating factors but may also be presented by the prosecution so as to evidence aggravating factors as well.⁷⁵ Also, courts will weigh what is perceived as the clarity and lucidity of conflicting expert testimony in determining whether a mitigating factor is present.⁷⁶

Such testimony as to mental disorder need not support a finding of insanity.⁷⁷ On the other hand, courts are split on the question of the relevancy of testimony as to the defendant's capacity for rehabilitation.⁷⁸ Further, testimony at the sentencing phase must be admitted even where

(Ariz. 1991).

71. This section is generally adapted from PERLIN, *supra* note 59, § 4.47(D), at 644-45.

72. *See, e.g.,* *Moody v. State*, 418 So. 2d 989 (Fla. 1982).

73. *See* *Spivey v. Zant*, 661 F.2d 464, 472 (5th Cir. 1981).

74. *See, e.g.,* *Morgan v. Zant*, 743 F.2d 775 (11th Cir. 1984); *Westbrook v. Zant*, 704 F.2d 1487 (11th Cir. 1983).

75. *See, e.g.,* *People v. Devin*, 444 N.E.2d 102 (Ill. 1982); *State v. Brogdon*, 457 So. 2d 616 (La. 1984); *State v. Woomey*, 299 S.E.2d 317 (S.C. 1982).

76. *See, e.g.,* *State v. Smith*, 638 P.2d 696 (Ariz. 1981).

77. *See* *Simmons v. State*, 419 So. 2d 316, 317 (Fla. 1982) (noting that at sentencing, the defendant presented testimony of an examining psychiatrist who concluded that, while the defendant was neither psychotic nor neurotic, while he knew right from wrong, and while he was of normal intelligence, he suffered from a character disorder and extreme emotional immaturity); *see also* *State v. English*, 367 So. 2d 815, 819 (La. 1979) (holding that at the penalty phase, even where the insanity defense is rejected, "another dimension of mental condition comes into play").

78. *Compare* *Simmons*, 419 So. 2d at 320 (stating that the potential for rehabilitation is an element of character, and thus may not be excluded from consideration as a potentially mitigating factor), *with* *Volle v. State*, 474 So. 2d 796, 804 (Fla. 1985) (distinguishing *Simmons*, where proffered testimony of corrections consultants and prison psychiatrists that defendant—if given life sentence rather than death—would be a "model prisoner," was characterized as irrelevant to sentencing inquiry).

a defense of not guilty by reason of insanity has been specifically rejected at the guilt phase of the trial,⁷⁹ or where the issue was never previously raised.⁸⁰

5. *Penry* and Mitigation⁸¹

Finally, in *Penry v. Lynaugh*,⁸² the Court's most recent decision on this question involving a mentally disabled defendant, the Supreme Court held that evidence as to the defendant's mental retardation was relevant to his culpability and that, without such information, jurors could not express their "reasoned moral response" in determining the appropriateness of the death penalty.⁸³ There, the court found that assessment of the defendant's retardation would aid the jurors in determining whether the commission of the crime was "deliberate."⁸⁴ Without a special instruction as to such evidence, a juror might be unaware that his evaluation of the defendant's moral culpability could be informed by his handicapping condition.⁸⁵ Also, in attempting to grapple with questions of future dangerousness or of the presence of provocation (both questions that must be considered under the Texas state sentencing scheme), jurors were required to have a "vehicle" to consider whether the defendant's background and childhood should have mitigated the penalty imposed.⁸⁶

79. See *People v. Moseley*, 281 N.Y.S.2d 762, 765 (1967) (finding that defendant was not attempting to re-litigate the issue of his legal insanity or criminal responsibility; instead, he was properly endeavoring to persuade the jury that, while his mental illness was not a defense to the crime, it may have rendered it impossible for him to exercise any self-control and should, therefore, be considered in mitigation); see also *Mines v. State*, 390 So. 2d 332, 337 (Fla. 1980) (finding of sanity does not eliminate consideration of statutory mitigating factors concerning mental condition).

80. See *Washington v. Commonwealth*, 323 S.E.2d 577, 586 (Va. 1984).

81. This section is largely adapted from PERLIN, *supra* note 59, § 4.47(C), at 643.

82. 492 U.S. 302 (1989).

83. *Id.* at 321 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988)). The defendant in *Penry* was mentally retarded. See *id.* at 307. See generally 3 PERLIN, *supra* note 4, § 17.09, at 282-84 (Supp. 1995) (discussing *Penry*). On the traditional role of clemency in such cases, see Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 624-27 (1991).

84. See *Penry*, 492 U.S. at 322.

85. See *id.*

86. See *id.* at 322-26.

Without such testimony, the jury could not appropriately express its "reasoned moral response" on the evidence in question.⁸⁷

C. Mental Disability and Execution⁸⁸

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. In his classic treatise, *Insanity and the Criminal Law*,⁸⁹ Dr. William White focused on the "general feeling of abhorrence against executing a person who is insane."⁹⁰ Although the roots of the policy against execution of insane offenders are ancient, "no consensus exists about the reasons for it, about the meaning of 'insane' in this context, or the procedures which should be used to determine it."⁹¹ One commentator suggests that 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."⁹²

The Supreme Court's 1986 decision in *Ford v. Wainwright*⁹³ brought limited doctrinal coherence to this question. In *Ford*, a divided court⁹⁴ concluded that the Eighth Amendment did prohibit the imposition of the

87. See *id.* at 328; see also, e.g., *Kwan Fai Mak v. Blodgett*, 754 F. Supp. 1490 (W.D. Wash. 1991) (holding that ineffective assistance of counsel was demonstrated where lawyer failed to adduce mitigating evidence regarding severe assimilation difficulties experienced by adolescents from far eastern cultures when they relocate to the United States).

88. This section is largely adapted from PERLIN, *supra* note 59, § 4.50, at 654-57.

89. WILLIAM A. WHITE, M.D., *INSANITY AND THE CRIMINAL LAW* (1923) (De Capo ed. 1981).

90. *Id.* at 245.

91. Elyce H. Zenoff, *Can an Insane Person Be Executed?*, 16 PREVIEW U.S. SUP. CT. CAS. 465, 466 (1986).

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

93. 477 U.S. 399 (1986).

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

death penalty on an insane prisoner.⁹⁵ On this point, Justice Rehnquist dissented on behalf of himself and Chief Justice Burger.⁹⁶ 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."⁹⁷ He thus rejected the majority's conclusion that the Eighth Amendment created a substantive right not to be executed while insane.⁹⁸

Ford is a curious and difficult opinion that reflects the ambiguity and ambivalence that permeate this subject-matter.⁹⁹ It is especially perplexing in light of the Court's subsequent decision in *Penry v. Lynaugh*¹⁰⁰ in which it rejected the argument that defendant's mental retardation barred capital punishment.¹⁰¹ Although she conceded that the execution of the "profoundly or severely retarded" might violate the Eighth Amendment, Justice 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,"¹⁰² an observation astonishing either in its naïveté or its cynicism.¹⁰³ Although New York's new death penalty statute on its face bars the execution of persons with mental retardation,¹⁰⁴ *Penry* is nonetheless important because it gives us both

95. See *id.* at 402-10 (concluding that a *de novo* evidentiary hearing on Ford's sanity was required unless "the state-court trier of fact has after a full hearing reliably found the relevant facts"); *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963).

96. See *Ford*, 477 U.S. at 431 (Rehnquist, J., dissenting).

97. *Id.* at 431-33.

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

99. An early analysis of *Ford* saw it as "sanctioning a double paradox: condemned prisoners are killed if they are sane, but spared if they are insane; insane prisoners are cured in order that they may be killed." *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 100, 106 (1986) (citation omitted).

100. 492 U.S. 302 (1989).

101. See *id.* at 332-34. On the relationship between *Ford* and *Penry*, see 3 PERLIN, *supra* note 4, § 1.06A, at 296-77 (Supp. 1995).

102. *Penry*, 492 U.S. at 333. For an analysis of post-*Penry* litigation, see Thomas Criswell, *Due Process: Rios Grande: The Texas Court of Criminal Appeals Examines Mental Retardation as a Mitigating Factor in Rios v. Texas*, 47 OKLA. L. REV. 373 (1994).

103. See, e.g., MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 210-26, 372-74 (1994).

104. See N.Y. CRIM. PROC. LAW § 400.27(12) (McKinney Supp. 1996).

insights into, and signals about the U.S. Supreme Court's attitudes toward one population of persons with mental disabilities.

To some extent, *Ford* and *Penry* serve as paradigms for the Court's confusion about cases involving mentally disabled criminal defendants.¹⁰⁵ Justice Rehnquist's and Justice O'Connor's opinions in *Ford* and Justice O'Connor's opinion in *Penry* remain infused with the obsessive fear that defendants will raise "false" or "spurious claims" in desperate attempts to stave off execution.¹⁰⁶ This fear—a *doppelganger* of the public's "swift and vociferous . . . outrage"¹⁰⁷ over what it perceives as "abusive" insanity acquittals, thus allowing "guilty" defendants to "beat the rap"—remains the source of much of the friction in this area.¹⁰⁸

Justice O'Connor's *Penry* assertion that the insanity defense protects against the conviction and punishment of persons with severe mental disability stands in stark contrast to counsel's dismal track record in this area.¹⁰⁹ And, certainly, post-*Ford* litigation on this issue gives no support whatsoever to this assertion.¹¹⁰

D. *The Role of Jurors*¹¹¹

Scholars have expressed their skepticism about the use of a mental illness defense in a capital punishment penalty phase, indicating that such

105. See generally 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 (1987).

106. *Ford v. Wainwright*, 477 U.S. 399, 429 (1986) (O'Connor, J., concurring in part and dissenting in part); *id.* at 435 (Rehnquist, J., dissenting).

107. INGO KEILITZ & JUNIUS P. FULTON, *THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS* 3 (1984).

108. See, e.g., *id.* (noting that the "not guilty by reason of insanity" verdict in the Hinckley case led to public condemnation of the insanity defense).

109. See 3 PERLIN, *supra* note 4, § 15.23. For a stark case example, see *Alvord v. Wainwright*, 469 U.S. 956, 957 (1984) (Marshall, J., dissenting from denial of *certiorari*).

110. See, e.g., *Rector v. Bryant*, 111 S. Ct. 2872 (1991) (Marshall, J., dissenting from denial of *certiorari*); *Demosthenes v. Baal*, 495 U.S. 731 (1990); *Hamilton v. Texas*, 497 U.S. 1016 (1990) (Brennan, J., dissenting from denial of stay of execution); *Johnson v. Cabana*, 481 U.S. 1061 (1987) (Brennan, J., dissenting from denial of stay of execution and denial of *certiorari*); see generally Perlin, *supra* note 39 (discussing the general inadequacy of counsel in capital cases involving mentally disabled criminal defendants).

111. This section is largely adapted from 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. ETHICS & PUB. POL'Y 239, 245-48 (1994).

testimony raises issues of unpredictability and dangerousness to potentially suggest to the jury that the defendant "poses a continuing risk to society."¹¹² While expert witnesses have predicted (with near unanimity) that such a defense would be successful,¹¹³ research with mock jurors (and archival research in cases involving actual jurors) has revealed that (1) a defendant's unsuccessful attempt to raise an insanity defense positively correlates with a death penalty verdict,¹¹⁴ (2) a mental illness defense is rated as a less effective strategy than other alternatives at the penalty phase (even including the alternative of raising no defense at all),¹¹⁵ and (3) jurors who are "death qualified"¹¹⁶ are more likely to convict capital defendants who suffer from nonorganic mental disorders.¹¹⁷

112. George E. Dix, *Psychological Abnormality and Capital Sentencing: The New "Diminished Responsibility,"* 7 INT'L J.L. & PSYCHIATRY 249, 264 (1984); see generally Lawrence T. White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411, 414-19 (1987) (discussing the effectiveness of the mental illness defense). A significant number of defendants facing execution are mentally disabled. See Michael Mello, *On Metaphors, Mirrors, And Murders: Theodore Bundy And The Rule Of Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 887, 919 n.162 (1990-1991) (collecting studies). On the ways that imprisonment negatively affects mental health, see Sheilah Hodgins & Gilles Côté, *The Mental Health of Penitentiary Inmates in Isolation*, 33 CAN. J. CRIMINOLOGY 175 (1991).

For a thoughtful inquiry into the role of the jury as "authorizing agents" for capital punishment, see Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 79 IND. L.J. 1103 (1995). On the significance of the extent to which jurors perceive their personal decision-making responsibilities in death penalty cases, see Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241 (1995).

113. See White, *supra* note 112, at 414-15 (discussing findings reported in Lawrence T. White, Ph.D., *Trial Consultants, Psychologists, and Prediction Errors*, COURT CALL, Spring 1986, at 1).

114. See Note, *A Study of the California Penalty Jury on First-Degree Murder Cases*, 21 STAN. L. REV. 1296 (1969). This article, of course, predates the "modern" death penalty jurisprudence that follows the U.S. Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976). But cf. Berkman, *supra* note 55 (arguing that considering aggravating circumstances that flow from defendant's mental illness is constitutionally impermissible).

115. See Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies*, 11 LAW & HUM. BEHAV. 113 (1987).

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

117. Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).

Fact-finders demand that defendants conform to popular, common-sensical visual images of "looking crazy."¹¹⁸ This further "ups the ante" for defendants raising such a defense. On the other hand, some empirical evidence suggests that a mental illness defense may be successful where the defendant presents expert testimony, where he has a history of psychiatric impairment (especially where he has sought treatment), and where he is able to present purportedly "objective evidence of psychopathology."¹¹⁹ Also, empirical evidence reveals that fact-finders will be more receptive to a mental status defense that does not involve "planful" behavior,¹²⁰ and that, in coming to their conclusions, jurors are likely to rely upon "implicit theories about the causes of violence."¹²¹

Reconciliation of jurors' attitudes with court doctrine is made even more difficult by juror confusion over the proper role of mitigating evidence, their lack of recognition of mitigating evidence when presented with it, and their misunderstanding of its expected impact on their death

118. See, e.g., *State Farm Fire & Casualty Co. v. Wicks*, 474 N.W.2d 324, 327 (Minn. 1991) (noting that both law and society are always more skeptical about a putatively mentally ill person who has a "normal appearance" or "doesn't look sick"). See generally Perlin, *supra* note 38, at 724-27 (discussing the public's demand that mentally ill defendants "look crazy").

119. White, *supra* note 112, at 415-18; see Ellsworth, *supra* note 117, at 90 (noting that besides simply feeling that "mental illness is no excuse," jurors hostile to a mental illness defense focused on the possibility that the defendant was malingering, and on his prior failure to seek help for his problems). *But cf.* *State v. Perry*, 610 So. 2d 746, 781 (La. 1992) (Cole, J., dissenting) (noting that "[s]ociety has the right to protect itself from those who would commit murder and seek to avoid their legitimate punishment by a subsequently contracted, or feigned, insanity"); Gilbert Geis & Robert F. Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS 72, 73 (1985) (noting that it was irrelevant to Idaho residents whether defendant's reliance on the insanity defense was real or feigned); Henry Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEX. L. REV. 849, 861 (1960) (noting that a request for psychiatric assistance was seen as evidence of malingering).

120. See Stephen L. Golding & Ronald Roesch, *The Assessment of Criminal Responsibility: A Historical Approach to a Current Controversy*, in HANDBOOK OF FORENSIC PSYCHOLOGY 395, 400 (I. Weiner & A. Hess eds., 1987); Caton F. Roberts et al., *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 LAW & HUM. BEHAV. 207, 209-10 (1987).

121. Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 LAW & HUM. BEHAV. 185, 199 (1992).

penalty deliberations.¹²² In cases such as *Penry*,¹²³ where the defendant is mentally retarded, the problems may be further exacerbated due to juror miscomprehension of mental retardation, their use of stereotypes of mentally retarded persons, and their inability to understand the impact of retardation on a defendant's culpability.¹²⁴

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

[E]ither no one looks for them, or the defendants do not consider themselves impaired, so they never request special evaluations. Even when defendants are examined, they often are unaware of what symptoms might mitigate their sentences. Their inadequacies may make them less capable than other defendants of obtaining competent representation or assisting their attorneys in documenting types of neurological impairments that might be important for purpose of mitigation.¹²⁵

It is thus no surprise to learn that as many as half of death row inmates exhibit signs of serious mental illness or that ten to twenty percent demonstrate significant mental retardation.¹²⁶

122. See Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423, 426-28 (1993). On jury confusion in death cases in general, see Cho, *supra* note 57. On the psychology of jurors in death penalty cases, see generally Sherman, *supra* note 112.

123. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

124. See George S. Baroff, *Establishing Mental Retardation in Capital Cases: A Potential Matter of Life and Death*, 29 MENTAL RETARDATION 343, 344-45 (1991); Robert Hayman, *Beyond Penry: The Remedial Use of the Mental Retardation Label in Death Penalty Sentencing*, 59 UMKC L. REV. 17, 47 (1990); see also James W. Ellis & Ruth A. Luckasson, *The Mentally Retarded Criminal Defendant*, 53 GEO. WASH. L. REV. 414 (1985) (discussing doctrinal and practical issues); see generally David Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 14 ST. MARY'S L.J. 1299, 1325 (1993) (discussing misconceptions about mentally retarded persons).

125. Berkman, *supra* note 55, at 299 (citations omitted).

126. White, *supra* note 6, at 338; see also Berkman, *supra* note 55, at 298 (noting that in one survey of 15 adult inmates, nine had psychiatric disorders and six were found to be chronically psychotic); see generally Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 483 (1990-91) (noting that "a substantial number of death row inmates suffer from mental illness"); Perlin, *supra* note 38, at 715-17 (noting the "high degree of concordance between clinical evaluations of sanity and subsequent legal dispositions").

The riskiness of a mental illness defense must be considered in the context of yet other evidence that a significant percentage of actual jurors saw certain aspects of a defendant's demeanor—whether he looked passive, unremorseful, or emotionless—as a critical operative factor in determining whether or not to return a death sentence.¹²⁷ Other studies reveal that a defendant's attractiveness is a significant trial variable (with jurors treating attractive defendants more leniently than unattractive defendants)¹²⁸ and that a defendant's "emotionless appearance" will have negative trial consequences.¹²⁹

These findings are particularly problematic in light of the fact that a significant percentage of mentally disabled criminal defendants receive powerful psychotropic medication while awaiting trial.¹³⁰ Among the side effects of such medications are akinesia and akathisia, conditions that may mislead jurors by making the defendant appear either apathetic and

127. See William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 40-41, 51-52 (1987). On the significance of the images that jurors regularly confront in death penalty cases, see Sarat, *supra* note 112, at 1126-31. On the role of images in death penalty litigation in general, see Doyle, *supra* note 11, at 420-27.

128. See Marybeth Zientek, *Riggins v. Nevada: Medicated Defendants and Courtroom Demeanor from the Jury's Perspective*, 30 AM. CRIM. L. REV. 215, 227 (1992) (reporting on research in Wayne Weiten & Shari Seidman Diamond, *A Critical Review of the Jury Simulation Paradigm: The Case of Defendant Characteristics*, 3 LAW & HUM. BEHAV. 71, 74 (1979)).

129. See *id.* (reporting on research in Martin F. Kaplan & Gwen DeArment Kemmerick, *Juror Judgment as Information Integration: Combining Evidential and Non-Evidential Information*, 30 J. PERSONALITY & SOC. PSYCHOL. 493 (1974)). For a philosophical inquiry into the way that "character" is viewed in determinations of guilt and punishment, see Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99 (1966). On the ways that jurors construct "responsibility" see also Sarat, *supra* note 112, and Sherman, *supra* note 112.

130. See, e.g., Michael L. Perlin, *Decoding Right to Refuse Treatment Law*, 16 INT'L J.L. & PSYCHIATRY 151 (1993); 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. FORENSIC PSYCHIATRY 37 (1991); see also *Heller v. Doe*, 509 U.S. 312, 324-25 (1993) (noting that "[t]he mentally ill are subjected to medical and psychiatric treatment which may involve the . . . use of psychotropic drugs"); *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring) (noting that "[t]he side effects of antipsychotic drugs may alter demeanor in a way that will prejudice all facets of the defense").

unemotional or agitated and restless.¹³¹ Another important side effect, tardive dyskinesia—marked by “tic-like movements of the lips,” “worm-like contractions of the tongue,” “pouting, sucking, smacking and puckering lip movements,” and “expiratory grunts and noises”—will inevitably make defendants appear less “attractive” to jurors.¹³²

E. Conclusion

In short, mental disability evidence is misconstrued and misunderstood by counsel, by jurors, and by judges. It is frequently ignored, and often seen as an aggravator rather than as a mitigator. It is critical that any attempt to understand the “real life” application of the death penalty (oxymoron intentional) include an understanding of the way that this evidence is interpreted.

III. THE NEW YORK STATUTE¹³³

More than thirty years after the last execution in New York State, Governor Pataki signed legislation in March 1995 reintroducing the death penalty to the state’s criminal justice system.¹³⁴ The final legislation is significantly narrower than the typical post-*Gregg*¹³⁵ statute, in that with two exceptions, the only aggravating circumstances that a jury may consider are elements of the crime that have already been proven beyond a reasonable doubt;¹³⁶ the capital sentencing proceeding simply balances

131. See *United States v. Charters*, 829 F.2d 479, 493-94 (4th Cir. 1987), *on reh’g en banc* 863 F.2d 302 (4th Cir. 1988), *cert. denied*, 494 U.S. 1016 (1990) (noting that heavily medicated defendant might give jury “false impression of defendant’s mental state at the time of the crime”); see also Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are Fit*, 66 KY. L.J. 666, 668-71 (1978) (noting that defendant can alienate jury “if he displays such inappropriate demeanor as grinning when gruesome details are discussed, losing his temper when witnesses maintain he is a violent man, or acting indifferent to the proceedings”).

132. Dennis E. Cichon, *The Right to “Just Say No”: A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 304-07 (1992) (quoting Joseph T. Smith & Robert I. Simon, *Tardive Dyskinesia Revisited*, 31 MED. TRIAL TECH. Q. 342, 343 (1985)).

133. N.Y. CRIM. PROC. LAW § 400.27 (McKinney Supp. 1996).

134. See Executive Memoranda of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 2283 [hereinafter Executive Memoranda] (memorandum from Governor George E. Pataki approving death penalty laws); Michael Lumer & Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J.L. & POL’y 81, 81 (1995).

135. *Gregg v. Georgia*, 428 U.S. 153 (1976).

136. See N.Y. CRIM. PROC. LAW § 400.27(6).

any mitigating circumstances against the aggravating circumstances that were found as part of the guilt phase.¹³⁷ Under the mitigation section of the statute:

Mitigating factors shall include the following:

...
(b) The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;

...
(e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution; or

(f) Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.¹³⁸

Elsewhere, the statute bars the execution of any individual who is found to be mentally retarded at the time of the scheduled execution,¹³⁹ a section that Governor Pataki characterized as a "special measure of protection."¹⁴⁰

Importantly, the death penalty statute also provides for the creation of a Capital Defender Office, specifically providing representation for death-eligible defendants.¹⁴¹ The Office will represent some death penalty defendants directly.¹⁴² It will also establish panels (jointly with the presiding justices of the Appellate Division) to oversee the appointment of private lawyers to provide representation in other death penalty cases.¹⁴³

137. See Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J.L. & POL'Y 161, 220 (1995).

138. N.Y. CRIM. PROC. LAW § 400.27(9).

139. See *id.* § 400.27(12).

140. See Executive Memoranda, *supra* note 134, at 2285.

141. See N.Y. JUD. LAW § 35-b(3) (McKinney 1995); see generally James Traub, *The Life Preserver*, NEW YORKER, Apr. 8, 1996, at 47 (profiling Kevin Doyle, New York State's Capital Defender).

142. See Daniel Wise, *4 Panels Named for Death Penalty Cases; Assignments Include Counsel Compensation*, N.Y.L.J., Aug. 16, 1995, at 2.

143. See *id.* at 1.

The panel for the First Department (Manhattan) includes two former state supreme court judges and a former law school dean.¹⁴⁴ The New York Court of Appeals has recently set a rate of \$175 per hour for lead counsel (and \$150 for associate counsel) in death penalty cases.¹⁴⁵

The Office has retained, in addition to the typical fact investigators, a cadre of employees known as Mitigation Specialists (all with backgrounds in social work or the allied mental health professions) to investigate the social histories of all death penalty clients in anticipation of presenting mitigating evidence at the sentencing phase of the case.¹⁴⁶ In addition, a budget makes available funds for outside forensic experts to testify on the full range of mental status issues that could come before the court in a death penalty trial.¹⁴⁷

If there is to be a death penalty statute, one that creates a special office to provide both legal and investigative services is certainly, on paper, less problematic than one that is silent on the provision of counsel.¹⁴⁸ The New Jersey experience suggests a helpful parallel. There, the vast majority of death penalty defendants are represented by the state Office of the Public Defender—a state-wide office with extensive support staff and a budget for independent expert evaluations and forensic testimony.¹⁴⁹ In the fourteen years since New Jersey reinstated the death penalty, there have been no executions and only three of the first thirty-four death sentences handed down by juries have been upheld by the state supreme court.¹⁵⁰

144. *See id.*

145. *See* Daniel Wise, *Defense Counsel Pay Set for Capital Cases: Maximum Hourly Rates Highest in Nation*, N.Y.L.J., June 11, 1996, at 1.

146. Telephone interview with Russ Stetler, Director of Investigations, New York State Capital Defender Office (Jan. 12, 1996).

147. *Id.*

148. On the need for specialized defense systems in capital cases, see Michael Moore, *Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death Eligible Defendants*, 37 WM. & MARY L. REV. 1617, 1671 (1996) (noting that "indigent defense systems must find specialized means of providing indigent capital defendants with adequate representation").

149. *See* Vick, *supra* note 17, at 389-90.

150. *See* Michael T. Nolan, Jr., *Hell Bent on Intent: New Jersey Broadens the Class of Death Eligible Defendants*, 19 SETON HALL LEGIS. J. 195, 196 (1994). The three cases upholding capital sentences are *State v. Bey*, 645 A.2d 685 (N.J. 1994) (defendant killed victims after particularly vicious sexual assaults); *State v. Martini*, 619 A.2d 1208 (N.J. 1993) (defendant killed victim in course of kidnapping); and *State v. Marshall*, 613 A.2d 1059 (N.J. 1992) (defendant hired "hit man" to murder his wife). *Cf.* Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 IND. L. REV. 485, 532-33 (1996) (offering

This alone, however, should not suggest that the New York system will "work." First, as Russell Neufeld, Director of the New York Legal Aid Society's Capital Defense Unit, has pointed out, in the new law there are limits to the availability of counsel both on appeal and in collateral proceedings.¹⁵¹ But, even assuming that competent counsel is provided at every step of the proceedings, other potential problems still exist. In a series of papers, I have argued that it is impossible to make any sense of the criminal trial process (especially the way the legal system treats mentally disabled defendants) without considering the importance of what I call "sanism"¹⁵² and "pretextuality."¹⁵³ I will next examine these issues and finally consider them through the additional filter of "therapeutic jurisprudence."¹⁵⁴

suggestions for improvement of Indiana's system).

151. See Russell Neufeld, *Problems Defending Under New York's New Death Penalty Law*, 4 J.L. & POL'Y 143, 146-47 (1995) (stating that the statute does not provide for right to counsel on federal habeas corpus challenges and limits provision of counsel to providing representation on the first state-level quorum nobis petition).

152. See Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373 (1992) [hereinafter Perlin, *Sanism*]; Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993); 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, *Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 369 (1994) [hereinafter Perlin, *Understanding*].

153. See Michael L. Perlin, *Morality and Pretextuality, Psychiatry and Law: Of "Ordinary Common Sense," Heuristic Reasoning, and Cognitive Dissonance*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 131 (1991) [hereinafter Perlin, *Morality*]; Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625 (1993) [hereinafter Perlin, *Pretexts*]; Perlin, *Understanding*, *supra* note 152.

154. See Michael L. Perlin et al., *Therapeutic Jurisprudence and the Civil Rights of Institutionalized Mentally Disabled Persons: Hopeless Oxymoron or Path to Redemption?*, 1 PSYCHOL. PUB. POL'Y & L. 80 (1995); Michael L. Perlin, *What Is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

IV. SOME JURISPRUDENTIAL FILTERS

A. *Sanism*¹⁵⁵

1. In General

a. Introduction

"Sanism" is an irrational prejudice of the same quality and character as other irrational prejudices that causes, and is reflected in, prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.¹⁵⁶ It infects both our jurisprudence and our lawyering practices.¹⁵⁷ Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events, both in everyday life and in the legal process.¹⁵⁸

Judges are not immune from sanism. "[E]mbedded in the cultural presuppositions that engulf us all,"¹⁵⁹ they express discomfort with social science (or any other system that may appear to challenge law's hegemony over society) and skepticism about new thinking.¹⁶⁰ This discomfort and

155. This section is largely adapted from Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability Law and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 442-44 (1995).

156. The classic treatise is GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1955).

157. The phrase "sanism" was, to the best of my knowledge, coined by Dr. Morton Birnbaum. See Morton Birnbaum, *The Right to Treatment: Some Comments on Its Development*, in MEDICAL, MORAL AND LEGAL ISSUES IN HEALTH CARE 97, 106-07 (F. Ayd ed., 1974); see also *Koe v. Califano*, 573 F.2d 761, 764 (2d Cir. 1978) (citing Birnbaum); Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 92-93 (1991) (discussing Birnbaum's insights).

158. See, e.g., PERLIN, *supra* note 103, at 388-90.

159. Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991).

160. The discomfort that many judges feel in having to decide mental disability law cases is often palpable. See, e.g., 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, 991 (1990) (discussing the court's characterization in *United States v. Charters*, 863 F.2d 302, 310 (4th Cir. 1988) (en banc) cert. denied, 494 U.S. 1016 (1990), of judicial involvement in right to refuse antipsychotic medication cases as "already perilous" . . . reflecting the court's almost palpable discomfort in having to

skepticism allow judges to take deeper refuge in heuristic thinking and flawed, non-reflective OCS, both of which continue the myths and stereotypes of sanism.¹⁶¹

b. Sanism and the Court Process in Mental Disability Law Cases

Judges reflect and project the conventional morality of the community, and judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes.¹⁶² Their language demonstrates bias against mentally disabled individuals¹⁶³ and contempt for the mental health professions.¹⁶⁴ Courts often appear impatient with mentally disabled litigants, ascribing their problems in the legal process to weak character or poor resolve. Thus, a popular sanist myth is that "[m]entally disabled individuals simply do not try hard enough. They give in too easily to their base instincts, and do not exercise appropriate self-restraint."¹⁶⁵

confront the questions before it").

161. See Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 61-69 (1990); Perlin, *supra* note 38, at 713-14.

162. See Perlin, *Sanism*, *supra* note 152, at 400-04. For a recent inquiry into other related judicial biases, see generally Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1 (1994).

163. See, e.g., *Sinclair v. Wainwright*, 814 F.2d 1516, 1522 (11th Cir. 1987) (quoting *Shuler v. Wainwright*, 491 F.2d 1213, 1223 (5th Cir. 1974), as having the defendant being referred to as a "lunatic"); *Corn v. Zant*, 708 F.2d 549, 569 (11th Cir. 1983) (noting that the defendant was referred to as a "lunatic"); *Pyle v. Boles*, 250 F. Supp. 285, 288-89 (N.D. W. Va. 1966) (noting that the trial judge accused the habeas petitioner of "being crazy"); *Brown v. People*, 134 N.E.2d 760, 762 (Ill. 1956) (noting that the judge asked the defendant, "You are not crazy at this time, are you?"); *but cf.* *State v. Penner*, 772 P.2d 819 (Kan. 1989) (noting that witnesses were admonished not to refer to the defendant as "crazy" or "nuts").

164. See, e.g., *Commonwealth v. Musolino*, 467 A.2d 605 (Pa. Super. Ct. 1983) (holding that it was reversible error for the trial judge to refer to expert witnesses as "headshrinkers"); compare *State v. Percy*, 507 A.2d 955, 957 (Vt. 1986) (reversing conviction where prosecutor, in closing argument, referred to expert testimony as "psycho-babble"), with *Commonwealth v. Cosme*, 575 N.E.2d 726, 731 (Mass. 1991) (denying reversal where the prosecutor referred to the defendant's expert witnesses as "a little head specialist" and a "wizard").

165. Perlin, *Sanism*, *supra* note 152, at 396; see, e.g., J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 238 (1990) (noting that the Hinckley prosecutor suggested to jurors, "if Hinckley had emotional problems, they were largely his own fault"); see also *State v. Duckworth*, 496 So. 2d 624, 635 (La. Ct. App. 1986) (refusing to exclude juror who felt defendant would be responsible for actions as long as he

Sanist thinking allows judges to avoid difficult choices in mental disability law cases. Their reliance on non-reflective, self-referential alleged "ordinary common sense" contributes further to the pretextuality that underlies much of this area of the law.¹⁶⁶

2. In This Context

In this environment, it is easy to see how evidence of mental illness ostensibly introduced for mitigating purposes can be construed by judges as aggravating instead.¹⁶⁷ In one notorious Florida case, for example, a trial judge concluded that because of the defendant's mental disability (paranoid schizophrenia manifested by hallucinations in which he "saw" others in a "yellow haze"), "the only assurance society can receive that this man never again commits to another human being what he did to [the brutally murdered decedent] is that the ultimate sentence of death be imposed."¹⁶⁸

To a great extent, sanism in the death penalty decision-making process mirrors sanism in the context of insanity defense decision-making.¹⁶⁹ Such decision-making is often irrational, rejecting empiricism, science, psychology, and philosophy, and substituting in its place myth, stereotype, bias, and distortion. It resists educational correction, demands punishment regardless of responsibility, and reifies medievalist concepts based on fixed and absolute notions of good and evil and of right and wrong.

Like the rest of the criminal trial process, the insanity defense process is riddled by sanist stereotypes and myths. Examples include the following:

- reliance on a fixed vision of popular, concrete, visual images of "craziness";¹⁷⁰
- an obsessive fear of feigned mental states;¹⁷¹

"wanted to do them").

166. See generally Perlin, *supra* note 161 (discussing the psychodynamics of insanity defense jurisprudence).

167. See Berkman, *supra* note 55, at 299-300.

168. *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979) (vacating death sentence).

169. See PERLIN, *supra* note 103, at 387-92.

170. See, e.g., *Wainwright v. Greenfield*, 474 U.S. 284, 297 (1986) (Rehnquist, J., concurring); *State v. Clayton*, 656 S.W.2d 344, 350-51 (Tenn. 1983).

171. See, e.g., *Lynch v. Overholser*, 369 U.S. 705, 715 (1962); *United States v. Brown*, 478 F.2d 606, 611 (D.C. Cir. 1973), discussed in Peter Margulies, *The "Pandemonium Between the Mad and the Bad": Procedures for the Commitment and Release of Insanity Acquittees After Jones v. United States*, 36 RUTGERS L. REV. 793, 806-07 n.85 (1984).

- a presumed absolute linkage between mental illness and dangerousness;¹⁷²

- sanctioning the death penalty in the case of mentally retarded defendants, some defendants who are "substantially mentally impaired," or defendants who have been found guilty but mentally ill (GBMI);¹⁷³ and

- the regularity of sanist appeals by prosecutors in insanity defense summations, arguing that insanity defenses are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped.¹⁷⁴

In each case, similar myths apply when a mentally disabled defendant is being prosecuted in a capital case. And to confound matters, "enormous pressures" will often be placed on defense counsel to play into the hands of these myths and paint an exaggerated picture of a "totally crazy" defendant to assuage jurors whose "ordinary common sense"¹⁷⁵ demands an all-or-nothing representation of mental illness.¹⁷⁶ The importance of competent, trained, specialized counsel to identify and rebut these sanist myths should be clear on its face.

A sampling of cases decided under the Federal Sentencing Guidelines similarly demonstrates the ways in which judges are frequently sanist.¹⁷⁷ Although these are not death penalty cases, the judicial attitudes reflected are instructive. In rejecting defendant's "suicidal tendencies" as a possible basis for a downward departure in an embezzlement case, the Sixth Circuit held that departure would *never* be permissible on this basis because *any* consideration of this argument would lead to "boiler-plate" claims and force courts to "separate the wheat of valid claims from the chaff of disingenuous ones," a "path before which we give serious pause."¹⁷⁸

172. See, e.g., *Jones v. United States*, 463 U.S. 354, 365 (1983); *Overholser v. O'Beirne*, 302 F.2d 852, 861 (D.C. Cir. 1961).

173. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302 (1989) (mental retardation); *Harris v. State*, 499 N.E.2d 723 (Ind. 1986) (GBMI); *Commonwealth v. Faulkner*, 595 A.2d 28, 38 (Pa. 1991) (substantial mental impairment); see also *People v. Crews*, 522 N.E.2d 1167 (Ill. 1988) (holding it permissible to sentence GBMI defendant to post-life expectancy term).

174. See, e.g., *People v. Camden*, 578 N.E.2d 1211, 1223 (Ill. 1991); *People v. Aliwoli*, 606 N.E.2d 347, 353-54 (Ill. App. Ct. 1992).

175. See Perlin, *supra* note 161, at 61-69.

176. See Doyle, *supra* note 11, at 445 ("[T]here will be enormous pressures to craft a representation that earns the defendant membership in a preexisting, stereotypical category of 'acute' or 'extreme' illness, and to show that he fits into that category all of the time—that he is all sickness, no function.").

177. See Perlin & Gould, *supra* note 155, at 452-55.

178. *United States v. Harpst*, 949 F.2d 860, 863 (6th Cir. 1991).

This argument tracks, nearly *verbatim*, the reasoning of the Fourth Circuit, which refused to depart downward in the case of a defendant who had suffered severe childhood sexual abuse, referring to the "innumerable defendants" who could plead "unstable upbringing" as a potential departure ground.¹⁷⁹

Underlying many of the Guidelines cases is a powerful current of *blame*: the defendant *succumbed* to temptation by not resisting drugs or alcohol and by not overcoming childhood abuse.¹⁸⁰ This sense of blame mirrors courts' sanist impatience with mentally disabled criminal defendants in general, attributing their problems in the legal process to weak character or poor resolve.¹⁸¹ Thus, we should not be surprised to learn that a trial judge, responding to a National Center for State Courts survey, indicated that incompetent-to-stand-trial defendants *could have* understood and communicated with their counsel and the court "if they [had] only wanted."¹⁸²

B. *Pretextuality*¹⁸³

1. In General

The entire relationship between the legal process and mentally disabled litigants is often pretextual. This means simply that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially *expert* witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends."¹⁸⁴ This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and at times perjurious and corrupt testifying. The reality is well-known to frequent consumers of judicial services in this area: to mental health advocates and other public defender/legal aid/legal service lawyers assigned to represent patients and mentally disabled criminal defendants, to prosecutors and

179. *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989).

180. *See generally* Perlin, *Pretexts*, *supra* note 153, at 670-72.

181. *See generally* Bernard Weiner, *On Sin Versus Sickness: A Theory of Perceived Responsibility and Social Motivation*, 48 AM. PSYCHOLOGIST 957 (1993).

182. Perlin, *Pretexts*, *supra* note 153, at 671.

183. This section is largely adapted from Perlin & Gould, *supra* note 155, at 445-46.

184. Charles M. Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974) (commenting on police testimony).

state attorneys assigned to represent hospitals, to judges who regularly hear such cases, to expert and lay witnesses, and, most importantly, to the mentally disabled person involved in the litigation in question.¹⁸⁵

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders.¹⁸⁶ Experts frequently testify in accordance with their own self-referential concepts of "morality"¹⁸⁷ and openly subvert statutory and case-law criteria that impose rigorous behavioral standards as predicates for commitment¹⁸⁸ or that articulate functional standards as prerequisites for an incompetency to stand trial finding.¹⁸⁹ Often this testimony is further warped by a heuristic bias. Expert witnesses, like the rest of us, succumb to the seductive allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.

This testimony is then weighed and evaluated by frequently sanist fact-finders.¹⁹⁰ Judges and jurors, both consciously and unconsciously, frequently rely on reductionist, prejudice-driven stereotypes in their decision-making, thus subordinating statutory and case-law standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics further contaminate the process.¹⁹¹

185. See Perlin, *Morality*, *supra* note 153, at 133-35; Perlin, *Pretexts*, *supra* note 153, at 627-28.

186. See, e.g., *Streicher v. Prescott*, 663 F. Supp. 335, 343 (D.C. 1987) (stating that although a District of Columbia Code contained a provision that patient could seek periodic review of commitment or independent psychiatric evaluation, in 22 years since passage of relevant statute, not a single patient exercised rights to statutory review). The significance of *Streicher* is discussed in Arlene S. Kanter, *Abandoned but Not Forgotten: The Illegal Confinement of Elderly People in State Psychiatric Institutions*, 19 N.Y.U. REV. L. & SOC. CHANGE 273, 304-06 (1991-1992).

187. See, e.g., Cassia Spohn & Julia Horney, "The Law's the Law, but Fair Is Fair": Rape Shield Laws and Officials' Assessments of Sexual History Evidence, 29 CRIMINOLOGY 137, 139 (1991) (stating that "a legal reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law").

188. See, e.g., Perlin, *Morality*, *supra* note 153, at 135-36.

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

190. See generally Perlin, *Sanism*, *supra* note 152; Perlin & Dorfman, *supra* note 152.

191. See generally Perlin, *Pretexts*, *supra* note 153; Perlin, *supra* note 160.

2. In This Context

All of this data must be read in the context of other information about mental disability, criminal law, and jury behavior. We know that jurors adhere firmly to the belief that mental status pleas are overused in the face of a unanimous empirical database as to their rarity, the greater rarity of success, and the high risk to defendants raising such pleas.¹⁹² We know that defendants are more likely to feign sanity rather than insanity (even where the evidence of their mental disability might qualify as mitigating evidence under Supreme Court doctrine).¹⁹³ We know how, as a result of the vividness heuristic, one salient case can lead to the restructuring of an entire body of jurisprudence.¹⁹⁴ We know how jurors over-predict future dangerousness in death penalty cases.¹⁹⁵ We know how the Supreme Court's "death qualification" jurisprudence for jury selection makes it more likely that seated jurors will see mental nonresponsibility defenses "as a ruse and as an impediment to the conviction of criminals."¹⁹⁶ We know that there is "a clear 'fit' between the retribution-driven punitive response favored by authoritarians and the authoritarian's resentment of the insanity defense and his general hostility toward psychiatry."¹⁹⁷

192. See Perlin, *supra* note 38, at 648-55. For a recent case example, see *People v. Seuffer*, 582 N.E.2d 71, 79 (Ill. 1991).

193. See Perlin, *supra* note 38, at 715-17 (reporting on the research of, inter alia, Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 588 (1988); Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 841 (1986); P.J. Taylor, *Motives for Offending Among Violent and Psychotic Men*, 147 BRIT. J. PSYCHIATRY 491, 496-97 (1985)).

194. See James R.P. Ogloff, *The Juvenile Death Penalty: A Frustrated Society's Attempt for Control*, 5 BEHAV. SCI. & L. 447 (1987) (discussing the scenario preceding Vermont's elimination of a minimum age for prosecuting children as adults in murder cases).

195. See James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 L. & SOC'Y REV. 449, 466 (1989).

196. Ellsworth et al., *supra* note 117, at 90.

197. PERLIN, *supra* note 103, at 372 (citing, inter alia, Neil Vidmar & Dale T. Miller, *Socialpsychological Processes Underlying Attitudes Toward Legal Punishment*, 14 L. & SOC'Y REV. 565, 591 (1980)). On the ways that death penalty supporters are motivated by "vindictive revenge," see Robert M. Bohm, *Retribution and Capital Punishment: Toward a Better Understanding of Death Penalty Opinion*, 20 J. CRIM. JUST. 227 (1992). On the relationship between religious belief and support for the death penalty, see Harold G. Grasmick et al., *Religious Beliefs and Public Support for the*

This data must be read side-by-side with what we know about juror use of schema: that they are especially confused and confusing in death penalty cases;¹⁹⁸ that they "play to" menacing and dangerous stereotypes of mentally disabled persons;¹⁹⁹ and that when there are dissonances in these schema, they are interpreted in ways "consistent with criminality."²⁰⁰ It must be read further against the backdrop of ongoing judicial hostility toward mental disability-based excuses for crime and toward mental disability evidence in general.

As a result of these factors, application of the mitigation doctrine is revealed, in certain individual cases, to be a pretextual hoax. Consider the Florida case of *Mason v. State*.²⁰¹ Mason was convicted of murder after the trial court failed to inform the jury about his "long history of mental illness, the fact that he suffered from organic brain damage, that he suffered from mental retardation, had a history of drug abuse, that he attempted suicide on four occasions during [the prior year], and that he has a history of suffering from depression and hallucinations."²⁰² The dissonance between the trial court's behavior in this case and the Supreme Court's line of cases from *Eddings*²⁰³ and *Lockett*²⁰⁴ to *Penry*²⁰⁵ suggest that mere doctrinal analysis and recalibration can never be a solution to the underlying problems.

Further, there is now an impressive body of social science research that suggests that jurors frequently do not *understand* jury instructions as to the construction of mitigating evidence.²⁰⁶ What could be more pretextual than a system that relies on the transmission of information to

Death Penalty for Juveniles and Adults, 16 J. CRIME & JUST. 59 (1993) (stating that adherence to a literal interpretation of the Bible is predictive of support for the death penalty).

198. See Diamond, *supra* note 122, at 429-30.

199. See Hayman, *supra* note 124, at 47-48 (noting that "[t]ragically, the full range of stereotypes victimizes the mentally retarded defendant at the capital sentencing stage").

200. *Id.* (relying on HANS TOCH & KENNETH ADAMS, *THE DISTURBED VIOLENT OFFENDER* 18-19 (1989)).

201. 597 So. 2d 776 (Fla. 1992).

202. *Id.* at 780.

203. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

204. *Lockett v. Ohio*, 438 U.S. 586 (1978).

205. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

206. See Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10-23 (1995); see also, e.g., Valerie P. Hans, *Death by Jury*, in *CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES* 149, 168-71 (Kenneth C. Haas & James A. Inciardi eds., 1988) (discussing jury understanding of mitigating and aggravating evidence).

fact-finders who cannot understand the information being transmitted? Again, the presence of frequently inadequate counsel exacerbates this problem even more and heightens the pretextuality of the entire capital punishment process. Refusal by courts to acknowledge the regularly substandard job done by counsel in this most demanding area of the law is simply pretextual.²⁰⁷

In short, mental illness, rather than serving as a mitigating factor, is often seen in reality as an aggravating factor.²⁰⁸ If competent counsel is present, the dilemma may paradoxically be even further confounded: if she should rely on certain kinds of "empathy" evidence—evidence of abuse, stress, retardation, institutional failure, and substantive abuse—she runs the risk of putting before the jury the evidence that "has the greatest potential for turning into evidence in *aggravation*" ²⁰⁹ In the hands of sanist fact-finders, the presentation of such evidence can be deadly to the defendant.

207. For recent relevant cases, see 3 PERLIN, *supra* note 4, § 17.10, at 285-87 n.245.1 (Supp. 1995). Compare, e.g., *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (stating that counsel was not ineffective for failing to investigate the defendant's mental retardation as a mitigating factor), *Doyle v. Dugger*, 922 F.2d 646 (11th Cir. 1991) (stating same involving extreme emotional disturbance), *Francis v. Dugger*, 908 F.2d 696 (11th Cir. 1990) (stating same involving fetal alcohol syndrome), *McCoy v. Lynaugh*, 874 F.2d 954 (5th Cir. 1989) (stating same involving mental illness evidence), *Prejean v. Smith*, 889 F.2d 1391 (5th Cir. 1989) (stating same involving organic brain syndrome evidence), *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989) (stating same involving intoxication evidence), *Laws v. Armontrout*, 863 F.2d 1377 (8th Cir. 1988) (stating same involving mental illness evidence), *Thomas v. State*, 511 So. 2d 248 (Ala. Crim. App. 1987) (stating same involving mental illness evidence), and *King v. State*, 503 So. 2d 271 (Miss. 1987) (stating same involving low intelligence), with *Loyd v. Smith*, 899 F.2d 1416 (5th Cir. 1990) (stating that the attorney's failure to explore mitigating psychiatric evidence prejudiced the defendant), *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (stating same), and *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (stating same).

208. See Berkman, *supra* note 55, at 299-300; Hayman, *supra* note 124, at 47-48.

209. William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 273, 286 (1990-1991).

C. *Therapeutic jurisprudence*²¹⁰

1. In General

One potential solution is to turn to therapeutic jurisprudence for some answers. Therapeutic jurisprudence studies the role of the law as a therapeutic agent, recognizing that substantive rules, legal procedures and lawyers' roles may have either therapeutic or antitherapeutic consequences, and questioning whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while not subordinating due process principles.²¹¹ Therapeutic jurisprudence looks at a variety of mental disability law issues in an effort to both shed new light on past developments and to offer new insights for future developments. Recent articles and essays have thus considered such matters as the insanity acquittee conditional release hearing, juror decision-making in malpractice and negligent release litigation, competency to consent to treatment, competency to seek voluntary treatment, standards of psychotherapeutic tort liability, the effect of guilty pleas in sex offender cases, the impact of scientific discovery on substantive criminal law doctrine, and the competency to be executed.²¹²

2. In This Context²¹³

If therapeutic jurisprudence principles are applied to the questions raised in this presentation, several inquiries immediately surface. First, if mental disability evidence can be seen as aggravating rather than mitigating, what a powerful disincentive this may be for mentally disabled criminal defendants to deny their mental illness and simultaneously refuse to seek ameliorative treatment. If jurors especially turn "empathy" evidence into evidence of aggravating circumstances, how will that affect

210. See generally *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1991); *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (David B. Wexler ed., 1990); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick eds., 1996).

211. See, e.g., 1 PERLIN, *supra* note 4, § 1.05A (Supp. 1995); Perlin et al., *supra* note 154; Perlin, *Understanding*, *supra* note 152; Perlin, *supra* note 154; David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 CLEV. ST. L. REV. 517 (1992); David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27 (1992).

212. See, e.g., 1 PERLIN, *supra* note 4, § 1.05A, nn.156.6-156.24A (Supp. 1995).

213. This section is adapted from Perlin, *supra* note 111, at 278-79.

the already compromised relationship between counsel and the mentally disabled client?

In 1993, the Supreme Court held in *Godinez v. Moran*²¹⁴ that the standard for waiving counsel or for pleading guilty was to be no more stringent than the standard for competence to stand trial.²¹⁵ If *Godinez* causes more severely mentally disabled defendants to be tried in life-or-death cases without the aid of counsel, what will the impact be on penal settings (especially death row settings) if there is a significant influx of additional mentally ill prisoners?²¹⁶ Even if considered from the perspective of *victims*, there are therapeutic jurisprudence issues. Representatives of victims' rights organizations have testified before an ABA Task Force that adequate representation at all stages of the death penalty trial and appellate process was in the best interests of their constituencies.²¹⁷

In short, any death penalty system that provides inadequate counsel and that, at least as a partial result of that inadequacy, fails to insure that mental disability evidence is adequately considered and contextualized by death penalty decision-makers, fails miserably from a therapeutic jurisprudence perspective.

V. CONCLUSION

The New York capital punishment statute is still new and untested. There is no question that its passage met with wide public approval.²¹⁸ And, as death penalty statutes go, it is certainly not as onerous—on paper—as those that have passed constitutional muster in other states.²¹⁹ The Capital Defender Office strikes me as a model that could be well replicated in every death penalty jurisdiction in this nation.

Yet I am still certainly not convinced the death penalty will be administered fairly and even-handedly in each New York county. I am not convinced that judges and jurors will shed their sanist biases in dealing with allegedly mitigating mental disability evidence, and I am not

214. 509 U.S. 389 (1993).

215. *See id.*

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

217. *See* ABA REPORT, *supra* note 12, at 56.

218. *See* Stephanie Saul, *Death Penalty Push; The Public Supports It, but Does It Work as a Deterrent?*, N.Y. NEWSDAY, Oct. 24, 1994, at 7.

219. *See* James Dao, *New York Leaders Offer Limited Bill on Death Penalty*, N.Y. TIMES, Mar. 4, 1995, at 1.

convinced that the system will be one that will be administered in a manner free of pretextuality.

I end as I began, with Bob Dylan. The song from which I took the title for this paper—*A Hard Rain's A-Gonna Fall*—is widely seen as describing an environmental apocalypse. The lines preceding and following the line quoted in my title, however, are all equally relevant to the question before us:

Where the people are many and their hands are all empty,
Where the pellets of poison are flooding their waters,
Where the home in the valley meets the damp dirty prison,
Where the executioner's face is always well-hidden,
Where hunger is ugly, where souls are forgotten,
Where black is the color, where none is the number,

. . . .

And it's a hard, it's a hard, it's a hard, it's a hard,
It's a hard rain's a-gonna fall.²²⁰

Unless we openly confront the problems raised by inadequate counsel and by our inability to appropriately weigh mitigating evidence of mental disability, we will inevitably be faced with the bleak future of individuals in the "damp dirty prison" confronting the executioner's well-hidden face.

220. BOB DYLAN, *A Hard Rain's A-Gonna Fall*, on *THE FREEWHEELIN' BOB DYLAN* (Columbia Records 1963).