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## "Dignity was the First to Leave":\* *Godinez v. Moran*, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants

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This article considers the Colin Ferguson trial in the context of the United States Supreme Court's decision in *Godinez v. Moran*, establishing a unitary standard for the determinations of competence to stand trial, competence to plead guilty, and competence to waive counsel. The Ferguson trial was widely seen as a "charade." I argue that the Ferguson spectacle was the inevitable *dénouement* of the *Godinez* decision. I then look at the Ferguson trial (through contemporaneous press and television coverage) under the filters of "sanism" and "pretextuality." I conclude that the "dignity" value—a prerequisite for a constitutionally-acceptable fair trial—was, as a result of *Godinez*, lacking in the Ferguson case.

### I. INTRODUCTION

The public and the media rarely show interest in Supreme Court decisions in mental disability law cases. Both are *intensely* interested in cases involving famous litigants in which mental disability is an issue (John Hinckley being the most celebrated case, and Susan Smith serving as a more recent example) or in which an individual mentally disabled person's case is seen as somehow emblematic of a flawed social policy (the sagas of Larry Hogue, and before that, Billie Boggs, known also as Joyce Brown, on the Upper West Side of New York City being two provocative examples).<sup>1</sup> If the Supreme Court were to decide, for instance, that involuntary civil commitment was unconstitutional (which it will never do) or that

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\*From Bob Dylan, *Dignity* (c. 1995).

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<sup>1</sup> See e.g., *In re Boggs*, 522 N.Y.S. 2d 407 (Sup.), *rev'd*, 523 N.Y.S. 2d 71 (App. Div. 1987); Seltzer v. Hogue, 594 N.Y.S. 2d 781 (App. Div. 1993).

the use of the insanity defense was unconstitutional (which it can never do), such stories might conceivably be the lead articles on the front page of the *New York Times* or the *Washington Post*. But other cases generally pass with little attention, unless (as in the zoning cases of *City of Cleburne v. Cleburne Living Center*<sup>2</sup> or the more-recent *City of Edmonds v. Oxford House*<sup>3</sup>) there are wide implications beyond the narrower world of mental disability law.

And so it was when the Supreme Court decided *Godinez v. Moran* in the spring of 1993.<sup>4</sup> The Supreme Court has, for over a decade, been fascinated with the interplay between mental disability and the criminal trial process.<sup>5</sup> It has issued a lengthy series of decisions dealing with such issues as the privilege against self-incrimination, the interplay between competency and the death penalty, the right of an insanity defendant to refuse the imposition of antipsychotic medications during trial, the application of the right to refuse treatment to convicted prisoners, the constitutionality of state laws allowing for the continued retention of insanity acquittees who are no longer mentally ill, the constitutionality of state laws allowing for the retention of insanity acquittees for longer periods of time than the maximum to which they could have been sentenced had they been convicted of the underlying charges, the allocation of the burden of proof in a competency to stand trial proceeding, and more.<sup>6</sup> Few drew much attention (except perhaps for those involving insanity acquittees, and there the attention was primarily collateral to the facts of the Hinckley case). And *Godinez* was another in this series.

In *Godinez*, the Supreme Court, per Justice Thomas and over an impassioned dissent by Justice Blackmun, held that the standard for determining a defendant's competency to plead guilty or to waive counsel was the same as the standard employed to determine his competency to stand trial.<sup>7</sup> The decision reversed a Ninth Circuit finding that the former inquiries were to be more searching and that they obligated the trial judge to determine whether the defendant had the capacity for "reasoned choice" among the alternatives offered to him, a capacity that would require "a higher level of mental functioning than that required to stand trial."<sup>8</sup> A unitary competency finding in criminal cases was all that was constitutionally required, the Supreme Court ruled, concluding that there was "no basis for demanding a higher level of competence" for defendants who chose to plead guilty or waive counsel.<sup>9</sup>

At the time, *Godinez* was seen as yet another Supreme Court criminal procedure victory for prosecutors, and as a means of insuring both more convictions and fewer appellate reversals of convictions. If all that was required was a finding that the defendant could meet the incompetency to stand trial test of *Dusky v. United States* (that the defendant had a "rational understanding of the proceedings"),<sup>10</sup> then it would be likely that more mentally ill-but-legally-competent defendants would plead guilty and would waive counsel. In both instances, more convictions—convictions now nearly impervious (on these grounds, at least) on appeal—would flow.

*Godinez* has inspired surprisingly little critical commentary. A few student notes critiqued it (though others praised it); a piece by forensic psychiatrist Alan Felthous carefully analyzed it, and found it wanting.<sup>11</sup> Yet, compared to the outpouring of commentary that followed the decisions in *Riggins v. Nevada* (on the right of the insanity pleader to refuse medication at trial)<sup>12</sup> or *Foucha v. Louisiana* (on the constitutionality of statutes allowing the continued retention of no-longer-mentally-ill insanity acquittees),<sup>13</sup> the decision virtually passed without notice.<sup>14</sup>

This, in retrospect, should probably not have been surprising. The public's obsession with the use of the insanity defense is probably matched by its profound disinterest in the role of incompetency in the criminal trial process.<sup>15</sup> There are reasons for this: although incompetency is raised in far more cases than is the insanity defense, courts rarely find defendants to be incompetent.<sup>16</sup> When they do, prosecution is usually simply deferred (with the defendant in pretrial custody) until the defendant regains his competency to stand trial;<sup>17</sup> if it is unlikely that the defendant will regain his competency in the "foreseeable future" (a category reserved for the most seriously mentally impaired), it is most likely that he will be committed to a secure forensic hospital for a lengthy stay (in many cases, a lifetime commitment).<sup>18</sup> In such cases, defendants may very well simply "fade away" from public consciousness. Defendants in this category rarely are the "type" of defendants who commit the highly-publicized acts that have generated

<sup>2</sup> 473 U.S. 432 (1985) (striking down restrictive zoning ordinance).

<sup>3</sup> 115 S. Ct. 1776 (1995) (municipal zoning code's definition of a "family" not a maximum occupancy restriction exempt from Federal Fair Housing Act Amendments banning discrimination against disabled persons).

<sup>4</sup> 113 S. Ct. 2680 (1993).

<sup>5</sup> 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).

<sup>6</sup> See, respectively, *Estelle v. Smith*, 451 U.S. 454 (1981); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Perry v. Lynaugh*, 492 U.S. 302 (1989); *Riggins v. Nevada*, 112 S. Ct. 1810 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *Foucha v. Louisiana*, 112 S. Ct. 1780 (1992); *Jones v. United States*, 463 U.S. 354 (1983); *Medina v. California*, 113 S. Ct. 2572 (1992). See generally MICHAEL L. PERLIN, *LAW AND MENTAL DISABILITY* ch. 4 (1994).

<sup>7</sup> *Godinez*, 113 S. Ct. at 2686. See generally 3 MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* (1989), §§14.20A-14.21 (1995 Supp.).

<sup>8</sup> *Moran v. Godinez*, 972 F.2d 263, 266-67 (9th Cir. 1992), rev'd, 113 S. Ct. 2680 (1993).

<sup>9</sup> *Godinez*, 113 S. Ct. at 2686.

<sup>10</sup> 362 U.S. 402, 403 (1960), quoted in *Godinez*, 113 S. Ct. at 2686.

<sup>11</sup> For students' notes, see Brian Boch, Note, *Fourteenth Amendment—the Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial*, 84 *J. CRIM. L. & CRIMINOL.* 883, 883 (1994) (*Godinez* is a "correct[]" decision); Luke Vadas, Note, *Godinez v. Moran: An Insane Rule for Competency?* 39 *LOY. L. REV.* 903 (1994) (*Godinez* leaves "unprotected the basic due process rights of mentally ill criminal defendants"). For Dr. Felthous's analysis, see Alan Felthous, *The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez*, 18 *MENT. & PHYS. DIS. L. REV.* 105, 110 (1994) (in *Godinez*, Supreme Court "missed an opportunity to promote reason, logic, and justice in American jurisprudence"). See also Sheila Taub, *Competency Standard Clarified*, *NAT'L L.J.*, Oct. 18, 1993, at 25 (majority decision in *Godinez* "appears to be contrary to much professional opinion, both legal and medical, and to prevailing trends in the law").

<sup>12</sup> See articles cited in 2 PERLIN, *supra* note 7, §5.65A, at 99-100 n.1088.60 (1995 Supp.).

<sup>13</sup> See articles cited in 3 *id.*, §15.25A, at 207-09 n.479.46 (1995 Supp.).

<sup>14</sup> A search of the NEXIS/CURNWS database in LEXIS revealed not a single contemporaneous newspaper editorial commenting on the decision. The only law review commentary has been the articles cited *supra* note 11.

<sup>15</sup> See generally MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 34 (1994); see also 3 PERLIN, *supra* note 7, §14.02, at 206-07 n.1.

<sup>16</sup> Bruce Winick, *Restructuring Competency to Stand Trial*, 32 *UCLA L. REV.* 921, 922 n.3, 925 (1985).

<sup>17</sup> See generally *id.* at 921-31.

<sup>18</sup> See *Jackson v. Indiana*, 406 U.S. 715 (1972).

controversy over the insanity debate.<sup>19</sup> In short, the public has never been terribly interested in this area of the law, an apathy usually shared by the press and other media.

The arrest and trial of Colin Ferguson, however, focused national attention on this question. Even without the issues that are central to this article, Ferguson's case had all the high cards of a media circus: a mass murder on a New York City commuter train by a black defendant who sought out white victims as his targets.<sup>20</sup> When the level of Ferguson's mental illness became clear, the picture was complete. And public attention was intensified when Ferguson—relying (implicitly, at least) on *Godinez*—chose to represent himself at his trial, and chose specifically to disavow an insanity defense (based on a purported "black rage" theory) proposed by his lawyers, the high-profile William Kunstler and an associate.<sup>21</sup> The spectacle of a highly intelligent but seriously mentally ill defendant opening to the jury, doing direct and cross examination, and entering evidentiary objections, struck onlookers as yet another argument for the widely-held view (endorsed by many) that the American judicial system was flawed beyond repair.<sup>22</sup>

And yet, public attitudes toward the Ferguson trial were dramatically different from those toward other mentally ill defendants. In other cases, insanity pleaders were seen as shamming, malingering, pulling the wool over the courts' eyes, and so on.<sup>23</sup> Here, the fact that Ferguson was allowed to represent himself—and his failure to enter an insanity plea—was seen as a charade, a travesty of justice, or a sham.<sup>24</sup> In other such cases, lawyers are regularly pilloried for their "sleazy" tactics in promoting mental state defenses (and once-in-a-lifetime cases such as the alleged use of the "twinkie" defense in the Dan White case are discussed as if the use of such a plea is common);<sup>25</sup> here, the lack of counsel—even a counsel so regularly vilified by the public as Kunstler—was seen as, for want of a better phrase, utterly crazy.<sup>26</sup> In short, Ferguson's use of Justice Thomas's majority opinion in *Godinez* (in one of the many ironies of this case, Ferguson has likened himself to Justice Thomas, as another victim of a "high-tech lynching")<sup>27</sup> caused the public to reverse—almost completely—many of the "sanist" attitudes that are regularly invoked in "famous" cases involving mentally disabled criminal defendants.

Why is this? And what are its implications for the development of mental disability law, for the criminal trial process in general, for the ways that competence

is assessed, and for the way we generally construct mental disability? Does Ferguson's case truly hoist Justice Thomas by his own petard? Could Justice Thomas have ever dreamt that the *Godinez* decision would have led to the Ferguson spectacle? And what can we make of the public's astonishing about face (relating to its attitudes toward mental status defenses and the role of counsel in the criminal trial process) in this case? Finally, what do the perspectives of sanism and pretextuality teach us about *Godinez* and Ferguson?<sup>28</sup>

In Part II, I discuss the *Godinez* case and place it in the context of earlier incompetency to stand trial case law. In Part III, I discuss the Ferguson case, in the context of *Godinez*, and consider how some of the "hidden factors" in *Godinez* may be illuminated by the *denouement* of the Ferguson trial. In Part IV, I consider the public attitudes toward the Ferguson trial, and try to "read" those attitudes in the contexts of what we know about both sanism and pretextuality. I conclude that the conduct of the Ferguson trial was inevitable after the *Godinez* decision, and that, in the end, the criminal trial process was seriously robbed of its needed dignity.

## II. THE GODINEZ CASE<sup>29</sup>

### A. Introduction

Professors James Ellis and Ruth Luckasson have appropriately characterized the issue of assessing the competence of guilty pleas entered by mentally disabled defendants as presenting "one of the most difficult doctrinal and practical problems faced by the criminal justice system," a difficulty reflected in the "sharply divided" case law that has developed in this area.<sup>30</sup> Before *Godinez*, courts traditionally had generally recognized that the standard for competence to plead guilty is generally higher than for other sorts of consent or waiver.<sup>31</sup> However, courts had split on the significant question of whether the standard to plead guilty is the same as, higher than, or otherwise different from, the traditional standard for assessing competence to stand trial; for example, whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>32</sup>

The majority view had held that there is no substantial difference, and that the same test applies in assessing the validity of a guilty plea.<sup>33</sup> Most of these decisions

<sup>19</sup> But see Henry Steadman et al., *Maintenance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense*, 146 AM. J. PSYCHIATRY 357 (1989) (after Montana abolished its insanity defense, the ultimate effect was that courts found more defendants who would likely have been previously found not guilty by reason of insanity (NGRI) to be incompetent to stand trial, and committed them to the same forensic maximum security facilities to which NGRI acquittees were previously sent).

<sup>20</sup> DeWayne Wickham, *Line Between Justice, Revenge*, Gannet News Service, Feb. 2, 1995.

<sup>21</sup> David Van Bieman, *A Fool for a Client*, TIME, Feb. 6, 1995, at 66.

<sup>22</sup> Larry McShane, *Ferguson's Defense of Himself May Be Grounds for Appeal*, AUSTIN (TX) AMERICAN-STATESMAN, Feb. 19, 1995, at A9.

<sup>23</sup> PERLIN, *supra* note 15, at 111-12.

<sup>24</sup> McShane, *supra* note 22.

<sup>25</sup> PERLIN, *supra* note 15.

<sup>26</sup> McShane, *supra* note 22.

<sup>27</sup> Maureen Fan, *Ferguson Speaks: In Interview, Reiterates His Innocence*, NEWSDAY (Nassau-Suffolk ed.), Mar. 17, 1995, at A6.

<sup>28</sup> See generally Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J. L. & HEALTH 15 (1993-94).

<sup>29</sup> This section is generally adapted from Michael L. Perlin, *A Major Step Backwards: Deciphering Godinez v. Moran*, 2 CRIM. PRAC. L. REP. 89 (1994); PERLIN, *supra* note 6, §4.13; 3 PERLIN, *supra* note 7, §§14.20A-14.21 (1995 Supp.).

<sup>30</sup> James Ellis & Ruth Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 460 (1985); see generally 3 PERLIN, *supra* note 7, §§14.20, at 265-69.

<sup>31</sup> Ellis & Luckasson, *supra* note 30, at 461.

<sup>32</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960); see generally 3 PERLIN, *supra* note 7, §14.20, at 140-41 n.317.1 (1995 Supp.) (listing recent cases).

<sup>33</sup> See, e.g., *Malinauskas v. United States*, 505 F.2d 649 (5th Cir. 1974); *Stinson v. Wainwright*, 710 F.2d 743 (11th Cir.), *cert. denied*, 464 U.S. 984 (1983); *United States ex rel. McGough v. Hewitt*, 528 F.2d 339 (3d Cir. 1975); *Williams v. Bordenkircher*, 696 F.2d 464 (6th Cir.), *cert. denied*, 461 U.S. 916 (1983); *People v. Turner*, 443 N.E.2d 1167 (Ill. App. 1982); *State ex rel. Kessick v. Bordenkircher*, 294 S.E.2d 134 (W. Va. 1982).

were merely conclusory and bereft of any sort of doctrinal analysis. Only in *People v. Herl* did a court offer substantive justifications for the unitary standard: that a finding of competency to stand trial necessarily involved a finding that a defendant was capable of waiving his constitutional rights, and a dual standard might create "a class of semi-competent defendants who are not protected from prosecution because they have been found competent to stand trial, but who are denied the leniency of the plea bargaining process because they are not competent to plead guilty."<sup>34</sup>

This position was challenged, however, by a series of cases involving both mentally ill<sup>35</sup> and mentally retarded<sup>36</sup> defendants. These cases suggested a separate test: "A defendant is not competent to plead guilty if a mental [disability] has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the consequences of his plea."<sup>37</sup> Such a test has been employed by those courts that find it necessary for judges to "assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced,"<sup>38</sup> a test applauded by Ellis and Luckasson.<sup>39</sup> The rationale for this more stringent standard was that a simple finding of trial competency was not a sufficient basis for finding that the defendant was able to "make [other] decisions of very serious import."<sup>40</sup>

On the question of waiver of counsel, a significant amount of case law had also developed over the question of the level of competency required for a defendant to waive representation by counsel. Since the U.S. Supreme Court's ruling in *Faretta v. California*,<sup>41</sup> holding that a defendant has a federal constitutional right to represent himself if he voluntarily elects to do so, courts have focused on the question of whether a defendant has "the mental capacity to waive the right to counsel with a realization of the probable risks and consequences of his action."<sup>42</sup>

To meet such a standard, it is not necessary that the defendant be technically competent to represent himself but only that he be "free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary."<sup>43</sup> To this end, neither bizarre statements and actions,<sup>44</sup> mere eccentric behavior,<sup>45</sup> nor a finding that the defendant had been diagnosed as a paranoid schizophrenic<sup>46</sup> have been found in specific cases to be enough to establish lack of capacity to represent oneself.

<sup>34</sup> 342 N.E. 2d 34, 37 (Ill. 1976), citing Comment, *Competence to Plead Guilty: A New Standard*, 1974 DUKE L. J. 149, 170.

<sup>35</sup> *Seiling v. Eymann*, 478 F.2d 211 (9th Cir. 1973); *Steinsvik v. Vinzant*, 640 F.2d 949 (9th Cir. 1981); *State v. Walton*, 228 N.W.2d 21 (Iowa 1975).

<sup>36</sup> See *United States v. Masthers*, 539 F. 2d 721 (D.C. Cir. 1976).

<sup>37</sup> *Seiling*, 478 F. 2d at 215; see also *Schoeller v. Dunbar*, 423 F. 2d 1183, 1194 (9th Cir. 1970).

<sup>38</sup> *Seiling*, 478 F. 2d at 215.

<sup>39</sup> Ellis & Luckasson, *supra* note 30, at 462-63.

<sup>40</sup> *Seiling*, 478 F. 2d at 214-15.

<sup>41</sup> 422 U.S. 806, 835 (1975).

<sup>42</sup> *People v. Clark*, 213 Cal. Rptr. 837, 840 (App. 1985) (emphasis in original). See generally 3 PERLIN, *supra* note 7, §14.21, at 269-74. But see *In re Irwin*, 529 N.W.2d 366, 371 (Minn. 1995) (patient in psychopathic personality commitment case had no right to self-representation).

<sup>43</sup> *Curry v. Superior Court of Fresno County*, 141 Cal. Rptr. 884, 888 (App. 1977).

<sup>44</sup> *People v. Miller*, 167 Cal. Rptr. 816, 818 (App. 1980).

<sup>45</sup> *Curry*, 141 Cal. Rptr. at 888.

<sup>46</sup> *State v. Evans*, 610 P. 2d 35 (Ariz. 1980).

On the other hand, waiver of counsel should be "carefully scrutinized,"<sup>47</sup> and the record must reflect that "the accused was offered counsel and knowingly and intelligently refused the offer."<sup>48</sup> The court is required to conduct "more than a routine inquiry when making that determination."<sup>49</sup> Thus, at least several courts have found that the standard for self-representation is a higher one than the standard for competency to stand trial,<sup>50</sup> since "literacy and a basic understanding over and above the competence to stand trial may be required."<sup>51</sup>

A New Jersey intermediate appellate court has thus considered the full range of pertinent issues:

Without the guiding hand of counsel, a defendant may lose his freedom because he does not how to establish his innocence. . . . Trained counsel is also necessary to vindicate fundamental rights that receive protection from rules of procedure and exclusionary principles. . . . Where the doctrine supporting these rights "has any complexities the untrained defendant is in no position to defend himself." . . .

These considerations militate strongly in favor of exercising great caution in determining whether a proposed waiver of counsel satisfies constitutional standards. Within the context of the potential pitfalls of self-representation, it has been said "the court must make certain by direct inquiry on the record that defendant is aware of 'the nature of the charges, the statutory offenses included with them, the range of allowable punishments there under, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'"<sup>52</sup>

## B. Godinez

The Supreme Court ended both of these controversies in *Godinez*, where it held that the standards for pleading guilty and for waiving counsel were no higher than for standing trial: Did the defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of understanding" and a "rational as well as factual understanding of the proceedings against him?"<sup>53</sup>

The facts of the *Godinez* case are straight-forward. The defendant Moran shot a bartender and a patron, and subsequently stole the bar's cash register. Nine days later, he went to his former wife's apartment, and shot her five times. He then shot himself in the abdomen and attempted (unsuccessfully) to slit his own wrists. All three of his victims died; Moran confessed to police from his hospital bed two days after the shooting of his wife.<sup>54</sup> He initially pled not guilty, and was evaluated by a

<sup>47</sup> *People v. Kessler*, 447 N.E.2d 495, 499 (Ill. App. 1983), citing *Herl*, 342 N.E.2d at 37-38.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, citing *People v. Feliciano*, 417 N.E. 824 (Ill. App. 1981).

<sup>50</sup> See, e.g., *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975); *State v. Kolocotronis*, 436 P.2d 774 (Wash. 1968); *Pickens v. State*, 292 N.W.2d 601 (Wis. 1980); *State v. Harding*, 670 P.2d 383, 391 (Ariz. 1983).

<sup>51</sup> *Pickens*, 292 N.W. 2d at 611, citing *Faretta*, 422 U.S. at 835.

<sup>52</sup> *State v. Slattery*, 571 A.2d 1314, 1320-21 (N.J. App. Div. 1990) (citations omitted) (defendant functioned at "low average" range of intelligence).

<sup>53</sup> 113 S. Ct. at 2685, quoting *Dusky*, 362 U.S. at 402.

<sup>54</sup> *Godinez*, 113 S. Ct. at 2682.

pair of psychiatrists who found him competent to stand trial. Some 2 1/2 months after these evaluations were done, Moran appeared before the court, seeking to discharge his attorneys and plead guilty, explaining that he wanted to prevent the presentation of mitigating evidence at his sentencing.<sup>55</sup> The court accepted his guilty plea and his waiver of counsel, finding that he could "intelligently and knowingly" waive his right to assistance of counsel, and that his guilty pleas had been "freely and voluntarily" given. He was subsequently sentenced to death by a three-judge court on each of the three murders.<sup>56</sup>

Subsequently, the Nevada Supreme Court affirmed Moran's sentence for the tavern murders, but reversed the sentence for his wife's murder, and remanded the case for imposition of a life sentence without possibility of parole.<sup>57</sup> Next, Moran filed a petition for post-conviction relief in the state trial court; the court rejected his claim that he was "mentally incompetent to represent himself."<sup>58</sup> His appeal was dismissed by the state Supreme Court, and the U.S. Supreme Court denied *certiorari*.<sup>59</sup>

Moran then filed a federal habeas petition. It was denied by the District Court, but the District Court's denial was reversed by the Ninth Circuit Court of Appeals. The Ninth Circuit concluded that the trial record should have led the trial court to "entertain a good faith doubt about [Moran's] competency to make a voluntary, knowing, and intelligent waiver," and that waiver of constitutional rights required a "higher level of mental functioning than that required to stand trial," a level it characterized as "the capacity for 'reasoned choice.'"<sup>60</sup> In coming to its decision, the appellate court stressed the defendant's suicide attempt, his desire to prevent the presentation of mitigating evidence to the court at his sentencing hearing, his "monosyllabic" responses to the trial court's questions, and the fact that he was on four different prescription drugs at the time he sought to change his plea and discharge counsel.<sup>61</sup>

The Supreme Court reversed, per Justice Thomas, rejecting the notion that competence to plead guilty or waive counsel must be measured by a higher (or even different) standard from that used in incompetency to stand trial cases.<sup>62</sup> It reasoned that a defendant who was found competent to stand trial would have to make a variety of decisions requiring choices: whether to testify, whether to seek a jury trial, whether to cross-examine his accusers, and, in some cases, whether to raise an affirmative defense. While the decision to plead guilty is a "profound one, . . . it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial."<sup>63</sup> Finally, the Court reaffirmed that any waiver of constitutional rights must be "knowing and voluntary."<sup>64</sup>

<sup>55</sup> *Id.* at 2682-83.

<sup>56</sup> *Id.* at 2683.

<sup>57</sup> *Moran v. State*, 734 P. 2d 712 (Nev. 1987).

<sup>58</sup> *Godinez*, 113 S. Ct. at 2683.

<sup>59</sup> *Moran v. Warden*, 810 P. 2d 335 (Nev. 1989), *cert. den.*, 493 U.S. 874 (1989).

<sup>60</sup> *Moran v. Godinez*, 972 F. 2d 263, 265-67 (9th Cir. 1992), *rev'd*, 113 S. Ct. 2680 (1993).

<sup>61</sup> *Id.* at 265, 268.

<sup>62</sup> *Godinez*, 113 S. Ct. at 2686.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*, quoting *Parke v. Raley*, 113 S. Ct. 517, 523 (1992).

It concluded on this point:

Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel. While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.<sup>65</sup>

Justices Kennedy and Scalia concurred. They noted their concern with those aspects of the opinion that compared the decisions made by a defendant who pleads guilty with those made by one who goes to trial, and they expressed their "serious doubts" that there would be a heightened competency standard under the Due Process clause if these decisions were *not* equivalent.<sup>66</sup>

Justice Blackmun dissented (for himself and Justice Stevens), focusing squarely on what he saw as the likely potential that Moran's decision to plead guilty was the product of "medication and mental illness."<sup>67</sup> He reviewed the expert testimony as to the defendant's state of depression, a colloquy between the defendant and the trial judge in which the court was informed that the defendant was being given medication, the trial judge's failure to inquire further and discover the psychoactive properties of the drugs in question, the defendant's subsequent testimony as to the "numbing" state of the drugs, and the "mechanical character" and "ambiguity" of the defendant's answers to the court's questions at the plea stage.<sup>68</sup>

On the question of the multiple meanings of competency, Justice Blackmun added:

[T]he majority cannot isolate the term "competent" and apply it in a vacuum, divorced from its specific context. A person who is "competent" to play basketball is not thereby "competent" to play the violin. The majority's monolithic approach to competency is true to neither life or the law. Competency for one purpose does not necessarily translate to competency for another purpose.<sup>69</sup>

He concluded:

To try, convict and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal

<sup>65</sup> *Godinez*, 113 S. Ct. at 2688, *citing*, in a *cf.* reference, *Medina v. California*, 112 S. Ct. 2572 (1992) (not unconstitutional to place burden of proof on defendant at competency to stand trial proceeding).

<sup>66</sup> *Godinez*, 113 S. Ct. at 2688-89.

<sup>67</sup> *Id.* at 2692.

<sup>68</sup> *Id.* See also *id.* at 2696 ("such drugs often possess side effects that may 'compromise the right of a medicated criminal defendant to receive a fair trial . . . by rendering him unable or unwilling to assist counsel,'" quoting *Riggins v. Nevada*, 112 S. Ct. 1810, 181819 (1992) (Kennedy, J., concurring)). See generally 2 PERLIN, *supra* note 7, §5.65A (1995 pocket part); Michael L. Perlin, *Forced Drugging and Fair Trial Rights: Understanding Riggins v. Nevada*, 1 CRIM. PRAC. L. REP. 37 (1993); Michael L. Perlin & Deborah A. Dorfman, *Samsin, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAV. SCI. & L. 47 (1993).

The drugs given Moran were primarily antiseizure medications, see *Godinez*, 113 S. Ct. at 2683 n.2; *Riggins* had been receiving Mellaril. The fact that different types of drug were involved in the two cases was explored nowhere in any of the *Godinez* opinions.

<sup>69</sup> *Id.* at 2694, *citing* Richard Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 BEHAV. SCI. & L. 291, 299 (1992); RONALD ROESCH & STEPHEN GOLDING, *COMPETENCY TO STAND TRIAL* 1013 (1980).

justice system. I cannot condone the decision to accept, without further inquiry, the self-destructive "choice" of a person who was so deeply medicated and who might well have been severely mentally ill.<sup>70</sup>

Justice Blackmun's dissent in *Godinez* is a powerful document that speaks simultaneously to the empirical realities of the criminal trial process, the impact of mental illness and medication on a defendant's capacity for reasoned choice, and, perhaps most importantly, the role of pretextuality in the incompetency to stand trial process.<sup>71</sup> He rejects the formulistic approach of Justice Thomas's majority opinion, weighs the pertinent social science evidence, and demonstrates how the trial record reflects the "ambiguity" of the controlling colloquy between counsel and the trial judge. The underlying tensions of the case are exacerbated even further because the defendant had been sentenced to death. The Supreme Court has considered the relationship between mental illness and the competency to be executed,<sup>72</sup> the relationship between mental retardation and the competency to be executed,<sup>73</sup> and more recently has declined to consider on the merits the constitutionality of medicating a defendant so as to make him competent to be executed.<sup>74</sup> The decision in *Godinez*—virtually guaranteeing less searching inquiries in cases involving defendants of questionable competency—will likely complicate even further this area of mental disability law jurisprudence.<sup>75</sup>

The Court's decision is particularly troubling and perplexing, given its opinion the prior year in *Riggins*. In *Riggins*, the Court found that the involuntary drugging of an insanity-pleading defendant at trial potentially violated that defendant's fair trial rights.<sup>76</sup> The Court also found that, because involuntary medication could impair a defendant's ability to "follow the proceedings," "the substance of his communication," and "the content of his testimony,"<sup>77</sup> such drugging would be proscribed unless the state could demonstrate medical appropriateness and that, considering less intrusive alternatives or means, that it was "essential for the sake of [defendant's] own safety or the safety of others" or so as to obtain an adjudication of the defendant's guilt or innocence.<sup>78</sup>

Moran was receiving such drugs and, as Justice Blackmun underscores in his dissent, the court's perfunctory questions "only augment[ed] the manifold causes for concern by suggesting that his waivers and his assent to the charges against him were not rendered in a truly voluntary and intelligent fashion."<sup>79</sup> Inexplicably, the majority in *Godinez* does not even cite *Riggins*.

*Riggins* is even more important because of its chronology in the court's refusal-of-medication jurisprudence. It came soon after the court had decided in *Washington v. Harper*<sup>80</sup> that an informal administrative procedure was sufficient to satisfy the refusal of medication rights of a convicted prisoner.<sup>81</sup> The difference between *Harper* and *Riggins* appeared to reflect the different status of the litigants: Harper, a convicted prisoner, and Riggins, a non-convicted defendant at trial. The decision in *Harper* appeared to reflect an important strand of the court's institutional jurisprudence: that "prison security interests will, virtually without exception, trump individual autonomy interests."<sup>82</sup> Yet, the potential side-effects and other impacts of antipsychotic medications are ignored in *Godinez*, notwithstanding the reality that Moran (like Riggins and unlike Harper) had not yet been convicted at the moment that he entered his plea and discharged his counsel. The *Godinez* opinion is utterly bereft of any analysis of this issue.

In its other major holding, the *Godinez* court found that there was "no reason" to believe that the decision to waive counsel requires an "appreciably higher level of mental functioning than the decision to waive other constitutional rights."<sup>83</sup> It rejected the defendant's arguments that a self-representing defendant must have "greater powers of comprehension, judgment and reason, than would be necessary to stand trial with the aid of an attorney," concluding that this rested on a "flawed premise; the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself."<sup>84</sup> Relying on its decision in *Faretta*,<sup>85</sup> the Court found that a defendant's ability to represent himself "has no bearing upon his competence to choose self-representation."<sup>86</sup>

Justice Blackmun's dissented on this point as well, concluding:

A finding that a defendant is competent to stand trial establishes only that he is capable of aiding his attorney in making the critical decisions required at trial or in plea negotiations. The reliability or even relevance of such a finding vanishes when its basic premise—that counsel will be present—ceases to exist. The question is no longer whether the defendant can proceed with an attorney but whether he can proceed alone and uncounselled.<sup>87</sup>

<sup>70</sup> *Godinez*, 113 S. Ct. at 2694.

<sup>71</sup> See, e.g., Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAAMI L. REV. 625 (1993) (Perlin, *Pretexts*). See also *infra* Part IV B.

<sup>72</sup> See *Ford v. Wainwright*, 477 U.S. 399 (1986). See generally 3 PERLIN, *supra* note 7, §17.05, at 498-512; compare Douglas Mossman, *The Psychiatrist and Execution Competency: Forging Murky Waters*, 43 CASE W. RES. U. L. REV. 1 (1992).

<sup>73</sup> See *Perry v. Lynaugh*, 492 U.S. 302 (1989). See generally 3 PERLIN, *supra*, note 7, §17.06A (1995 Supp.).

<sup>74</sup> See *Perry v. Louisiana*, 498 U.S. 38 (1990). See generally 3 PERLIN, *supra*, note 7, §17.06B (1995 Supp.); compare Douglas Mossman, *Denouement of an Execution Case: Is Perry Pyrrhic?* 23 BULL. AM. ACAD. PSYCHIATRY & L. 269 (1995).

<sup>75</sup> See, e.g., *United States v. Day*, 998 F.2d 662 (8th Cir. 1993) (rejecting defendant's claim that the court should have conducted a competency hearing prior to allowing him to proceed pro se); compare *State v. Pollard*, 657 A.2d 185, 18990 (Vt. 1995) (construing *Godinez* to reverse trial court order allowing waiver of counsel in case of defendant who did not have "rational" understanding of proceedings).

<sup>76</sup> *Riggins*, 112 S. Ct. at 1814-16.

<sup>77</sup> *Id.* at 1816.

<sup>78</sup> *Id.* at 1815.

<sup>79</sup> *Godinez*, 113 S. Ct. at 2696.

<sup>80</sup> 494 U.S. 210 (1990).

<sup>81</sup> See generally 2 PERLIN, *supra*, note 7, §5.64A (1995 Supp.).

<sup>82</sup> See *id.* at 82; see generally, Perlin & Dorfman, *supra* note 68.

<sup>83</sup> *Godinez*, 113 S. Ct. at 2682.

<sup>84</sup> *Id.* at 2686-87 (emphasis in original).

<sup>85</sup> 422 U.S. 806 (1975); see *supra* text accompanying note 41.

<sup>86</sup> *Godinez*, 113 S.Ct. at 2687.

<sup>87</sup> *Id.* at 2693.

### III. THE FERGUSON CASE

#### A. The Crime and Trial

On December 7, 1993, Colin Ferguson, a 37 year old native of Jamaica, killed six people and wounded 19 others on a Long Island Rail Road (LIRR) commuter train from New York City as it arrived in Garden City, Long Island.<sup>88</sup> When arrested, Ferguson was found with 150 rounds of ammunition and notes in his pockets suggesting a hatred of whites and persons of Asian ancestry.<sup>89</sup> Ferguson was originally represented by William Kunstler, a well-known lawyer often associated with unpopular or controversial causes. He fired Kunstler, however, when Kunstler announced that he planned to pursue an insanity defense based on a "black rage" theory: Ferguson, a highly-intelligent, but mentally disturbed individual who had been raised as "a child of privilege in his native Jamaica,"<sup>90</sup> had been "pushed over the edge into murder by endemic American racism."<sup>91</sup> Ferguson stated he would rather represent himself and prove—in spite of a staggering number of eyewitnesses to the contrary<sup>92</sup>—that a Caucasian perpetrator stole his gun and did the shootings in question.<sup>93</sup>

At a pretrial hearing in December 1994, psychologists John D'Alessandro and Allen Reidman testified that Ferguson, while suffering from paranoid personality disorder, was rational and free from delusions.<sup>94</sup> Based on these reports and on his own questioning of the witness, Nassau County Court Judge Donald E. Belfi found Ferguson competent to stand trial.<sup>95</sup> This decision appeared totally consistent both with the teachings of *Godinez* and with both pre-*Godinez* and post-*Godinez* New York state decisions,<sup>96</sup> decisions which supported the holding that an "articulate, intelligent and rational" defendant such as Ferguson had a constitutional right to represent himself.<sup>97</sup>

<sup>88</sup> John T. McQuiston, *In the Bizarre L.I.R.R. Trial, Equally Bizarre Confrontation*, N.Y. TIMES (L.I. ed.), Feb. 5, 1995, sec. 13LI, at 1.

<sup>89</sup> Bruce Frankel, *Justice "At Its Worst" NY Defendant Acts as Lawyer*, USA TODAY, Jan. 27, 1995, at 40.

<sup>90</sup> Sheryl McCarthy, *Ferguson: Madness or Just Manipulation?* NEWSDAY (city ed.), Feb. 22, 1995, at 6.

<sup>91</sup> Van Bieman, *supra* note 21. See, e.g., Claire Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 280 (1995); J. Thomas Sullivan, *Psychiatric Defenses in Arkansas Criminal Trials*, 48 ARK. L. REV. 439, 454 (1995). The defense was rejected in *State v. Lamar*, 698 P. 2d 735, 741 (Ariz. App. 1984). For a recent discussion of "syndromic defenses" in general, see Stephen Morse, *The "New Syndrome Excuse Syndrome"*, CUM. JUST. ETHICS, Winter/Spring 1995, at 3.

<sup>92</sup> John T. McQuiston, *Adviser Says L.I.R.R. Suspect Prefers Conviction to Insanity Finding*, N.Y. TIMES, Feb. 10, 1995, at B5.

<sup>93</sup> Wickham, *supra* note 20.

<sup>94</sup> Robin Topping, *Weighing Competence vs. Sanity*, NEWSDAY, (Nassau & Suffolk ed.), Feb. 5, 1995, at A6.

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., *People v. Reason*, 372 N.Y.S. 2d 614, 618 (1975) (determination that defendant was competent to stand trial, coupled with trial judge's "searching inquiry" as to whether decision was made "knowingly and intelligently with full awareness of risks and consequences," sufficient to support waiver); *People v. Schoolfield*, 608 N.Y.S. 2d 413, 41617 (App. Div. 1994) ("A criminal defendant is entitled to be master of his own fate and 'respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice "with eyes open,"' quoting, in part, from *People v. Vivenzio*, 477 N.Y.S. 2d 318, 319 (App. Div. 1984) (*Godinez* not cited); *People v. Meurer*, 621 N.Y.S. 2d 422, 42324 (App. Div. 1994) (affirming conviction where, after defendant was found competent to stand trial, trial court found decision to waive was made "knowingly, intelligently and voluntarily with full awareness of the risks and consequences") (*Godinez* not cited).

<sup>97</sup> Topping, *supra* note 94, at A6.

At trial, Ferguson opened by telling the jury that he was charged with:

93 [criminal] counts, only because it matches the year 1993. Had it been 1925, it would have been 25 counts. This is a case of stereotype victimization of a Black man and subsequent conspiracy to destroy him.<sup>98</sup>

The manner in which Ferguson conducted his defense was described aptly by a *Boston Globe* commentator as providing "uniquely creepy television," and, quoting Court TV president Steven Brill, the ultimate triumph of "form over substance."<sup>99</sup> Among the defense strategies used by Ferguson included the announcement that he would call as a witness a parapsychologist and exorcist who would testify that government agents had planted a microchip in Ferguson's head and that he (Ferguson) had been "lasered out by a remote-control device."<sup>100</sup> Also, during his cross-examination of the ballistics expert, Ferguson asked whether the bullet fragments had been tested for "alcohol or substance abuse."<sup>101</sup>

In his summation—characterized uniformly as "rambling and sometimes incoherent"—he argued that the 19 shooting survivors had conspired with police authorities to convict him.<sup>102</sup> Finally, in his allocution statement at sentencing, he told the court:

Jeffrey Dahmer's death in prison was not coincidence. It was timed just moments before I was given *pro se* status in anticipation of my trial beginning in a matter where it was setting the precedent for my murder in an upstate prison.<sup>103</sup>

Ferguson was convicted on six counts of murder and 22 counts of attempted murder, weapons possession, and reckless endangerment, and acquitted on 25 counts of civil-rights violations.<sup>104</sup> He was sentenced to over 300 years in prison.<sup>105</sup> The observation that Ferguson's courtroom behavior ranged from the "bizarre to the surreal"<sup>106</sup> was never contradicted.

#### B. Ferguson and *Godinez*

How does the Ferguson trial "fit" with the Supreme Court's *Godinez* decision? First, it demonstrates precisely how difficult the trial judge's task is in honoring

<sup>98</sup> Transcript 1109-5, NATIONAL PUBLIC RADIO, WEEKEND EDITION, FEB. 5, 1995.

<sup>99</sup> Frederic Biddle, *In Ferguson, TV Gets New Spectacle*, BOSTON GLOBE, Feb. 16, 1995, at 1.

<sup>100</sup> John T. McQuiston, *Commuter Killing Trial Goes to Jury: Ferguson Gives Incoherent Summation*, HOUSTON CHRONICLE, Feb. 17, 1995, at A2. For a flavor of other defense tactics, see, e.g., McShane, *supra* note 11; Andrew Blum, *LIRR Gunman Goes Pro Se With Perplexing Voir Dire*, NAT'L L.J., Feb. 6, 1995, at A11; John T. McQuiston, *Abrupt End to Defense in Rail Case*, N.Y. TIMES, Feb. 16, 1995, at B1.

The delusion that a microchip has been planted in one's head may be symptomatic of paranoid schizophrenia, raising the question of whether another incompetency to stand trial inquiry should have been made at this point in the proceedings. See *Drope v. Missouri*, 420 U.S. 162 (1971).

<sup>101</sup> Court TV: Tape FER5610104 (Television broadcast, Feb. 2, 1995), Log timecode 12:50.

<sup>102</sup> John T. McQuiston, *Murder Trial in L.I.R.R. Case Goes to the Jury for Deliberation*, N.Y. TIMES (Feb. 17, 1995), at B1.

<sup>103</sup> Court TV: Tape FER5610204 (Television broadcast, Feb. 16, 1995), Log timecode 11:18.

<sup>104</sup> Diana Rojas, *LIRR Massacre Gunman Convicted of Murder; The Verdict, Guilty; N.J. Family Says Ordeal Not Over*, BERGEN (NJ) RECORD, Feb. 18, 1995, at A1.

<sup>105</sup> Maureen Fan, *315 213 Years For Ferguson; Protesting to the End, LIRR Killer Sentenced*, NEWSDAY (Nassau & Suffolk ed.), Mar. 23, 1995, at A4.

<sup>106</sup> *Railroad Shooter Telephones Lawyers: Kunstler Willing to Handle Ferguson Process of Appeals*, SPRINGFIELD STATE JOURNAL-REGISTER, Feb. 19, 1995, at 3.

Godínez's dictates. As Robin Topping—one of a small handful of trial observer/reporters who understood the link between Godínez and the Ferguson trial—pointed out in *Newsday*:

It's not a simple situation for the judge. [Judge] Belfi has to perform a delicate balancing act. He is legally obligated to take extra precautions to make sure that Ferguson is given a fair trial—especially because he is not a lawyer. He must be careful that Ferguson doesn't disrupt the trial but he has to be equally careful in revoking his right to represent himself lest he, Belfi, be reversed by a higher court.<sup>107</sup>

Ferguson is yet another in a lengthy series of pre-Godínez and post-Godínez cases concluding that "bizarre behavior" is not necessarily evidence of incompetency.<sup>108</sup>

Godínez purports to balance fair trial and autonomy issues, concluding that "a criminal defendant's ability to represent himself has no bearing on his competence to choose self-representation."<sup>109</sup> On the other hand, it warns that the waiver of counsel must be "intelligent and voluntary" before it can be accepted.<sup>110</sup>

To what extent was this standard complied with in the Ferguson trial? Godínez speaks only to questions of *decisional* competency: if the defendant has the capacity to *decide* to waive counsel, then the standard for determining his competence to stand trial will suffice. It ignores—fatally, in my view—the other question that is needed to give life to an otherwise sterile and formalistic legal doctrine: Does the defendant have the functional ability to represent himself?<sup>111</sup> This is the question addressed by Justice Blackmun in his dissent, and studiously ignored by Justice Thomas in the majority. It is here that Godínez fails and the reason for the Ferguson "charade" becomes apparent: the key question—Did Colin Ferguson, truly, have the capacity to conduct his own defense in a meaningful way, to conduct it with dignity?—remains unasked.<sup>112</sup>

<sup>107</sup> Robin Topping, *Crime and Courts; Law and Order*, "The Pitfalls of Self-Representation," *Newsday* (Nassau & Suffolk ed.), Feb. 1, 1995, at A29. Pre-Godínez caselaw on the right of criminal defendants to represent themselves is discussed *supra* note 96.

<sup>108</sup> E.g., *State v. Ploof*, 649 A.2d 774, 778 (Vt. 1994); *Boag v. Raines*, 769 F.2d 1341, 1343 (9th Cir. 1985), *cert. den.*, 474 U.S. 1086 (1986); *People v. Holma*, 450 N.E.2d 432, 435 (Ill. 1983). See generally, 3 PERLIN, *supra* note 7, §14.04 at 218-19.

<sup>109</sup> Godínez, 113 S. Ct. at 2687.

<sup>110</sup> *Id.* at 2688.

<sup>111</sup> Felthous, *supra* note 11, at 105; Taub, *supra* note 11, at 28, 29.

<sup>112</sup> See Topping, *supra* note 107. Courts and commentators have regularly discussed "dignity" in a fair trial context both in cases involving mentally disabled criminal defendants and in other settings. See, e.g., *Marquez v. Collins*, 11 F.3d 1241, 1243 (5th Cir. 1994) ("Solemnity . . . and respect for individuals are components of a fair trial"); *Heffernan v. Norris*, 48 F.3d 331, 336 (8th Cir. 1995) (Bright, J., dissenting) ("the forced ingestion of mildaltering drugs not only jeopardizes an accused's rights to a fair trial, it also tears away another layer of individual dignity . . ."). See Felthous, *supra* note 11, quoting Bruce Ennis & Christopher Hansen, *Memorandum of Law: Competency to Stand Trial*, 4 J. PSYCHIATRY & L. 491, 512 (1976) (one of the four purposes of incompetency to stand trial determination is to "preserve the dignity and integrity of legal processes"); Keith Nicholson, *Would You Like Some More Salt in That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103, 1128 (1995) (for trial to be fair, "it must be conducted in an atmosphere of respect, order, decorum and dignity befitting its importance both to the prosecution and the defense"); see also Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 444 (1992) ("significance" of dignity values in involuntary civil commitment hearings); Deborah A. Dorfman, *Effectively Implementing Title I of the Americans With Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J. L. & HEALTH 105, 121 (1993-94) (same).

Godínez is an example of the Supreme Court's willful blindness at its worst. The court is aware—it must be aware—of the pretextual way that incompetency to stand trial proceedings are frequently conducted.<sup>113</sup> The court is aware—it must be aware—of the way that incompetent defendants are "shuttled" back and forth between jail and mental hospital, reflecting frequent changes in their trial competency status.<sup>114</sup> The court is aware—it has stated that it is aware—of the potential impact of drug side effects on mentally disabled criminal defendants and the integrity of the trial process.<sup>115</sup> And yet, in *Godínez* it blithely brushes all these empirical realities aside and endorses a minimalistic test that is sure to further sap the integrity of the criminal trial process.

Was Colin Ferguson functionally competent to conduct his own defense?<sup>116</sup> Some guidance here may be found in *McKaskle v. Wiggins*.<sup>117</sup> There, the Supreme Court listed some of the tasks a pro se defendant must be allowed to perform without interference from "standby counsel": to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court where appropriate.<sup>118</sup> It defies credulity to suggest that Colin Ferguson was able to do these tasks in such a way that insured a trial that reflected the type of "solemnity" and "dignity" that are integral to a trial's fairness.

#### IV. SANISM, PRETEXTS, THE PUBLIC AND COLIN FERGUSON

##### A. Sanism<sup>119</sup>

"Sanism" is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.<sup>120</sup> It infects both our

<sup>113</sup> See generally Perlin, *Pretexts*, *supra* note 71.

<sup>114</sup> See, e.g., Winick, *supra* note 15, at 936 n. 57, cited in *Commonwealth v. DelVerde*, 496 N.E.2d 1357, 1360 (Mass. 1986); *State v. Wilkins*, 736 S.W.2d 409, 415 (Mo. 1987).

<sup>115</sup> See, e.g., *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), discussed *supra* notes 76-78; see also *Heller v. Doe*, 113 S. Ct. 2637, 2645 (1993) (institutionalized mentally ill persons are subjected to "invasive" treatments such as the use of psychotropic drugs).

<sup>116</sup> For an important recent debate on this issue, compare Richard Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAAMI L. REV. 539 (1993), to Bruce Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Proposal and Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571 (1995).

<sup>117</sup> 465 U.S. 168 (1984).

<sup>118</sup> *Id.* at 176-79. These aspects of *McKaskle* are carefully discussed in Felthous, *supra* note 11, at 107.

<sup>119</sup> Text accompanying notes 120-35 is generally adapted from Perlin, *supra* note 28.

<sup>120</sup> The classic treatise is GORDON ALLPORT, *THE NATURE OF PREJUDICE* (1955). On the way that sanism incorporates a multistep "prejudice assimilation model," see Keri Gould, "Madness in the Streets" *Rides the Waves of Sanism*, 9 N.Y. L. Sch. J. Hum. Rts. 567, 574-81 (1992) (book review of R.J. ISAAC & V.C. ARMAT, *MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL* (1990)).



jurisprudence and our lawyering practices.<sup>121</sup> Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstition, and deindividuation, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

Judges are not immune from sanism. "[E]mbedded in the cultural presuppositions that engulf us all,"<sup>122</sup> they express discomfort with social science<sup>123</sup> (or any other system that may appear to challenge law's hegemony over society) and skepticism about new thinking; this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective OCS, both of which perpetuate the myths and stereotypes of sanism.<sup>124</sup>

Sanism is readily detected in court processes 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.<sup>125</sup> Judicial language demonstrates bias against mentally disabled individuals<sup>126</sup> and contempt for the mental health professions.<sup>127</sup> 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 don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint."<sup>128</sup>

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 law.

## B. Pretextuality

The entire relationship between the legal process and mentally disabled litigants is often pretextual. By this I mean simply that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decisionmaking, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends."<sup>129</sup> 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/or corrupt testifying. The reality is well known to frequent consumers of judicial services in this area: to mental health advocates and other public defender/legal aid/legal service lawyers assigned to represent patients and mentally disabled criminal defendants, to prosecutors and state attorneys assigned to represent hospitals, to judges who regularly hear such cases, to expert and lay witnesses, and, most importantly, to the mentally disabled persons involved in the litigation in question.

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders.<sup>130</sup> Experts frequently testify in accordance with their own self-referential concepts of "morality"<sup>131</sup> and openly subvert statutory and caselaw criteria that impose rigorous behavioral standards as predicates for commitment<sup>132</sup> or that articulate functional

<sup>121</sup> The phrase "sanism" appears to have been 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 Perlin, *supra* note 27, at 9293 (discussing Birnbaum's insights). See also *Koe v. Califano*, 573 F. 2d 761, 764 (2d Cir. 1978). Dr. Birnbaum is universally regarded as having first developed and articulated the constitutional basis of the right to treatment doctrine for institutionalized mental patients. See Morton Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960), discussed in 2 PERLIN, *supra* note 7, §4.03, at 8-13.

<sup>122</sup> Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991).

<sup>123</sup> The discomfort that judges often feel in having to decide mental disability law cases is often palpable. See, e.g., Michael L. Perlin, *Are Courts Competent To Decide Competency Questions? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957, 991 (1990) (court's characterization in *Charters*, 863 F. 2d 302, 310 (4th Cir. 1988) (en banc), *cert. den.*, 494 U.S. 1016 (1990), of judicial involvement in right to refuse antipsychotic medication cases as "'already perilous' . . . reflects the court's almost palpable discomfort in having to confront the questions before it").

<sup>124</sup> Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 61-69 (1990) (Perlin, *Psychodynamics*); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 618-30 (1989-90).

<sup>125</sup> See Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 400-04 (1992).

<sup>126</sup> See, e.g., *Corn v. Zant*, 708 F. 2d 549, 569 (11th Cir. 1983), *reh. den.*, 714 F. 2d 159 (11th Cir. 1983), *cert. den.*, 467 U.S. 1220 (1984) (defendant referred to as a "lunatic"); *Sinclair v. Wainwright*, 814 F. 2d 1516, 1522 (11th Cir., 1987), quoting *Shuler v. Wainwright*, 491 F. 2d 213 (5th Cir. 1974) (using "lunatic"); *Brown v. People*, 134 N.E. 2d 760, 762 (Ill. 1956) (Judge asked defendant, "You are not crazy at this time, are you?"); *Pyle v. Boles*, 250 F. Supp. 285, 289 (N.D. Va. 1966) (trial judge accused habeas petitioner of "being crazy"); *but cf.* *State v. Penner*, 772 P. 2d 819 (Kan. 1989) (unpublished disposition), at \*3 (witnesses admonished not to refer to defendant as "crazy" or "nuts").

<sup>127</sup> See, e.g., *Commonwealth v. Musolino*, 467 A. 2d 605 (Pa. Super. 1983) (reversible error for trial judge to refer to expert witnesses as "headshrinkers"). Compare *State v. Percy*, 507 A. 2d 955, 956 (Vt. 1986), *app'l after remand*, 595 A. 2d 248 (Vt. 1990), *cert. den.*, 112 S. Ct. 344 (1991) (conviction reversed where prosecutor, in closing argument, referred to expert testimony as "psychobabble"), to *Commonwealth v. Cosme*, 575 N.E. 2d 726, 731 (Mass. 1991) (not error where prosecutor referred to defendant's expert witnesses as "a little head specialist" and a "wizard").

<sup>128</sup> Perlin, *supra* note 125, at 396. See, e.g., J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 238 (1990) (Linckley prosecutor suggested to jurors, "if Linckley had emotional problems, they were largely his own fault"). See also *State v. Duckworth*, 496 So. 2d 624, 635 (La. App. 1986) (juror who felt defendant would be responsible for actions as long as he "wanted to do them" not excused for cause) (no error).

<sup>129</sup> 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, 133 (1991). See also Charles Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 840 (1974).

<sup>130</sup> See, e.g., *Streicher v. Prescott*, 663 F. Supp. 335, 343 (D.D.C. 1987) (although District of Columbia Code contained provision that patient could invoke to 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 Kanter, *Abandoned but Not Forgotten: The Illegal Confinement of Elderly People in State Psychiatric Institutions*, 19 N.Y.U. REV. L. & SOC'Y CHANGE 273, 304-06 (1991-92).

<sup>131</sup> 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 CRIMINOL. 137, 139 (1991) (a legal reform that contradicts deeply held beliefs may result either in open defiance of the law or in a surreptitious attempt to modify the law). Compare H. RICHARD UVILLER, *TEMPERED ZEAL* 116-18 (1988) (police sanction perjury in cases where Supreme Court has imposed constitutional rules that do not comport with officers' "own idea of fair play"), with Tracey Maclin, *Seeing the Constitution from the Backseat of a Police Squad Car* (Book Review of H.R. UVILLER, *supra*) 70 B.U. L. REV. 543, 580-82 (1990) (criticizing view).

<sup>132</sup> See, e.g., Perlin, *Pretexts*, *supra* note 71, at 135-36.

standards as prerequisites for an incompetency to stand trial finding.<sup>133</sup> 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 in their testimony.

This testimony is then weighed and evaluated by frequently-sanist fact-finders.<sup>134</sup> Judges and jurors, both consciously and unconsciously, frequently rely on reductionist, prejudice-driven stereotypes in their decisionmaking, thus subordinating statutory and caselaw standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.<sup>135</sup>

### C. The Ferguson Trial

Was the Ferguson trial pretextual? Was it a "sham, a charade. . .", or was it the vindication of a defendant's Fourteenth Amendment right to self-representation? In one of the most unscriptable ironies of the entire affair, Ferguson likened himself to Clarence Thomas, claiming they had both been victims of "high tech legal lynchings."<sup>136</sup> One wonders how Ferguson would have responded had he known that Thomas authored the *Godínez* opinion that set the wheels of justice in motion in his own case. The Court's holding in *Godínez* reflected at its base the court's profound disinterest in (and perhaps, cynicism about) the integrity of the criminal trial process. Its opinion must be read against the background of both its decision in *Strickland v. Washington*,<sup>137</sup> and the reality that counsel generally made available to mentally disabled persons is substandard (and especially substandard in the case of mentally disabled criminal defendants).<sup>138</sup>

Was the Ferguson trial sanist? This is an exceedingly difficult question to answer. At first glance, it appears that *Godínez* was the rarest of all creatures: a nonsanist opinion that captured the votes of Justices Scalia, Rehnquist, and Thomas, the core of the Court that has consistently taken the most sanist positions in their opinions.<sup>139</sup> *Godínez*—specifically—appears to grant significant autonomy to

<sup>133</sup> See, e.g., *People v. Doan*, 366 N.W. 2d 593, 598 (Mich. App. 1985), *app'l den.* (1985) (expert testified that defendant was "out in left field" and went "bananas").

<sup>134</sup> See generally Perlin, *supra* note 125; Perlin & Dorfman, *supra* note 68.

<sup>135</sup> See generally Perlin, *Pretexts*, *supra* note 71.

<sup>136</sup> Fan, *supra* note 27. Ironically, Justice Thomas and Ferguson are "twinned" in an opinion piece written shortly after O.J. Simpson was apprehended:

A black person says, "The same spot in my heart that was bruised over Clarence Thomas, Mike Tyson, Michael Jackson, Tupac Shakur, and Colin Ferguson, the same spot that gets bruised by the nightly local news parade of black hands in handcuffs has been rebruised."

Alison Taylor, "Girl, There's Another Black Man Gone," PALM BEACH POST, June 26, 1994, at 1F (emphasis added).

<sup>137</sup> 466 U.S. 668, 687 (1984) (establishing a pallid, almost-impossible-to-violate "reasonably effective assistance" standard in criminal cases).

<sup>138</sup> See Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39 (1992).

<sup>139</sup> See generally Perlin, *supra* note 5; Perlin, *Psychodynamics*, *supra* note 124; Perlin & Dorfman, *supra* note 68.

mentally disabled criminal defendants, to treat them more *like* other defendants, to neither infantilize nor demonize them,<sup>140</sup> and to decline to focus solely on their mental disability in construing their criminal process trial rights.

That this, however, may be little more than a *trompe d'oeil* illusion begins to become apparent as one contextualizes the public reaction to the Ferguson trial. First, Ferguson's initial set of lawyers fell all over themselves in an effort to make Ferguson appear as mentally disabled as possible: "A delusional psychotic," declared Ronald Kuby, Kunstler's associate;<sup>141</sup> a "raving maniac," chimed in Kunstler;<sup>142</sup> a "deranged man with a crazy defense," again from Kuby.<sup>143</sup> Colin Moore, a black activist attorney who had represented Ferguson on another matter, called the trial a "ritualistic sacrifice."<sup>144</sup> And a prominent columnist characterized Ferguson as "nutty as peanut brittle."<sup>145</sup> The irony was noted by a *Washington Post* commentator:

The Ferguson trial has the lawyer-hating masses clamoring for—you guessed it—a real lawyer. Suddenly, lawyers are agents of rationality and justice.<sup>146</sup>

Other lawyers raised the question of fundamental fairness in other ways. Said Jack Litman, "As horrific as the crimes are, when people see someone battling for himself and he doesn't know how to do it, they feel this isn't fair."<sup>147</sup> Leon Friedman honed in on what he saw as Judge Belfi's failure to inquire into Ferguson's ability to *knowingly* and *intelligently* waive counsel.<sup>148</sup> Professor Burt Neuborne focused on the community's need for an "imprimatur of guilt": "It was important for everyone to say 'You did something terrible,' and they want to be sure Ferguson never gets out of jail. It served an important social purpose. But that is not the purpose of a trial."<sup>149</sup>

And while the trial had its "moments of catharsis for survivors," it left a "nasty, hollow feeling in its wake."<sup>150</sup> Jan Hoffman's analysis for the *New York Times* rings the most true:

Judge Belfi's ruling addressed a broader social need as well. Since 1981, when John Hinckley shot President Reagan, the public has grown weary and fearful of both the insanity defense and a defendant's being found continually unfit to stand trial. People are concerned that such defendants will somehow unjustly elude conviction and punishment, and that terrible crimes will never be brought to closure.<sup>151</sup>

<sup>140</sup> Perlin, *supra* note 125.

<sup>141</sup> *Nightline* (ABC News television broadcast, Feb. 10, 1995), Transcript 3580.

<sup>142</sup> Associated Press, *LIRR Shooting Suspect Rejects Insanity Defense; Contends That Court Wants to Cover Up the Facts*, BERGEN (NJ) RECORD, Aug. 20, 1994, at A4.

<sup>143</sup> Bruce Frankel, *NY Rail Suspect Will Represent Self in Court*, USA TODAY, Jan. 17, 1995, at 2A.

<sup>144</sup> Alyson Alert, *United States: Lawyer/Killer Tests Rules for Mental Competence*, InterPress Service, Nov. 22, 1994.

<sup>145</sup> Otis Pike, *Insane Policy*, NEW ORLEANS TIMES-PICAYUNE, Feb. 23, 1995, at B7.

<sup>146</sup> *Letter From a Different Trial: Raising the Images of Lawyers By Proceeding Without Them*, WASH. POST, Feb. 3, 1995, at A2.

<sup>147</sup> Jan Hoffman, *Lingering Emptiness*, N.Y. TIMES, Feb. 18, 1995, at 26.

<sup>148</sup> Marilyn Goldstein, *LIRR Case a "Catch22" in Reverse*, Newsday (Nassau & Suffolk ed.), Feb. 3, 1995, at A8 (characterizing Belfi's decision as "a mistake").

<sup>149</sup> Hoffman, *supra* note 147, at 26.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

By the time the trial was over, some observers shifted their original perspective on Ferguson. Said the widow of one victim who originally assumed Ferguson was insane ("because I couldn't believe any human being could actually do this"), "There is no doubt now that he is sane; . . . a very calculating, manipulating person."<sup>152</sup>

The Ferguson trial, in summary, concluded with the same sort of stereotypical constructions of mentally disabled criminal defendants as have most of the other important cases to draw media attention since the trial of John W. Hinckley.

## V. CONCLUSION

It is difficult to discuss the Ferguson trial—"one of the most bizarre cases in court history"<sup>153</sup>—without invoking *Hamlet*: Is Justice Thomas hoisted by his own petard? *Godinez* rejected the argument that an assessment of competence for counsel-waiver purposes need be more searching or detailed than one for ability-to-stand-trial purposes. This rejection resulted, ultimately, in the affirmation of the defendant Moran's conviction in that case,<sup>154</sup> a "victory" for the state of Nevada (where Moran's crimes were committed) and the United States Department of Justice (that shared argument on the Supreme Court level with the state).<sup>155</sup> It is beyond argument that one of the hoped-for results of a prosecutorial victory would be an increase in the number of convictions (and a concomitant decrease in the number of appellate reversals) in cases involving defendants of questionable competence.<sup>156</sup> And the denouement of Colin Ferguson's case was precisely such a result. Richard Moran's original guilty plea attracted no national attention. The Supreme Court's decision in *Godinez* attracted little. The Ferguson case was a media circus. The heuristic of the vivid case<sup>157</sup> quickly educated the media and the American public about the broad outlines of the *Godinez* rationale (although few of the thousands of press stories about Ferguson made the explicit link between that case and the *Godinez* decision). For better or worse, just as the Hinckley case drove the insanity "reform" debate of the early 1980's,<sup>158</sup> so will the Colin Ferguson case drive whatever debate develops over competence questions in the late 1990's.<sup>159</sup>

<sup>152</sup> John T. McQuiston, *Reporter's Notebook: Views Shift on Insanity in Killings on L.I.R.R.*, N.Y. TIMES, Feb. 12, 1995, at 42.

<sup>153</sup> McQuiston, *supra* note 88.

<sup>154</sup> On remand, the Ninth Circuit affirmed the trial court's denial of Moran's habeas petition, finding that his guilty plea entry was voluntary and intelligent. *Moran v. Godinez*, 40 F. 3d 1567 (9th Cir. 1994), amended on denial of rehearing, 1994 WL 805772 (9th Cir. 1994), but see *id.*, 40 F. 3d at 1577 (Pregerson, J., dissenting).

<sup>155</sup> See 1993 WL 751849 (transcript of oral argument in *Godinez v. Moran*, 113 S. Ct. 2680 (1993)).

<sup>156</sup> In 1992, the Supreme Court had ruled in *Medina v. California*, 112 S. Ct. 2572 (1992), that it was not unconstitutional to place the burden of proof at an incompetency to stand trial hearing on the defendant. Thus, if the scales are equally balanced between competence and incompetency, cases may proceed to trial.

<sup>157</sup> See e.g., Perlin, *supra* note 123; Perlin, *supra* note 124; Perlin, *Psychodynamics*, *supra* note 124.

<sup>158</sup> PERLIN, *supra* note 15.

<sup>159</sup> Beyond the scope of this paper is an inquiry into an irony that seems never to have been considered in the literature: the parallels between the post-Hinckley insanity defense "reform" debate (on whether the affective/behavioral prong of the insanity defense should be jettisoned, leaving only a cognitive prong, see *id.* at 17-27) and the inquiry posed here (as to whether a cognitive inquiry is sufficient in a competence-waiver case, or whether a functional standard must be met as well).

*Godinez* is, at base, a cynical and meretricious decision. It is cynical because of its sole focus on the cognitive aspects of the capacity determination and its profound disinterest in the functional aspects. It is meretricious because it appears to simplify and unify a complex area of the law; in reality, it simply makes it more likely—far more likely—that more seriously mentally disabled criminal defendants will be convicted and subsequently imprisoned.<sup>160</sup> It is also meretricious because, though it appears to privilege autonomy in an almost libertarian way, it actually exposes the majority's deep contempt for mentally disabled criminal defendants and its utter disinterest in the logical and likely results of the decision.<sup>161</sup> And this contempt extends to a contempt to the victims of crimes such as those committed by Ferguson.<sup>162</sup>

Reaction to the Ferguson trial exposes the pretextuality that provides the underpinning of the *Godinez* decision. Although public and media response did not appear to be as overtly sanist as, say, typical responses to mitigating mental disability evidence in death penalty cases<sup>163</sup> or federal judges' construction of such evidence in their application of the Federal Sentencing Guidelines,<sup>164</sup> the trial spectacle remained profoundly sanist.<sup>165</sup> The appearance of justice is a component of a fair trial;<sup>166</sup> that appearance was sadly lacking in Ferguson's trial.

*Godinez*, to be blunt, is a bad decision. It is also a cruel decision. Few onlookers can quarrel with the ultimate verdict in the Ferguson case, but the steps along the way did nothing more than strain justice and mock the Constitutional guarantees of a fair trial. Dignity, indeed, was the first to leave.

<sup>160</sup> See *id.* at 428-29 (offering similar argument against abolition of the insanity defense).

<sup>161</sup> Profound therapeutic jurisprudence questions are also raised by both the *Godinez* decision and the Ferguson trial. See generally PERLIN, *supra* note 6; Michael L. Perlin, *What Is Therapeutic Jurisprudence?* 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); David Wexler, *Putting Mental Health Into Mental Health Law*, 16 LAW & HUM. BEHAV. 27 (1992); David Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 12 (1993). Resolution of these questions including specifically the question of the extent to which some measure of carefully modulated paternalism (as would be reflected in a refusal to allow mentally disabled defendants such as Ferguson to waive counsel) is sanist is also beyond the scope of this paper.

<sup>162</sup> See Christopher Johns, *Kafkaesque Nightmare of a Trial*, ARIZ. REPUBLIC, Mar. 5, 1995, at F3:

The justice system also fails victims. In the Ferguson case, the trial must have been a Kafkaesque nightmare. There is no justice when an accused roams the courtroom incapable of defending himself or taking responsibility for his actions. It was a spectacle, not a trial. It undermined the court's integrity and fostered the belief that the criminal justice system is not fair.

<sup>163</sup> 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. POLY 239 (1994).

<sup>164</sup> Michael L. Perlin & Kerri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431 (1995).

<sup>165</sup> See Johns, *supra* note 162 ("Regrettably, Thomas' opinion does not fit reality or serve justice. It's a backward step in the face of a mushrooming population of mentally ill, developmentally disabled, and mentally retarded people ensnared in the criminal justice system").

<sup>166</sup> E.g., *In re Murchison*, 349 U.S. 133, 136 (1955); *Walker v. Lockhart*, 726 F. 2d 1238, 1244 (8th Cir. 1984); *City of Cleveland v. Cleveland Electric Illuminating Co.*, 503 F. Supp. 368, 381 (M.D. Ohio 1980).