“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 *denouement* 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 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).¹ 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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¹From Bob Dylan, *Dignity* (c. 1995).

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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 Gloucester v. Gloucester Living Center [2] or the more recent City of Edmonds v. Oxford House[3]) there are widespread 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 1993.4 The Supreme Court has, for over a decade, been fascinated with the interplay between mental disability and the criminal trial process.5 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.6 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.7 The decision reversed a Ninth Circuit finding that the former inquiries were too narrow and that they obligated the trial judge to determine whether the defendant had the capacity for “reasoned choice” among the alternative offered to him, a capacity that would require “a higher level of mental functioning than that required to stand trial.”8 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.9

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”),10 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.11 Yet, compared to the outpouring of commentary that followed the decisions in Riggins v. Nevada (1991),12 or Panache v. Louisiana (1992),13 the constitutionality of statutes allowing the continued retention of no-longer-mentally-ill insanity acquittees,14 the decision virtually passed without notice.15

This, in retrospect, should probably not have been surprising. The public’s obsessions with the use of the insanity defense is probably matched by its profound disinterest in the role of incompetency in the criminal trial process.16 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.17 When they do, prosecution is usually simply deferred (with the defendant in pretrial custody) until the defendant regains his competency to stand trial;18 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).19 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

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2 115 S. Ct. 1917 (1995) (municipal zoning code’s definition of a “family” not a maximum occupancy restriction exempt from Federal Fair Housing Act Amendments barring discrimination against disabled persons).
9 Godinez, 113 S. Ct. at 2686.
is assessed, and for the way we generally construct mental disability? Does Ferguson's case truly host 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 pretextsualize teach us about Godinez and Ferguson?28

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 Godines, and consider how some of the "hidden factors" in Godines 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 pretextsualize. 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

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.30 Before Godines, courts traditionally had generally recognized that the standard for competence to plead guilty is generally higher than for other sorts of consent or waiver.31 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."32

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.33 Most of these decisions

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31 Ellis & Luckasson, supra note 30, at 461.
were merely conclusory and bereft of any sort of doctrinal analysis. Only in People v. Horal 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 lenity of the plea bargaining process because they are not competent to plead guilty."34 This position was challenged, however, by a series of cases involving both mentally ill35 and mentally retarded36 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."37 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,"38 a test applauded by Ellis and Luckasson.39 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."40

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 Paretta v. California,41 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."42 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."43 To this end, neither bizarre statements and actions,44 nor eccentric behavior,45 nor a finding that the defendant had been diagnosed as a paranoid schizophrenic46 have been found in specific cases to be enough to establish lack of capacity to represent oneself.

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?"47 The facts of the Godinez case are straightforward. 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.48 He initially pled not guilty, and was evaluated by a

45 See State v. Walton, 228 N.W.2d 21 (Iowa 1975).
46 422 U.S. 806, 835 (1975).
49 113 S. Ct. at 2685, citing Dickey, 362 U.S. at 402.
50 Godinez, 113 S. Ct. at 2682.

On the other hand, waiver of counsel should be "carefully scrutinized,"47 and the record must reflect that "the accused was offered counsel and knowingly and intelligently refused the offer."48 The court is required to conduct "more than a routine inquiry when making that determination."49 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,50 since "literacy and a basic understanding over and above the competence to stand trial may be required."51 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 mitigate 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
the 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.'"52

2 Id.
6 113 S. Ct. at 2685, citing Dickey, 362 U.S. at 402.
7 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. 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.

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. 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.” His appeal was dismissed by the state Supreme Court, and the U.S. Supreme Court denied certiorari.

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.” In coming to its decision, the appellate court stressed the defendant’s suicide attempts, 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.

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. 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.” Finally, the Court reaffirmed that any waiver of constitutional rights must be “knowing and voluntary.”

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.”

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.

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.” He reviewed the expert testimony as to the defendant’s state of depression, a condition 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 psychotropic 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.

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.”

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

61 Godinez, 113 S. Ct. at 2688-89.
62 Id. at 2692.
64 The drugs given Moran were primarily antipsychotic medications, see Godinez, 113 S. Ct. at 2683 n.2: Riggins had been receiving Medline. The fact that different types of drug were involved in the two cases was explored nowhere in any of the Godinez opinions.
65 Id. at 2694; citing Richard Bonnie, The Competence of Criminal Defendants: A Theoretical Reformulation, 10 BRIAS. & L. 291, 299 (1992); Ronald Kuehn & Stephen Golding, Competency to Stand Trial 1013 (1980).
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.34 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,"7 such drugging would be proscribed unless the state could demonstrate medical appropriateness and that, considered together, 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.78

Moran was receiving such drugs and, as Justice Blackmun underscores in his dissent, the court's percuratory 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."79 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. Harper79 that an informal administrative procedure was sufficient to satisfy the refusal of medication rights of a convicted prisoner.81 The difference between Harper and Riggins appears 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."82 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."83 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."84 Relying on its decision in Parata,85 the Court found that a defendant's ability to represent himself "has no bearing upon his competence to choose self-representation."

Justice Blackmun's dissent 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 findings varies when its basic premise—such 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 unrepresented.

79 Godinez v. Moran, 113 S. Ct. at 2694.
82 See id. at 122; see generally, Perlin & Dorfman, supra note 45.
83 Godinez, 113 S. Ct. at 2682.
84 Id. at 2680-87 (emphasis in original).
85 422 U.S. 806 (1975); see supra text accompanying note 41.
86 Godinez, 113 S. Ct. at 2687.
87 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 Railroad Train (LRIR) commuter train from New York City as it arrived in Garden City, Long Island. 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. 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," had been "pushed over the edge into murder by epidemic American racism." Ferguson stated he would rather represent himself and tried, in spite of a staggering number of eyewitnesses to the contrary— that a Caucasian perpetrator stole his gun and did the shootings in question.

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

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.

The manner in which Ferguson conducted his defense was described aptly by a Boston Globe commentator as providing "unique, creepy television," and, quoting Court TV president Steven Brill, the ultimate triumph of "form over substance." 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." Also during his cross-examination of the ballistic expert, Ferguson asked whether the bullet fragments had been tested for "alcohol or substance abuse." 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. Finally, in his allocution statement at sentencing, he told the court:

Jeffrey Dohrer'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 up-state prison.

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. He was sentenced to over 300 years in prison. The observation that Ferguson's courtroom behavior ranged from the "bizarre to the surreal" 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...
Godinez's dictates. As Robin Topping—one of a small handful of trial observers who understood the link between Godinez and the Ferguson trial—pointed out in Newsday:

"It's not a simple matter 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. So Belfi, be reversed by a higher court."

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

Godinez 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."109 On the other hand, it warns that the waiver of counsel must be "intelligent and voluntary" before it can be accepted.110

To what extent was this standard complied with in the Ferguson trial? Godinez speaks only to questions of decisional competency: if the defendant has the capacity to decide to waive counsel, then the standard for determining his competency 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?111 This is the question addressed by Justice Blackmun in his dissent, and studiously ignored by Justice Thomas in the majority. It is here that Godinez falls and the reason for the Ferguson "charade" becomes most evident: the key question—Did Colín Ferguson, truly, have the capacity to conduct his own defense in a meaningful way, to conduct it with dignity—remains unasked.112

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107 Godinez, 113 S. Ct. at 2687.

109 Id. at 2688.

110 Feldhaus, supra note 11, at 105; Taub, supra note 11, at 28, 29.

111 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) ("Sacrifice ... and respect for individuals are components of a fair trial"); Heffman v. Norris, 48 F. 3d 331, 335 (6th Cir. 1995) (Brigid, J., dissenting) ("forced ingestion of mind-altering drugs not only jeopardizes an accused's right to a fair trial, it also tears away another right of individual dignity ... ."); See Feldhaus, 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 important ways in which competency to stand trial determinations is to preserve the dignity and integrity of legal process"); Keith Nicholson, While You Laugh Some More: Both the "Wounded 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 befits its importance both to the parties 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 109, 121 (1993-94) (same).
jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly upon stereotype, myth, superstitition, and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process. Judges are not immune from sanism. "[E]mbodied in the cultural presuppositions that engulf us all," 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; this discomfort and skepticism allows them to take deeper refuge in heuristic thinking and flawed, non-reflective OCS, both of which permeate the myths and stereotypes of sanism. Sanism is readily detected in court proceedings 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. Judicial language demonstrates pressure against mentally disabled individuals and contempt for the mental health professions. Courts often appear indifferent with mentally disabled litigants, servicing their problems in the legal process to week 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 baser instincts, and do not exercise appropriate self-restraint." Sanism 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) decision-making, specifically where witnesses, especially expert witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, dovetails with the perjury that, at times, perjurious and/or corrupt testifying. The reality is well known to frequent consumers of judicial services in this area: mental health advocates and other public defenders/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 pretextsv of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of "morality" and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional

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 unspeakable ironies of the entire affair, Ferguson likened himself to Clarence Thomas, claiming they had both been victims of “high tech legal lynchings.” One wonders how Ferguson would have responded had he known that Thomas authored the Godinez opinion that set the wheels of justice in motion in his own case. The Court’s holding in Godinez 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, 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).

Was the Ferguson trial sanist? This is an exceedingly difficult question to answer. At first glance, it appears that Godinez was the rarest of all creations: 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. Godinez—specifically—appears to grant significant autonomy to mentally disabled criminal defendants, to treat them more like other defendants, to neither infantilize nor demonize them, 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 trojan d’oeuf 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 psychopath,” declared Ronald Kuby, Kunstler’s associate; a “raving maniac,” chimed in Kunstler; a “deranged man with a crazy defense,” again from Kuby. Colin Muirc, a black activist attorney who had represented Ferguson on another matter, called the trial a “ritualistic sacrifice.” And a prominent columnist characterized Ferguson as “nutty as peanut brittle.” 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.”

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.” Leon Friedman honed in on what he saw as Judge Bjell’s failure to inquire into Ferguson’s ability to knowingly and intelligently waive counsel. Professor Burt Neumorbe focused on the community’s need for an “imputus 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.”

And while the trial had its “moments of catharsis for survivors,” it left a “nasty, hollow feeling in its wake.” Jan Hoffmann’s analysis for the New York Times rings the most true:

Judge Bjell’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.

133 See, e.g., People v. Dean, 364 N.W. 2d 593, 599 (Mich. App. 1985), op pend. (1985) (expert testified that defendant was "out in left field" and went "bananas").
134 See generally Perlin, supra note 125; Perlin & Dorfman, supra note 68.
135 See generally Perlin, Pretext, supra note 71.
136 See generally 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, Tupac Shakur, and Colin Ferguson, she says, must get bruised by the nightly local news parade of black hands in handcuffs has been bruised.”
Alison Taylor, "Girl, There’s Another Black Man Gone," Palm Beach Post, June 26, 1994, at 1F (emphasis added).
137 466 U.S. 666, 687 (1986) (establishing a plaintiff, almost-impossible-to-violate “reasonably effective assistance” standard in criminal cases).
139 See generally Perlin, supra note 5; Perlin, Psychodynamics, supra note 124; Perlin & Dorfman, supra note 68.
140 Nightline (ABC News television broadcast, Feb. 10, 1995), Transcript 3580.
142 Bruce Frankel, NY Rail Suspect Will Represent Self in Court, USA Today, Jan. 17, 1995, at 2A.
147 Marilyn Golden, Trial Case a "Catch 22" in Return, Newsday (Nassau & Suffolk ed.), Feb. 3, 1995, at A8 (characterizing Bjell’s decision as "a mistake").
148 Hoffman, supra note 147, at 26.
149 Id.
150 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."112

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"113—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 inattention of the defendant, Moran's conviction in that case,114 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).115 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.116

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 case117 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,118 so will the Colin Ferguson case drive whatever debate develops over competence questions in the late 1990's.119

113 McQuiston, supra note 88.
114 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 P. 3d 1567 (9th Cir. 1999), amended on denial of rehearing, 1994 WL 805772 (9th Cir. 1994), but see id., 40 P. 3d at 1577 (Pregerson, J. dissenting).
115 See, e.g., 1993 WL 751849 (transcript of oral argument in Godinez v. Moran, 113 S. Ct. 2686 (1993)).
116 In 1992, the Supreme Court had ruled in Medina v. California, 112 S. Ct. 2672 (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.
117 See supra note 123; Perlin, supra note 124, Perlin, Psychiatriameric, supra note 124.
118 Perlin, supra note 15.
119 Beyond the scope of this paper is an inquiry into an irony that seems never to have been considered in the literature: the parallel between the post-Hinckley insanity defense "reform" debate (on whether the affective/behavioral proof of the insanity defense should be jettisoned, leaving only a cognitive proof, 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.160 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.161 And this contempt extends to a contempt to the victims of crimes such as those committed by Ferguson.162

Reaction to the Ferguson trial exposes the protruxuality that provides the underpinnings of the Godinez decision. Although public and media response did not appear to be as overtly sancti as, say, typical responses to mitigating mental disability evidence in death penalty cases163 or federal judges' construction of such evidence in their application of the Federal Sentencing Guidelines,164 the trial spectacle remained profoundly sancti.165 The appearance of justice is a component of a fair trial;166 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.

160 See id. at 428-29 (offering similar argument against abolition of the insanity defense).
161 Profound therapeutic jurisprudence questions are also raised by both the Godinez decision and the Ferguson trial. See generally Perlin, supra note 112; Michael L. Perlin, What Is Therapeutic Jurisprudence? 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993); David Weidner, Punishing Mental Illness Into Mental Health Law, 19 L. & HUM. BEHAV. 27 (1993); David Weidner, Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship, 11 BRIAN. SCH. & 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 sancti is also beyond the scope of this paper.
162 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 stands 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.

165 See Johns, supra note 162 ("Regrettably, Thomas' opinion does not fit reality or serve justice. It is 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").