Criminal Law and Procedure

Minding Moral Responsibility: The Supreme Court's Recent Mental Health Rulings

*By Steven K. Erickson**

It can be fairly said that American criminal law is based upon a moral consensus about which behaviors are considered right or wrong. This consensus is derived from our cultural and legal traditions, which inseparably hold individual autonomy and freedom in tandem with individual responsibility. As such, which behaviors are considered right or wrong flows not so much from legal precedent but from popular notions of agency, accountability, and the belief in an objective truth demarking good actions from evil ones. Yet, modern times have borne witness to such truly revolutionary advances in psychological science that many question whether these popular beliefs about agency and accountability are in fact true. The emergence of various forms of brain scanning technologies has led scientists to make startling claims. Recent studies have suggested that the brain embarks on a decision before an individual is actually aware of his choice,[1] while others propose that neuroscientists have located an area of the brain, known as the dorsolateral prefrontal cortex, where moral decision-making takes place.[2]

The contrived methodology and novelty of these findings has not prevented many scientists and scholars alike from speculating on the substantial implications these findings suggest.[3] In regards to the former, some conclude that most decisions are not voluntarily made by the actor, while, in the latter, others claim damage to this area may leave some unable to behave in a morally responsible manner.[4] In a similar vein, additional scientific findings ranging from behavioral genetics of psychopathy to predictions of future dangerousness have given fodder to those who argue that historical conceptions of free will are false and most human behavior determined by genetic factors, leaving little room for choice.[5] If such conclusions are correct, we are indeed in a new era of criminal and moral responsibility, whereby individual responsibility itself is anathema to a coherent regimen of criminal law.

But history is a testament to scientific theories once embraced as definitive and later abandoned because they are fraught with flaws and oversimplifications. In the late nineteenth century, Italian criminologist Cesare Lombroso posited the idea that criminal behavior was an immutable genetic trait that set affected individuals down an inevitable road of criminality and vice.[6] Lombroso's work centered on identifying these hapless miscreants, and suggested various physiognomic features could be used to ascertain which people were in fact "natural born killers." This imprudent social Darwinist approach seems laughable today, but was considered serious science at the time and employed statistical analyses which gave Lombroso's theory an appearance of scientific certainty and impartiality. Thus, it is unsurprising that Lombroso's theory was heavily relied upon by the eugenics movement, which advocated substantial coercive governmental policies aimed at establishing better societies through forced sterilization, massive institutionalization of "undesirables," and even genocide by its fanatics. Less stark but no less grievous was Sigmund Freud's enduring theory of psychosexual development and the subconscious, which captivated behavioral scientists and our popular culture with notions of a universal Oedipus complex, repressed memories, and the derivative "schizogenic mother."[7] Similar to Lombroso, Freudian theory was once heralded as the scientific explanation for a variety of social woes including violence, criminality, and delinquency, only to be dismissed in later years as utter pseudoscience.[8]

Despite this sordid past, psychological science has indeed benefited our culture and legal system. Most reputable behavioral scientists now agree that severe mental illnesses like schizophrenia and bipolar disorder are caused by significant biological deficiencies in the brain, and not by frigid parents or an individual's choice to have a "unique" outlook on life, as perpetuated during the 1960s by prominent psychiatrists such as Thomas Szasz and R. D. Laing. We have learned a great deal about the fallibility of eyewitness testimony and confessions conducted under extreme duress.[9] Such accomplishments should be praised for their value in ensuring a just criminal justice system. Since science and law approach the world from differing epistemologies, it is predictable that disagreements will occur about the normative construction of our criminal code. For the law, individual capacity for responsibility is presumed, and the bar for exculpation is set high, as the opposite would surely cause our entire criminal justice system to collapse under the weight of an endless procedural morass of dueling experts and frivolous affirmative defenses.

Indeed, efficiency is both a necessary and legitimate aim for criminal law. The past thirty years have shown just how damaging an inefficient criminal justice system can be if we examine the nearly endless delays seen in death penalty practice. While arguments abound about the deterrent effect of the death penalty, classic criminological theory suggests substantial delays between the time of the crime and imposition of the penalty likely reduces the deterrent effect.[10] Nonetheless, for science, knowledge is cumulative, and consequently the world seems increasingly nuanced. For every scientific question answered, many more follow in its wake. Thus, questions about competency and insanity seem less clear as mounting evidence suggests mental processes are far more complex than previously thought. The upshot of these different approaches that law and science take has been an indulgence of the former with novel scientific claims and an increasing politicization of the latter. Both are dangerous for different reasons. When the law entertains superficial science, it risks becoming ensnared in a false objective reality; when science becomes a political entity, it gives us more of that specious reality.

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This past term, the Supreme Court decided two cases that entailed questions of psychological science and criminal law. Both cases involved the death penalty and to some degree questions about mental capacity that tread close to the ultimate issue about how our criminal code conceptualizes the responsible agent. In *Panetti v. Quarterman*, the issue surrounded the competency of a defendant with a well-documented history of schizophrenia who represented himself during a capital trial and was subsequently sentenced to death.[11] After exhausting his state appeals and denied federal habeas corpus relief, he filed a second federal habeas corpus appeal arguing that he was incompetent to be executed because he lacked a rational understanding of why the death penalty was being imposed. Unlike the seminal case of *Ford v. Wainwright*, which prohibited the execution of an incompetent defendant who lacked a factual awareness of his punishment, it was uncontested that Panetti knew that the death penalty was being imposed upon him by the state for a crime in which it held him responsible.[12] Rather, Panetti's delusional belief was that the real reason for his death sentence was because the government wished to prevent him from preaching the gospel of Jesus Christ. Thus, the question presented rested on whether the Constitution requires a defendant to posses a factual and rational awareness of the criminal process in order to be considered a competent for punishment. Since the Constitution is silent about competency, Supreme Court cases have repeatedly engaged in a quasi-orginalist analysis by examining historical traditions of English and American common law regarding mentally impaired defendants. Such analyses always harken back to Blackstone's famous commentaries, which held it immoral to pursue criminal prosecution against "madmen," since such defendants are unable to understand why they are being accused, and thus unable to assist in their defense.[13] Blackstone's moral precept is congruent with our modern criminal justice system, which holds the individual ultimately responsible, and charged with his own defense, in a court of law.

And this is exactly where the problem lies. In the legendary case of *Faretta v. California*, the Supreme Court held that a defendant has a constitutional right to represent himself during a criminal proceeding.[14] As Justice Blackmun aptly noted in his dissent, the Court created a constitutional right to be a fool.[15] Panetti did exactly that, and by any measure his defense was both laughable and tragic. His attempts to subpoena Pope John Paul II, John F. Kennedy, and Jesus Christ were only outdone by his incoherent ramblings and nonsensical testament about his fearless approach to death. Despite ample evidence of his raging psychosis, which was surely exacerbated by his refusal to take his prescribed antipsychotic medicine, the trial court never questioned Panetti's competency once the trial commenced. While the right to be competent to stand trial is firmly rooted in American criminal law and affirmed by no less than four major Supreme Court decisions during the past forty years, *Faretta* seems to have trumped that right in the *Panetti* case. Nonetheless, in writing for the majority, Justice Kennedy held that the state could not execute Panetti since he lacked a rational appreciation for why the state wished to put him to death. Pointing to *Ford*, the 5-4 Court opinion concluded that it was inhuman to send an insane person to death, while engaging in a tortuous analysis of what *Ford* meant in its fragmented plurality opinion by holding that defendants must have "awareness" to be considered competent. While the Court in *Ford* complained about the "subtleties and nuances" of psychiatric evidence as reason for an abundance of caution when approaching mental health issues, in *Panetti* the Court appears to eagerly agree with the amicus brief filed by the American Psychological Association supporting Panetti's appeal and the certitude of his diagnosis of schizophrenia as sound science. Despite *Ford's* plurality status, the Court in *Panetti* readily deferred to its holding as the basis for its decision.[16]

However, precedent is flexible matter. In *Ford*, the Court held that when there is a "substantial threshold showing of insanity" a defendant is entitled to an evidentiary hearing on his competency, including production of his own expert witnesses and cross-examination of the state's expert witnesses.[17] Although Panetti's trial transcript is ample proof of his florid psychosis during trial, the Court relies upon a one-page affidavit by a psychologist and law professor who interviewed Panetti for one hour as satisfying *Ford's* "substantial showing" of incompetence. On its face, these seem apposite since "substantial showing" presumably means that the presumption of competency is given significant deference and overcoming this presumption requires considerable evidence to the contrary. Yet psychosis is a difficult matter. On the one hand, interviewing someone in the throws of florid psychosis is often a fruitless endeavor and one may not need more than a modicum of interaction to ascertain that the afflicted is seriously impaired. On the other hand, if rationality is such an intractable and subtle construct to determine as *Ford* and *Panetti* seem to indicate, than one wonders whether such a brief interview could accurately illuminate Panetti's true competence. Nonetheless, since the Court did not point to anything within the one-page report as a definitive showing of incompetence, a sensible interpenetration of the Court's ruling suggests that the *Ford* precedent of "substantial showing" may not be as high of a burden for defendants as the vernacular suggests.

Of course, precedent is a matter that the Court has the liberty of defining, but Acts of Congress are usually left to "plain meaning" and the intentions of Congress. Thus, the second issue resolved in *Panetti* was whether Panetti's second federal habeas corpus petition was a "second or successive" petition prohibited under the Antiterrorism and Effective Death Penalty Act (AEDPA).[18] Since Panetti had not claimed during his first habeas petition that he was incompetent to be executed, his second habeas petition seems a clear violation of the Act. Not so, held the Court, holding that the Act's phrase "second or successive" was not "self-defining" but instead in harmony with prior case law.[19] As Justice Thomas noted, however, in his dissent, the Court's opinion neither cites to a pre-AEDPA case that defined "second or successive" nor any pre-AEDPA case in which a subsequent habeas application challenging the same state-court judgment was considered anything but a "second or successive" petition. The best the Court can do is distinguish *Panetti* from its prior holding in *Stewart v. Martinez-Villareal*, where the Court affirmed a defendant's right to raise a second *Ford* claim when his initial claim had been dismissed as unripe. In justifying its novel finding that Panetti's claim was not second or successive the majority suggests that the logical consequence

of adopting a literal interpretation of the AEDPA's prohibition of second or successive petitions would equate to a tacit approval by the Court for all defendants to raise Ford claims at the outset of appeal in an effort to preserve the issue.[20] What follows in the *Panetti* opinions is a debate between the majority and the dissenting Justices about whether allowing Panetti's second habeas petition promotes or detracts from judicial efficiency, with the implicit difference of opinion resting on whether district courts can easily dismiss illegitimate *Ford* claims if the literal meaning of AEDPA's prohibition is followed. And what was lost in this procedural disputation is that while judicial efficiency is surely a legitimate and important consideration, none of this would be at issue if our judicial system was more concerned about the illegitimacy of an obviously incompetent defendant allowed to proceed at trial and less concerned about the intricacies of the legal lexicon behind words like "second or successive." Of course, Panetti's competence at trial was not at issue, and thus the Court ruled only on the narrow issue before it; namely, whether Panetti was competent to be executed. Applying narrow holdings to constricted fact patterns is what courts do, after all.

This narrow approach of court holdings is both a blessing and a curse. In *Panetti*, Justice Kennedy, writing for the majority, assures us that the mental state at issue is a narrow one. In attempting to foreclose any debate about which mental states may qualify for the newly created *Panetti* exception to AEDPA's ban on "second or successive" petitions, the Court holds that "the beginning of doubt about competence in a case like petitioner's is not misanthropic personality or amoral character. It is psychotic disorder."[21] It is reasonable to assume that the Court wished to prevent opening a floodgate of claims by death row inmates claiming incompetence based on the widely used psychiatric classification manual, the Diagnostic and Statistical Manual for Mental Disorders (DSM), published by the American Psychiatric Association. Now in its fourth edition, the DSM was first published in 1952 and contained 106 mental disorders at a length of 130 pages.[22] It was also the first time the term mental disorder was widely used in place of terms like mental illness or mental disease. Since then, the number of diagnosable mental disorders has blossomed, with the current edition at a hefty 886 pages containing 297 mental disorders.[23] Included among these 297 mental disorders are such mental phenomena as "Breathing-Related Sleep Disorder",[24] "Hyposexual Desire Disorder",[25] and the various personality disorders.[26] Recently, the American Medical Association tabled consideration of the addition of Video Game Addiction Disorder.[27] There are many critics of the DSM and many valid criticisms of the numerous behaviors now considered mental disorders, and hence under the purview of behavioral experts. What is telling, however, is how the Court approaches these various mental disorders and how it applies its skepticism of psychiatric "subtleties and nuances." In *Panetti*, the Court reassured us that the point of departure was Panetti's psychotic disorder and not anything else. Thus, the Court seemed reasonably confident that psychotic disorders were legitimate mental illnesses worthy of special consideration in criminal proceedings. In this sense, the Court appeared to be making a judgment that psychoses like Panetti's schizophrenia are legitimate while "misanthropic personalities" are not. Yet the second case to be discussed in this essay casts some doubt on this supposed bright line.

In *Schriro v. Landrigan*, a 5-4 Supreme Court reversed the Ninth Circuit Court of Appeals ruling that defendant Landrigan's attorney provided ineffective assistance of counsel by failing to investigate and provide mitigating evidence of Landrigan's purported antisocial personality disorder.[28] The defendant, Jeffery Landrigan, had a long history of antisocial behavior that stretched back to his childhood which included drug use during his early teen years. In 1982, Landrigan was convicted of murder and while serving a sentence for that crime, was convicted for repeatedly stabbing another inmate. In 1989, Landrigan escaped from custody and subsequently murdered another man. During the ensuing sentencing for that murder, Landrigan's counsel sought to introduce mitigating evidence in accord with *Wiggins v. Smith* by having Landrigan's mother testify regarding Landrigan's troubled childhood, and his ex-wife about being a good father for their child.[29] But Landrigan would have none of it. He repeatedly interrupted his counsel and stated "if you want to give me the death penalty, bring it on."[30] Nevertheless, the trial judge asked Landrigan whether he had instructed his attorney not to bring *any* mitigating evidence forward. Landrigan responded in the affirmative and the judge subsequently sentenced Landrigan to death. On direct appeal, the Arizona Supreme Court affirmed the sentence. As expected, a federal habeas claim was filed next and was subsequently denied by the District Court which was unanimously affirmed by the Ninth Circuit panel. However, the full court granted a hearing en banc and reversed, holding that Landrigan had made a colorable claim under *Strickland v. Washington*.[31] The Supreme Court reserved, holding no violation of *Strickland* had occurred and found that Landrigan had clearly waived his right to present mitigating evidence.

In a curious dissent, Justice Stevens wrote that Landrigan's purported anti-social personality disorder was a "serious organic brain syndrome" and should have been further investigated and presented by Landrigan's counsel.[32] Furthermore, Justice Stevens suggested that Landrigan had not waived his right to present mitigating evidence despite being asked directly by the trial judge whether he had instructed his attorney not to present any mitigating evidence. In no less than seven instances, the dissenting opinion referred to Landrigan's antisocial personality disorder as a "serious organic brain syndrome" despite the fact that the DSM does not refer to it in such a manner, instead classifying it as a personality disorder. A reasonable reading of the term "serious organic brain syndrome" suggests that the dissent was implying that Landrigan was unable to control his behavior because such behavior was the product of a brain disease on par with epilepsy. In fact, the DSM reserves the term "organic" for mental disorders, such as delirium, mental retardation, and dementia—although organic simply means originating from living organisms. Indeed, the dissent points to a psychological report prepared for the defense claiming that Landrigan's violence likely stemmed from a genetic disposition, leaving him unable to control his behavior.

While some may find the dissent's characterization of Landrigan's anti-social personality disorder bordering on the

absurd, such claims are not uncommon as of late. Numerous stories in the popular media discussing recent brain imaging findings regarding antisocial personality disorder, psychopathy, and impaired moral decision-making have generated considerable attention. In fact, a recent article in the *New York Times* discussed the vast increase in the number of legal claims based on brain imaging technology and impaired moral reasoning which have been enthusiastically received by numerous law professors and neuroscientists.[33] Likewise, a recent law school symposium was entirely dedicated to brain scanning as the possible "next big thing," implying a radical transformation of our cultural and legal traditions is at hand.[34]

Such enthusiasm is both undeserved and troubling. While brain-scanning technology has allowed scientists unprecedented access to living brains, fundamentally all they can describe is brain anatomy and physiology. Of course, these are vitally important matters, but whether a certain location of the brain appears inactive during a task performed while confined within the enormous magnetic field that constitutes an MRI machine tells us little about such global constructs as free will, agency, and accountability. The evidence from these limited studies simply cannot be generalized to the larger concepts of concern in criminal law. Moreover, the impressive pictures that these technologies produce are often based on extremely small sample sizes that undermine any statistical analyses performed to assess for differences between the supposed affected individuals and the normal controls. Additionally, they rely entirely upon complicated mathematical algorithms which employ "image smoothing" techniques that impute missing values, and hence add artificial values for missing data. Such procedures are entirely legitimate, as most computer monitors and televisions employ similar methods, but the notion that brain scans take a "picture" of the brain implies a precision they do not deserve.

Nonetheless, the findings from the various brain imaging technologies have provided additional evidence that behavior is a complex phenomenon, and there is no doubt that as the technology improves further evidence will come forward suggesting certain brain areas are associated with certain behaviors—even legally relevant behaviors. But scholars who adopt such findings to suggest that free will and agency are myths simply misunderstand the science behind the findings. For instance, the dissent in *Landrigan* implied that because Landrigan's behavior was the product of biology—a possible broken brain—he was entitled to presentation of this evidence, because it probably would have mitigated his culpability. But, of course, all behavior is biologically derived. Entrenched American legal traditions hold that individuals may be exculpable for criminal offenses in only limited circumstances where a mental illness so severely and substantially undermines an actor's rationality that holding such defendants culpable would offend common notions of decency. In fact, an equally compelling argument can be made that anti-social personality disorder should be exclusively considered an aggravating factor, since, absent a psychotic illness, such a diagnosis is associated with a rational actor who has a substantially elevated risk of future criminality and dangerousness. Mental disorder and madness are not synonymous, and not all mental disorders are created equal. Irrespective of their biological origins, some mental disorders deserve our pity, while others rightfully signal little compassion by the public. Mitigation rests not on a mechanical determination that some brains are biologically impaired but from the moral precept that substantial mental impairments can undermine individual accountability within our criminal justice system. Thus, our criminal justice system allows mitigation for those limited defendants because it reflects our collective belief in mercy for those unable to defend themselves before the law. As the majority aptly said in the *Panetti* case, it is cruel to send an insane person to death. Such pronouncements have little to do with the actual defendant suffering the penalty, since arguably psychoses like Panetti's would probably obscure realization of the impending penalty. Rather, the cruelty Justice Kennedy refers to in *Panetti* speaks volumes about our social norms, including our desire to punish only those who understand why the state wishes to exact the ultimate price for "amoral" behaviors. As the Court noted in *Panetti* when speaking of competency, the doubt begins with psychosis and is limited to very few other mental disorders.

The problem with our behavioral sciences lies with the misnomer of mental abnormality. When the DSM abandoned the term mental disease in favor of mental disorder few perhaps understood at that time the future it would unleash. But, as psychological science has moved further away from the constricted dimension of disease in describing abnormal behavioral phenomena towards the almost boundless construct of disorder, an increasingly greater number of behaviors have fallen under the authority of behavioral experts. As it remains entirely unclear what makes a cluster of behaviors a disorder, behavioral science experts and our culture have become complacent with the very idea that bad behavior is caused by bad biology. Such thinking has infected our beliefs about all behaviors that we view as undesirable; hence, we have respected national medical organizations seriously contemplating whether playing video games too much should be called and *thought of* as addictions. Likewise, our legal system has adopted the notion of indefinite civil commitment for sex offenders not because they have a disease as conventionally construed but because it is postulated that some hereto unknown mental abnormality causes them to engage in the worst behavior imaginable against our most helpless citizens. While the incapacitation of such offenders is desirable and understandable, the means of achieving that end have hastened our journey down the road of biology run amuck with any biological abnormality located in the brain as sufficient evidence for jettisoning our long-standing traditions of holding individuals responsible for their behaviors irrespective of their individual idiopathic differences. American criminal law has always set the bar high for diminished capacity and exculpatory defenses, not because it is ignorant of the individual differences people have but because it demands equal compliance of the law from everyone, irrespective of those differences. Only under that regimen can we have a comprehensible and effective criminal code that assures the biologically gifted and the biologically deficient that all citizens they encounter are expected not to murder, rape, and otherwise engage in wrongful conduct against them.

Such expectations by the public are not only intuitive but also wise. As certain as Lombroso was that he could identify

the biologically determined criminal over 100 years ago, such hubris is evident with those who confidently proclaim free will a myth because of the brain scans of a select few. Many scoff at the popular skepticism of insanity defenses and claims of childhood maltreatment as an excuse for adult criminality, but such skepticism insulates our legal and moral codes from the corrupting influence of fashionable scientific claims proffered with much certitude early on only to fall into disfavor in ensuring years. Science is about testing hypotheses in the empirical world, but it infrequently proves anything definitively. Even the hard sciences, such as physics, have yet to provide a unified theory of the material universe, and are subject to the flavor-of-the month effect. String theory, for example, has been heralded as the final piece of the puzzle in subatomic physics, but has recently been called into question as an insufficient explanation.[35] When we deal with the products of the metaphysical mind, such as anti-social behavior, caution and a healthy dose of skepticism are in order. At the same time, science does tell us much about the material world in which we live, and our desire to pick and choose which scientific findings we wish to entertain is foolish. Physics may lack a unifying theory, but there is little doubt that gravity exists, just as it is unquestionable that schizophrenia is a severe brain disease. Folks like Scott Panetti deserve our mercy just as Blackstone decreed many years ago, not so much because he deserves it, but because we and our future generations deserve a just and merciful society. The past can tell us much about how to navigate the future ahead of us. Any thoughtful reflection of the past invariably humbles the wise as it becomes apparent how little we really know about our world. Humility is a virtue the behavioral sciences and our criminal-moral code could surely benefit from; the former because it is so certain it has the answers for many questions, and the latter because it is so unwilling to listen to any of those answers.

Endnotes

1 Benjamin Libet, et al., *Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness-Potential): The Unconscious Initiation of a Freely Voluntary Act*, 106 Brain 623 (1983).

2 *See, e.g.,* Joshua D. Greene, et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 Sci. 2105 (2001).

3 *See, e.g.,* Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 Mich. L. Rev. 269 (2002).

4 *See generally,* Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. Rev. 1511, 1611 (1992).

5 *See, e.g.,* Matthew Jones, *Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution*, 52 Duke L.J. 1031 (2003).

6 *See* Arthur Herman, The Idea of Decline in Western History 110-113 (1997).

7 *See* E. Fuller Torey, Freudian Fraud: The Malignant Effect of Freud's Theory on American Thought and Culture (1992).

8 *See* Richard Webster, Why Freud Was Wrong (1995).

9 *See generally* Neil Brewer & Kipling D. Williams, Psychology and Law: An Empirical Perspective (2005).

10 *See* Jeremy Bentham, "Principles of the Civil Code: Principles of Penal Law," *in* 1 The Works of Jeremy Bentham (John Bowring ed., 1962).

11 Panetti v. Quaterman, 127 S. Ct. 2842 (2007).

12 477 U.S. 399 (1986).

13 William Blackstone, 4 Commentaries *20-33.

14 422 U.S. 806 (1975).

15 *Id* at 852.

16 *Ford* at 426.

17 *Id.*

18 Antiterrorism and Effective Death Penalty Act 28 U.S.C. § 2254.

19 *Panetti* at 2853.

20 Stewart v. Martinez-Villareal, 523 U.S. 627 (1998).

21 *Panetti* at 2862.

22 American Psychiatric Association, Diagnostic and Statistical Manual for Mental Disorders (1st ed., 1952).

23 American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders - Text Revision (4th ed. 2000).

24 *Id.* at 622.

25 *Id.* at 539.

26 *Id.* at 835-730.

27 *See AMA Takes Action on Video Games*, American Medical Association, *at* http://www.ama-assn.org/ama/pub/category/17770.html (last modified July 27, 2007).

28 127 S. Ct. 1933 (2007).

29 Wiggins v. Smith, 539 U.S. 510 (2003).

30 *Landrigan* at 1937.

31 Strickland v. Washington, 466 U.S. 668 (1984).

32 *Landrigan* at 1945.

33 Jeffery Rosen, *The Brain on the Stand*, N.Y. Times, March 11, 2007.

34 *The Law and Ethics of Brain Scanning: The Next Big Thing Coomig Soon to a Courtroom Near You?*, Sandra Day O'Conner College of Law, *at* http://www.law.asu.edu/?id=658 (April 13, 2007).

35 Peter Woit, Not Even Wrong (2006).