

1988

Execution of the Insane

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Recommended Citation

Cafone, Joan P. (1988) "Execution of the Insane," *NYLS Journal of Human Rights*: Vol. 5 : Iss. 2 , Article 9.
Available at: https://digitalcommons.nyls.edu/journal_of_human_rights/vol5/iss2/9

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NOTES

EXECUTION OF THE INSANE*

*In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.*¹

The purpose of this paper will be to explore selected ramifications of the onset of such insanity. A brief review of the history and rationale behind the exclusion of the mentally incompetent from execution is included as well as an analysis of Supreme Court decisions on the issue. Other controversial topics which are examined include the quality of legal services afforded the indigent in a capital case and the uncertainties felt by mental health professionals concerning the ethics of providing treatment to an incompetent death row inmate when the ultimate goal of such treatment is to return the inmate to competency for the purpose of execution.

INTRODUCTION

The law recognizes that the presence of mental illness affects criminal liability in several ways.² It is widely recognized that certain conditions and circumstances serve to relieve an accused from criminal responsibility.³ The rationale behind such a policy is that it is unjust to impose criminal sanctions upon an individual who is not capable of responsible action.⁴ Moreover, it is common that where a defendant is suffering from a mental illness during proceedings against him, such proceedings are to be suspended.⁵ Here, the individual is afforded protection based on the notion that one should not stand trial when one's mental

* The author would like to thank New York Law School Professor Michael L. Perlin for his invaluable assistance.

1. *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).
2. Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381 (1962).
3. *Id.*
4. *Id.*
5. *Id.* at 381-82.

condition prevents one from making a meaningful defense.⁶

The presence of mental illness affects criminal liability in a third, and perhaps, more controversial way. The exclusion of the convicted but mentally incompetent⁷ prisoner from execution has a history in Anglo-American law dating back to the medieval period.⁸

The traditional rationales behind proscribing the execution of the insane are found in the works of the common law commentators from the past.⁹ Bracton¹⁰ opined that the incompetent should be spared execution because of their lack of reason.¹¹ Coke¹² maintained that such executions would be a "miserable spectacle" and that the taking of the life of an insane person did not serve as an example to others and thus had no deterrent value.¹³ Blackstone¹⁴ and Hale¹⁵ defended the stay of execution on the ground that such a person could not aid in his or her defense.¹⁶ Blackstone also argued that the prisoner's insanity was sufficient punishment in and of itself.¹⁷ Sir John Hawles wrote that executing a presently incompetent prisoner denied him the chance to make peace with God.¹⁸

The desire for retribution is another basis upon which the rule exempting the insane from execution has been explained.¹⁹ Retribution has been distinguished from the desire for vengeance in that "it is immaterial for vengeance whether the defendant is sane or not; the important thing is to exterminate the

6. *Id.* at 382.

7. For purposes of this note, the terms "mentally incompetent" and "insane" are often used interchangeably to denote incompetency at the time of execution.

8. Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 778 (1980).

9. Hazard & Louisell, *supra* note 2, at 383.

10. 2 H. BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (S. Thorne trans. 1968).

11. *Id.* See Note, *supra* note 8, at 778 n.62.

12. E. COKE, THIRD INSTITUTE 4 (London 1979) (1st ed. London 1628).

13. *Id.* at 6. Note, *supra* note 8, at 778 n.62. For a discussion on Coke's views, see Hazard & Louisell, *supra* note 2 at 384-85.

14. 4 BLACKSTONE, COMMENTARIES 395-96 (13th ed. 1800).

15. 1 M. HALE, PLEAS OF THE CROWN 34-35 (1736).

16. Hazard & Louisell, *supra* note 2, at 383-84.

17. *Id.* at 384.

18. Sir John Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 STATE TRIALS 474, 478 (Howell ed. 1816); see Note, *supra* note 8, at 778 n.62.

19. Hazard & Louisell, *supra* note 2, at 386.

wrongdoer."²⁰ However, if retribution is the suggested justification for capital punishment—that every wrong must be met with a punitive act of equal value—then presumably “killing an insane person does not have the same moral quality as killing a sane one.”²¹ Thus, it could be concluded that executing the insane is improper, for then a punishment of unequal quality is inflicted.²²

Explanations for the purpose of exempting the insane prisoner from execution (hereinafter referred to as the “exemption rule”), are met with persuasive counter-arguments. In response to the premise that insanity prevents the defendant from thinking of some reason why the death penalty should not be carried out, supporters of the execution of convicted prisoners argue that it is improbable that offenders who were sane at the time of trial and sentencing would have any new and relevant information to offer in aid of a defense.²³ It is also noted that the “same reasoning would be sufficient to postpone—perhaps indefinitely—the execution of a sane man, for if it be assumed that intelligent reflection will disclose reasons for a stay of execution, then time for reflection should be allowed the sane as well.”²⁴

The argument that the defendant’s insanity in itself is sufficient punishment is counterbalanced by the view that it is not recognized as an appropriate sentence since the offender who recovers sanity is still executed.²⁵ Furthermore, it is suggested that it is an inverted humanitarianism that permits one to escape capital punishment only if insane.²⁶

Against the supposition that the execution of an insane person loses its ability to act as a deterrent, proponents of such an execution argue that the death penalty does act as a deterrent because the potential murderer will know that even subsequent insanity will not relieve one of punishment.²⁷ Such supporters of

20. *Id.*

21. *Id.* at 387.

22. *Id.*

23. Zenoff, *Can an Insane Person Be Executed?* (1985-1986) A.B.A. PREVIEW, Issue No. 16 (June 27, 1986), 465, 466.

24. Hazard & Louisell, *supra* note 2, at 383.

25. Zenoff, *supra* note 23.

26. Phyle v. Duffy, 34 Cal. 2d 144, 159, 208 P.2d 668, 676-77 (1949) (Traynor, J., concurring).

27. Zenoff, *supra* note 23.

the imposition of the death penalty also note that retribution is being served if it is viewed as taking a life for a life.²⁸

Finally, it is argued that a theological rationale for the exemption rule (that the condemned should have a chance to make peace with his or her maker), is no longer legitimate given the pluralistic society that exists today.²⁹ The theological rationale has also been weakened by the argument that one's eternal destiny depends more on the general tenor of one's life, rather than the frame of mind at the particular moment of death.³⁰

Thus, although many explanations have been offered, there is no general agreement as to why there should be a rule proscribing the execution of mentally incompetent capital inmates. Indeed, some commentators observe that the uneasiness over invoking the insanity exemption may represent deeper public misgivings about the death penalty itself.³¹

While there is no general consensus concerning the exemption rule, its existence at common law was widely recognized, and as sociologist Michael Radelet and psychiatrist George Barnard note, "this attitude toward the mentally incompetent death row inmate carried over to nineteenth century America, [where] legislators and courts to this day continue to voice prohibitions against the execution of the mentally incompetent."³²

THE SUPREME COURT AND THE EXECUTION OF THE INSANE

Between 1897 and 1958, the Supreme Court on several occasions reviewed cases which involved the execution of prisoners who had become insane after conviction and sentencing.³³

The Court first considered the issue in 1897, in *Nobles v. Georgia*.³⁴ In *Nobles*, the petitioner asserted that due process was violated by a state procedure whereby a claim of post-sentencing insanity was determined by the sheriff, with the assis-

28. *Id.*

29. *Id.*

30. Hazard & Louisell, *supra* note 2, at 388 (citing Archbishop William Temple).

31. Kenner, *Competency on Death Row*, 8 INT'L. J. LAW & PSYCH. 253, 254 n.6 (1986).

32. Radelet & Barnard, *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 BULL. AM. ACAD. PSYCH. & L. 37, 38 (1986); see also Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 72-76 (1986).

33. Note, *supra* note 8, at 774 n.46.

34. 168 U.S. 398 (1897).

tance of a twelve-member jury.³⁵

After noting that at common law an insane person was not to suffer punishment,³⁶ the Supreme Court addressed the issue of what procedures were necessary for determining the existence of insanity after conviction and sentencing.³⁷ The Court rejected Nobles' assertion that a judicial proceeding, "surrounded by all the safeguards and requirements of a common law jury trial"³⁸ was required, and held that no right to trial by jury existed. The Court reasoned that the prisoner had the benefit of a jury trial, and that "[t]he plea at this stage is only an appeal to the humanity of the court to postpone the punishment until a recovery takes place, or as a merciful dispensation."³⁹

The Court expressed concern that if a prisoner were entitled to a trial by jury on the question of insanity after sentence, the punishment of a defendant would "depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial."⁴⁰

Thus, in *Nobles*, the Supreme Court concluded that a suggestion of insanity made after the verdict and sentence of a prisoner did not give rise to an absolute right on the part of a convict to have the issue tried before the court and a jury.⁴¹ The Court stressed the importance of leaving to the discretion of a judge the most appropriate procedure for determining the sanity of a defendant already sentenced to die.⁴² Because at common law the prisoner had no inherent right to a jury trial on the issue of supervening insanity, the Court concluded that the matter was one of legislative regulation and ruled that Georgia's procedure did not deny the inmate due process.⁴³

The Supreme Court did not consider the issue again for fifty years, when a due process challenge to another Georgia law was examined in *Solesbee v. Balkcom*.⁴⁴ The Georgia procedure

35. Ward, *supra* note 32, at 69.

36. *Nobles*, 168 U.S. at 406.

37. *Id.*

38. *Id.* at 405.

39. *Id.* at 407.

40. *Id.* at 406.

41. *Id.* at 409.

42. *Id.* at 408.

43. *Id.* at 409. Ward, *supra* note 32, at 70.

44. 339 U.S. 9 (1950).

at issue in *Solesbee* vested discretionary authority in the Governor, who, with the aid of physicians, was to determine whether a condemned prisoner had become insane after sentencing.⁴⁵ The Supreme Court rejected petitioner's claim that the due process clause of the fourteenth amendment required that an assertion of insanity after sentence be settled by a "judicial or administrative tribunal, after notice and hearings in which he could be represented by counsel, cross-examine witnesses and offer evidence."⁴⁶ The Court also found that no constitutional defect was created because the Governor's decision was not subject to judicial review.⁴⁷

In holding that the procedure did not deny the petitioner due process, the Supreme Court compared the procedure at issue to an executive reprieve or grant of clemency, powers generally free from judicial review.⁴⁸ Citing the Georgia Supreme Court, the Court noted that the Georgia scheme was "motivated solely by a sense of 'public propriety and decency'—an 'act of grace' which could be 'bestowed or withheld by the State at will' and therefore not subject to due process requirements."⁴⁹ The *Solesbee* Court reiterated concerns found in *Nobles* that requiring judicial review every time a convicted defendant suggested insanity could result in an indefinite stay of execution.⁵⁰ The Court stated that "[t]o protect itself, society must have power to try, convict, and execute sentences."⁵¹

The sole dissenter in *Solesbee*, Justice Frankfurter, stated that executing the presently incompetent violated the due process clause of the fourteenth amendment because "it offends our historic heritage to kill a man who has become insane while awaiting sentence."⁵² He noted that not a single state had "uprooted the heritage of the common law which deemed it too barbarous to execute a man while insane,"⁵³ and concluded that:

45. *Id.* at 10.

46. *Id.*

47. *Id.* at 13.

48. *Id.* at 12.

49. *Id.* at 11.

50. *Id.* at 12.

51. *Id.* at 13.

52. *Id.* at 16.

53. *Id.* at 22.

[I]f the deeply rooted principle in our society against killing an insane man is to be respected, at least the minimum provision for assuring a fair application of that principle is inherent in the principle itself. And the minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.⁵⁴

The next significant case considered by the Supreme Court, *Caritativo v. California*,⁵⁵ decided in 1958, involved an attack on a California statute which provided a prison warden with the exclusive means for initiating a judicial proceeding to determine an inmate's sanity. The California Supreme Court had held that unless and until a prison warden began a sanity inquiry, the courts lacked jurisdiction to rule on the question of a prisoner's sanity or to review a warden's determination.⁵⁶ Citing *Solesbee v. Balkcom* the Supreme Court upheld the California Supreme Court's ruling in a one sentence opinion.⁵⁷ Justice Frankfurter again dissented, this time joined by Justices Brennan and Douglas.⁵⁸ While Justice Frankfurter did not suggest that the due process clause required a formal judicial proceeding or a formal adversary hearing before a warden, he did insist upon a mandatory requirement that a procedure be instituted to ensure that the warden listen to a claim of insanity postured by the condemned prisoner.⁵⁹ He noted that, "because the initial evaluation by the warden was both final and ex parte, the due process clause required a better opportunity for a hearing."⁶⁰

Thus, by 1958 the Supreme Court had reviewed the constitutionality of several state procedures governing the execution of insane prisoners and had concluded that the due process clause did not require a judicial determination of competency before execution. However, by that time three United States Supreme Court Justices were of the belief that the Federal Constitution

54. *Id.* at 23.

55. 357 U.S. 549 (1958).

56. *Ward, supra*, note 32, at 71.

57. *Caritativo*, 357 U.S. at 550.

58. *Id.* at 552.

59. *Id.* at 557.

60. *Id.* at 558. *Ward, supra* note 32, at 71.

did not tolerate the execution of the insane, and that the right of an insane man not to be executed merited more procedural protection than was afforded by an ex parte proceeding which provided no opportunity to the condemned to be heard on the life or death issue involved.

Such was the state of the law when in 1985 the Supreme Court granted Alvin Bernard Ford's petition for certiorari in *Ford v. Wainwright*,⁶¹ to resolve the issue of whether the eighth amendment prohibits the execution of the insane.⁶²

In an opinion which examined the history of American legal development in the area as well as the Common Law of England,⁶³ the Court ruled 5 to 4 that executing the insane violates the United States Constitution and that Florida's procedures for determining the sanity of a death row prisoner were not "adequate to afford a full and fair hearing" on the critical issue," and therefore, were unconstitutional.⁶⁴ This decision rendered all state statutes with provisions like the Florida statute at issue in *Ford* unconstitutional. At the time of the decision, 41 states had a death penalty or statutes governing execution procedures.⁶⁵ Twenty-six states have statutes which require that the execution of a prisoner who is legally incompetent be suspended.⁶⁶ Other states, by judicial decision, have adopted the common law proscription against execution of the insane.⁶⁷ Some jurisdictions

61. 477 U.S. 399 (1986).

62. *Id.* at 403.

63. *U.S. Supreme Court Bars Execution of the Insane*, N.Y.L.J., June 27, 1986.

64. *Ford*, 477 U.S. at 410.

65. *Id.* at 405 n.2.

66. *Id.* Justice Marshall cited: ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN. § 13-4023 (1978); ARK. STAT. ANN. § 43-2622 (1977); CAL. PENAL CODE ANN. § 3703 (West 1982); COLO. REV. STAT. § 16-8-112(2) (1978); CONN. GEN. STAT. § 54-101 (1985); FLA. STAT. § 922.07 (1985); GA. CODE ANN. § 17-10-62 (1982); ILL. REV. STAT., Ch. 38, § 1005-2-3 (1982); KAN. STAT. ANN. § 22-4006(3) (1981); KY. REV. STAT. § 431.240(2) (1985); MD. ANN. CODE, Art. 27, § 75(c) (1985 Supp.); MISS. CODE ANN. § 99-19-57(2) (Supp. 1985); MO. REV. STAT. § 522.060 (1978); MONT. CODE ANN. § 46-14-221 (1984); NEB. REV. STAT. § 29-2537 (1979); NEV. REV. STAT. § 176.445 (1977); N.J. STAT. ANN. § 30:482 (West 1981); N.M. STAT. ANN. § 31-14-6 (1984); N.Y. CORREC. LAW § 656 (McKinney Supp. 1986); N.C. GEN. STAT. § 15A-1001 (1983); OHIO REV. CODE ANN. § 2949.29 (1982); OKLA. STAT. tit. 22, § 1008 (1986); S.D. CODIFIED LAWS § 23A-27A-24 (1979); UTAH CODE ANN. § 77-19-13 (1982); WYO. STAT. § 7-13-901 (Supp. 1985). *Id.*

67. *Id.* See *State v. Allen*, 204 La. 513, 515, 15 So. 2d 870, 871 (1943); *Commonwealth v. Moon*, 383 Pa. 18, 22-23, 117 A.2d 96, 99 (1955); *Jordan v. State*, 124 Tenn. 81, 89-90 135 S.W. 327, 329 (1911); *State v. Davis*, 6 Wash. 696 (1940).

have adopted a more discretionary statutory approach by suspending the sentence of a convicted prisoner and providing for transfer to a mental facility.⁶⁸ The remaining states which have a death penalty have no specific procedures concerning the onset of insanity, but have not repudiated the common law rule.⁶⁹

It is clear that states will have to tailor their statutory procedures to encompass the *Ford* decision; what is left unclear by the *Ford* decision, however, is exactly what procedures are necessary to satisfy due process.

ALVIN BERNARD FORD

On July 21, 1974, Alvin Bernard Ford, with the aid of three accomplices committed the armed robbery of a Fort Lauderdale, Florida restaurant. The three accomplices, fearing that the police had been alerted, left the scene of the crime before the robbery had been completed.⁷⁰ Ford remained behind to secure \$7,000 from the restaurant's safe.⁷¹ When police officer Dimitri Walter Ilyankoff appeared to investigate, Ford shot and killed the officer without provocation.⁷² The trial court found that the defendant shot the decedent without warning twice in the body, grievously wounding him. Then, despite the decedent's pleas for help and after he no longer constituted a threat to the defendant's safety, or his escape and while the decedent was in fact completely helpless, the defendant again shot the decedent, this time in the head causing his immediate death.⁷³ Ford was convicted of first degree murder and sentenced to death.⁷⁴ Subsequent appeals of his conviction in the state and federal court systems continued for seven years.⁷⁵

68. *Id.* See DEL. CODE ANN., tit. 11, § 406 (1979); IND. CODE § 11-10-4-2 (1982); MASS. GEN. LAWS ch. 279 § 62 (1985); R.I. GEN. LAWS § 40.1-5.3-7 (1984); S.C. CODE § 44-23-220 (1985); TEX. CODE CRIM. PROC. ANN. art. 46.01 (Vernon 1979).

69. *Id.* See also Appendix I from the Brief of the Office of the Capital Collateral Representative *et al.* as *amici curiae* for an overview of different procedures used by the states. Brief for Office of the Capital Collateral Representative at 61, *Ford v. Wainwright*, 477 U.S. 399 (1986).

70. *Ford v. State*, 374 So. 2d 496, 497 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980).

71. *Id.*

72. *Id.*

73. *Id.* at 502 n.1.

74. 451 So. 2d 471, 473 (Fla. 1984).

75. *Zenoff*, *supra* note 23, at 465.

Throughout this period Ford's mental condition was not at issue.⁷⁶ However, in early 1982, Ford began to display gradual behavioral changes.⁷⁷

[Ford suffered from a] pervasive delusion that he had become the target of a complex conspiracy involving the [Ku Klux] Klan and assorted others, designed to force him to commit suicide. He believed that the prison guards, part of the conspiracy, had been killing people and putting the bodies in the concrete enclosures used for beds. Later, he began to believe that his women relatives were being tortured and sexually abused somewhere in the prison. This notion developed into a delusion that the people who were tormenting him at the prison had taken members of Ford's family hostage. . . . [b]y 'day 287' of the 'hostage crisis,' the list of hostages had expanded to include 'senators, Senator Kennedy, and many other leaders. . . . He began to refer to himself as 'Pope John Paul, III,' and reported having appointed nine new justices to the Florida Supreme Court.⁷⁸

For the next eighteen months, Ford was evaluated periodically by defense psychiatrists. On the basis of evaluations, recorded conversations between Ford and his attorneys, Ford's written correspondence and medical records as well as interviews with Ford's acquaintances, the treating psychiatrist concluded that Ford suffered from a "severe, uncontrollable, mental disease which closely resemble[d] 'Paranoid Schizophrenia With Suicide Potential,' a 'major mental disorder. . . severe enough to substantially affect Mr. Ford's present ability to assist in the defense of his life.'"⁷⁹

76. At the time of trial Ford was examined by Dr. David Taubel who testified that although Ford "had a basic hostility towards society," Ford was intelligent, had previously held jobs of considerable responsibility and understood the nature and quality of his acts. *Ford v. State*, 374 So. 2d at 500-01 n.1.

77. *Ford*, 477 U.S. at 402.

78. *Id.*

79. *Id.* Ford subsequently refused to see the psychiatrist again, believing that he had now joined the conspiracy against him. Later, Ford "regressed further into nearly complete incomprehensibility, speaking only in a code characterized by intermittent use of the word 'one,' making statements such as 'Hands one, face one, Mafia one. God one, father one. Pope one. Pope one. Leader one.'" (App.) at 72. *Id.* at 403.

Subsequently, Ford's attorney invoked the Florida statute governing the determination of competency of a condemned inmate.⁸⁰ Pursuant to the procedures set forth in the statute, Governor Bob Graham named a commission of three psychiatrists to evaluate whether Ford had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."⁸¹ In one session, the three psychiatrists interviewed Ford for approximately thirty minutes in the courtroom at the Florida State Prison.⁸² An attorney from the governor's office as well as correctional officers, two paralegals and two defense attorneys also attended the session.⁸³ Following the session with Ford, the state-appointed psychiatrists examined his cell and spoke with correctional officers. They also reviewed his medical records and consulted the medical staff concerning Ford's condition.⁸⁴ Two of the psychiatrists also reviewed re-

80. *Ford*, 477 U.S. at 403. Text of Florida statute 922.07 (1983).

Proceedings when a person under sentence of death appears to be insane.

1. When the Governor is informed that a person under a sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.

2. After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant to the warden directing him to execute the sentence at a time designated in the warrant.

3. If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

4. When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection (1).

5. The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

81. *Id.*

82. Zenoff, *supra* note 23, at 465.

83. *Id.*

84. *Id.*

ports of the defense psychiatrists and some of Ford's correspondence.⁸⁵ Each doctor then filed a separate two- to three-page report with the Governor.⁸⁶ Although they varied in their diagnoses of Ford's mental condition, each doctor concluded that Ford understood that he was facing the death penalty.⁸⁷ Therefore, there was agreement on the issue of sanity as defined by Florida law.⁸⁸

No further administrative or judicial proceedings are required under Florida law. The statute provides that after receiving a commission's report (from the three psychiatrists), the governor is to sign a death warrant "if he decides that the examinee has the required mental capacity."⁸⁹ After refusing to consider psychiatrists' reports submitted by the defense, Florida governor Bob Graham, who had a publicly announced policy of not permitting advocacy by the inmate's counsel on the issue of competency,⁹⁰ signed a death warrant for Ford's execution, without explanation or statement.⁹¹

Ford's counsel subsequently petitioned for a hearing in state court to determine Ford's competency to be executed.⁹² A petition for *habeas corpus*⁹³ was filed in the United States District Court for the Southern District of Florida. In attempting to obtain an evidentiary hearing on the question of Ford's sanity, counsel noted that the three diagnoses offered by the three psychiatrists appointed by the Governor to examine Ford conflicted with each other. Counsel also drew attention to the fact that there had been many challenges made by other psychiatrists to

85. *Id.*

86. *Id.* See Fla. statute 922.07 (1983), *supra* note 80.

87. "One doctor concluded that Ford suffered from 'psychosis with paranoia' but had 'enough cognitive functioning to understand the nature and the effects of the death penalty, and why it is to be imposed on him.' Another found that, although Ford was 'psychotic,' he did 'know fully what can happen to him.' The third concluded that Ford had a 'severe adaptational disorder,' but did 'comprehend his total situation including being sentenced to death, and all of the implications of that penalty.'" *Ford*, 477 U.S. at 403.

88. *Id.*

89. See Fla. statute 922.07 (1983), *supra* note 80.

90. Amicus curiae brief submitted by Office of Collateral Representative, *supra* note 69, at 13. (The Supreme Court made no critical mention of the Governor's policy).

91. *Ford*, 477 U.S. at 403.

92. *Id.*

93. 28 U.S.C. § 2254.

the methods of the three Governor-appointed psychiatrists.⁹⁴ The petition was denied without a hearing. Counsel for Ford appealed, and the Court of Appeals for the Eleventh Circuit granted a certificate of probable cause and stayed Ford's execution.⁹⁵ Subsequent attempts by the state to vacate the stay of execution were unsuccessful.⁹⁶ The appellate court then examined Ford's claim and a divided panel concluded that the district court's denial of the writ should be affirmed.⁹⁷ Citing *Goode v. Wainwright*,⁹⁸ a case which had previously examined the same Florida statute at issue in *Ford*, the court held that the Florida statute met minimum standards of procedural due process.⁹⁹ Rejecting Ford's claim that his case was distinguishable from *Goode* and that *Solesbee v. Balkcom* was no longer binding authority, the court stated that "[i]f our application of *Solesbee* and *Goode* is to be altered, it must be done by the Supreme Court or at least by this court sitting en banc."¹⁰⁰

In his dissent from the court of appeals decision, Judge Clark stated that the court should have resolved whether Ford had a substantive constitutional claim before analyzing the due process requirements.¹⁰¹ He concluded that "[a]n application of the Supreme Court's analysis of Eighth Amendment claims to the issue in question in this case leads to the conclusion that the execution of one who is presently insane would violate the Eighth Amendment."¹⁰² Because the Florida procedure did not adequately protect Ford's eighth amendment right not to be executed while insane, Judge Clark would have reversed the district court and remanded the case for an evidentiary hearing pursuant to 28 U.S.C. § 2254(d)¹⁰³ to determine whether Ford

94. *Ford*, 477 U.S. at 403.

95. *Ford v. Strickland*, 734 F.2d 538 (11th Cir. 1984).

96. 467 U.S. 1220 (1984).

97. *Ford v. Wainwright*, 752 F.2d 526 (11th Cir. 1985).

98. 731 F.2d 1482 (11th Cir. 1984). In *Goode*, the eleventh circuit rejected an attack on the same Florida statute involved in *Ford*. The court held that the statute met minimum standards required by procedural due process. *Goode*, 731 F.2d at 1483.

99. 752 F.2d at 528.

100. *Id.*

101. *Id.* at 529.

102. *Id.* at 530.

103. 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State

was insane.¹⁰⁴

THE SUPREME COURT DECISION

As noted, the Supreme Court had previously examined the constitutionality of state procedures governing the execution of the insane in several cases, but *Ford* was the first time it had considered the issue since its 1962 decision of *Robinson v. California*¹⁰⁵ making the eighth amendment applicable to the states. After noting that "our interpretations of the Due Process Clause

court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a:

full, fair, and adequate hearing in the State court proceedings; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

104. 752 F.2d at 535.

105. 370 U.S. 660 (1962).

and the Eighth Amendment have evolved substantially since this Court last had occasion to consider the infliction of the death penalty upon the insane,"¹⁰⁶ Justice Marshall began his analysis with the common law proscription against executing a prisoner who has lost his sanity. Citing authorities such as Blackstone, Coke, and Hale, Marshall concluded that virtually no authority existed at English common law condoning the execution of the insane.¹⁰⁷ After observing that this "solid proscription was carried to America where. . . 'the judge [was] bound' to stay the execution upon insanity of the prisoner,"¹⁰⁸ Justice Marshall noted that this "ancestral legacy has not outlived its time."¹⁰⁹ Marshall, concluding that no state currently permits execution of the insane,¹¹⁰ held that the eighth amendment must be construed to prohibit a state from enforcing the execution of a prisoner who is insane.¹¹¹ "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."¹¹²

After settling the substantive eighth amendment issue, Justice Marshall concluded that Florida's statutory procedures for determining a condemned prisoner's sanity provided inadequate assurance of accuracy to satisfy the requirement of *Townsend v. Sain*,¹¹³ which held that "in a *habeas corpus* proceeding, a federal evidentiary hearing is required unless the state court trier of fact has after a full hearing reliably found the relevant facts."¹¹⁴

106. *Ford*, 477 U.S. at 404. Justice Marshall noted that the Supreme Court had never considered whether there was a right under the eighth amendment to a judicial determination of sanity after conviction and sentence. Previous cases which had examined the issue had arisen before the eighth amendment had been made applicable to the states. See *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953); *Phyle v. Duffy*, 334 U.S. 431 (1948). In *Ford*, Marshall stated that "now that the Eighth Amendment has been recognized to affect significantly both the procedural and the substantive aspects of the death penalty, the question of executing the insane takes on a wholly different complexion." *Ford*, 477 U.S. at 404.

107. *Ford*, 477 U.S. at 405.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 406.

112. *Id.*

113. 372 U.S. 293 (1963).

114. *Ford*, 404 U.S. at 406 (quoting *Townsend*, 372 U.S. at 312-13).

Justice Marshall noted that "because execution is the most irremediable and unfathomable of penalties," the Court has required that factfinding measures in capital proceedings "aspire to a heightened standard of reliability."¹¹⁵ Thus, Justice Marshall concluded that the determination of a prisoner's sanity as a predicate to execution demands the same standards as in any other aspect of a capital proceeding.¹¹⁶ Therefore, having been denied a fact-finding procedure "adequate to afford a full and fair hearing" on the critical issue as required by 28 U.S.C. § 2254(d)(2),¹¹⁷ petitioner was entitled to a *de novo* evidentiary hearing in the district court on the question of his competence to be executed.¹¹⁸ Justice Marshall based his findings on the fact that the Florida scheme precluded a prisoner or his counsel from presenting material relevant to the petitioner's sanity, thereby excluding the prisoner from the truth-seeking process.¹¹⁹ Citing Justice Frankfurter's dissent in *Solesbee*, Justice Marshall pointed out "the minimum assurance that the life and death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected."¹²⁰

In elaborating upon the resultant prejudice to petitioner when denied the opportunity to present evidence, Justice Marshall also quoted from his opinion in *Ake v. Oklahoma*,¹²¹ noting that because "psychiatrists disagree widely and frequently on what constitutes mental illness. . . the fact-finder must resolve differences in opinion within the psychiatric profession 'on the basis of the evidence offered by each party' when a defendant's sanity is at issue in a criminal trial."¹²² Justice Marshall noted that this was equally so after conviction, where a prisoner's representative might offer potentially probative information at least

115. *Id.* at 407.

116. *Id.*

117. *See supra* note 103 for text of statutes.

118. *Ford*, 477 U.S. at 407.

119. *Id.* at 408.

120. *Id.*

121. 470 U.S. 68 (1985). In *Ake* the Supreme Court held that "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue, if the defendant cannot otherwise afford one." *Id.*

122. *Ford*, 477 U.S. at 408 (quoting from *Ake* 470 U.S. at 77).

as worthy of consideration as the state's.¹²³ The failure to consider such information, according to Justice Marshall, created an increased likelihood of an erroneous decision.¹²⁴ In addition, Justice Marshall based his findings on the fact that the Florida scheme precluded the prisoner from challenging or impeaching the opinions of the state-appointed psychiatrists.¹²⁵ Citing Wigmore for the premise that "[c]ross-examination. . . is beyond any doubt the greatest legal engine ever invented for the discovery of the truth," Justice Marshall concluded on this point that the Florida procedure was likely to result in "distorted" decisions, by denying the prisoner's attorney the right to question the state experts' opinions or methods.¹²⁶

Finally, he reasoned that the most striking defect in the Florida procedures was the fact that the final determination of a prisoner's competency to be executed was vested solely in the executive branch.¹²⁷ He stated, "the commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the fact-finding proceeding."¹²⁸ Noting that historically, a stay of execution was required by law and not left to judicial or executive discretion, Justice Marshall stated that there was no basis either in history or logic for placing the prisoner's fate in the untouchable hands of the state's chief executive.¹²⁹ "In no other circumstance of which we are aware," Justice Marshall concluded "is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal."¹³⁰

Justice Powell, in his concurring opinion, joined the majority on the substantive eighth amendment issue. After reviewing the common law proscription against the execution of the insane, Powell concluded that such a practice was cruel and unusual punishment and barred by our Constitution.¹³¹ Justice Powell went further than the Court's opinion by addressing the

123. *Id.*
124. *Id.* at 409.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 412.

issue of the definition of insanity in this context.¹³² Citing several standards,¹³³ he concluded that the "Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."¹³⁴ Noting that the petitioner's psychiatrist stated that petitioner was of the belief that the death penalty had been abolished, Justice Powell concluded that "if this assessment is correct, petitioner cannot connect his execution to the crime for which he was convicted."¹³⁵ Therefore, Ford's claim of insanity would fit the applicable standard for a stay of execution.¹³⁶

Justice Powell wrote separately to express his differing viewpoint on the procedures a state must adhere to in order to avoid *de novo* review in federal courts under 28 U.S.C. § 2254(d).¹³⁷ Conceding that the findings of "a State court of competent jurisdiction" must be given great deference, Justice Powell observed that "no amount of stretching" could extend the definition of state court to encompass the Governor.¹³⁸ Noting that "[t]he essence of a 'court' is independence from the prosecutorial arm of government," Justice Powell agreed with Justice Marshall that the Governor's finding of sanity was not entitled to a "presumption of correctness" under the *habeas* statute, and that Florida's procedures (whereby the question of petitioner's sanity appeared to have been resolved exclusively on the examinations and evaluations of state-appointed psychiatrists), did not comport with due process requirements as they invited "arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations."¹³⁹

While he concluded that the Florida procedures at issue did not meet basic fairness standards, Justice Powell felt that the requirements of due process were not as extensive as Justice Marshall had indicated and did not require the kind of "full-

132. *Id.* at 410.

133. *Id.* at 412 n.3.

134. *Id.* at 413.

135. *Id.*

136. *Id.*

137. *Id.* at 410. See *supra* note 103 for text of statute.

138. *Ford*, 477 U.S. at 413.

139. *Id.* at 414.

scale sanity trial" that Marshall would have invoked.¹⁴⁰ Moreover, Justice Powell stated that the Court's prior decisions which had imposed heightened procedural safeguards in capital cases were inapplicable,¹⁴¹ since the petitioner had already validly been convicted and sentenced to death. Therefore, the State had a "substantial and legitimate interest in taking the petitioner's life as punishment for his crime."¹⁴² Thus, because the question at issue was not "*whether* petitioner's execution may take place, but *when*," Justice Powell concluded that a claim of insanity made after conviction was not entitled to the heightened procedural safeguards afforded an individual in other stages of a capital case.¹⁴³

Because the petitioner had not been declared incompetent to stand trial, Justice Powell noted that the petitioner was not making his claim of insanity against a "neutral background,"¹⁴⁴ and that therefore a presumption of sanity should continue to the ends of executing the sentence.¹⁴⁵ Thus, the state may require a "substantial threshold showing of insanity merely to trigger the hearing process."¹⁴⁶

Finally, Justice Powell noted that the issue of sanity in the petitioner's case differed from issues of historical fact in that the question of the petitioner's sanity required a subjective judgment, the determination of which "depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'"¹⁴⁷ Citing *Parham v. J.R.*,¹⁴⁸ he reasoned that in such a

140. *Id.*

141. *Id.* Justice Powell cited *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion) and *Turner v. Murray*, 476 U.S. 28 (1986).

142. *Id.*

143. *Id.*

144. *Id.* Justice Powell did not define "neutral background." This author assumes that Justice Powell was referring to the fact that because the petitioner's legal history did not include any finding of mental illness, his present claim of insanity should be evaluated in light of that fact. Perhaps Justice Powell meant that if a petitioner with a present claim of insanity had a history of mental illness, a lower standard of proof would be necessary to substantiate the current claim of insanity.

145. *Id.*

146. *Id.* (quoting *Ake*, 470 U.S. at 70).

147. *Ford*, 477 U.S. at 415.

148. 442 U.S. 584 (1979). New York Law School Professor Michael Perlin notes that "Justice Powell's reliance on *Parham v. J.R.* . . . is astonishing when applied to a death penalty case. . . . *Parham* countenanced looser procedural safeguards in the juvenile commitment context, in part, because of the assumption that 'natural bonds of affection

situation, conventional adversarial procedures, requiring testimony, cross-examination, and oral argument, do not necessarily represent the best means of arriving at sound, consistent judgments concerning a defendant's sanity.¹⁴⁹

Accordingly, Powell concluded that something far less formal than a trial would be sufficient to safeguard the petitioner's constitutional rights.¹⁵⁰ For example, using an impartial officer or board to examine evidence and hear argument from the petitioner's counselor, including expert psychiatric evidence offered to contradict the state's psychiatric evidence would meet basic due process requirements.¹⁵¹ Noting that states should be permitted considerable discretion to determine the process that most effectively balances the various interests at stake, Justice Powell observed that "as long as 'basic fairness was observed'. . . due process would be satisfied."¹⁵² However, because the petitioner had raised a viable claim under the eighth amendment which was not adjudicated fairly within the meaning of due process, Justice Powell joined the Court's judgment and concluded that Ford was entitled to a *habeas* hearing in federal court.¹⁵³

Justice O'Connor, with whom Justice White joined, concurred in the result in part and dissented in part.¹⁵⁴ She stated:

I am in full agreement with Justice Rehnquist's conclusion that the Eighth Amendment does not create a substantive right not to be executed while insane. . . . Because however, the conclusion is for me inescapable that Florida positive law has created a protected liberty interest in avoiding execution while incompetent, and because Florida does not provide even those minimal procedural protections required by due process in this area, I would va-

lead parents to act in the best interests of their children.' Certainly, no one would suggest that such a benign motive propels state action in a capital punishment case." Perlin, *The Supreme Court, The Mentally Disabled Criminal Defendant, and Symbolic Values: Random Decisions, Hidden Rationales, or Doctrinal Abyss?*, 29 ARIZ. L. REV. 1, 77 (1987) (footnote omitted).

149. *Ford*, 477 U.S. at 415.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

cate the judgment and remand to the Court of Appeals with directions that the case be returned to the Florida system so that a hearing can be held in a manner consistent with the requirements of the Due Process Clause. I cannot agree, however, that the federal courts should have any role whatever in the substantive determination of a defendant's competency to be executed.¹⁵⁵

Justice O'Connor quoted from *Hewitt v. Helms*¹⁵⁶ in noting that liberty interests protected by the fourteenth amendment may arise from either the due process clause or the laws of the states.¹⁵⁷ Agreeing with Justice Rehnquist, she concluded that "the due process clause does not independently create a protected interest in avoiding the execution of a death sentence during incompetency."¹⁵⁸ However, she found it quite clear that the provision of the Florida code (providing that the Governor "shall" have the prisoner committed to a Department of Corrections mental health treatment facility if the prisoner "does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him,") did create an expected liberty interest protected by the due process clause.¹⁵⁹ Thus, Justice O'Connor noted that despite the fact that a state may consider certain methods adequate for ascertaining the "preconditions to adverse official action," it is federal law which mandates and defines the procedural safeguards a state *must* afford an individual prior to official state action which would result in a deprivation of a protected liberty or property interest.¹⁶⁰

Although she concluded that Florida law had created a substantive right not to be executed while insane, and that the demands of the due process clause were thus implicated, Justice O'Connor noted that in this context such demands were minimal.¹⁶¹ Observing the significance of the prisoner's interest in eluding the ramifications of an erroneous determination, she

155. *Id.*

156. 459 U.S. 460 (1983).

157. *Ford*, 477 U.S. at 415.

158. *Id.*

159. *Id.* at 416.

160. *Id.*

161. *Id.*

stated that "substantial caution" need be exercised "before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures."¹⁶² In support of this, she observed that once an individual is validly convicted, the state has a fixed right to punish and the requirements of due process are reduced accordingly.¹⁶³ Moreover, Justice O'Connor felt that expanding the reading of the due process clause in this context would create an enormous incentive for making false claims, thereby creating a vehicle for deliberate delay.¹⁶⁴ "By definition," she stated, the defendant's protected interest in a stay of execution can "never be conclusively and finally determined. . . until the very moment of execution. . . ."¹⁶⁵

Notwithstanding the fact that she felt the states should have broad discretion in this area, Justice O'Connor found one facet of the Florida procedure to be constitutionally lacking.¹⁶⁶ Noting that, "[i]f there is one 'fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard,'" she found that the Florida procedure for determining competency for execution precluded the defendant from acting in any adversarial manner during the examination.¹⁶⁷ In defining the parameters which would be constitutionally sufficient to safeguard the petitioner's rights, Justice O'Connor stated that oral advocacy or cross-examination would not always be necessary. However, she concluded that "due process at the very least requires that the decision-maker consider the prisoner's written submissions."¹⁶⁸

Thus, Justice O'Connor would vacate with orders to the eleventh circuit to return the case to the Florida state courts, to assess the defendant's competency in accordance with the com-

162. *Id.*

163. *Id.*

164. *Id.* Justice O'Connor continued, "[r]egardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary." *Id.* at 416.

165. *Id.*

166. *Id.*

167. *Id.* Justice O'Connor noted "[b]y executive order, the present Governor has provided that '[c]ounsel for the inmate and the State Attorney may be present [at the adversary hearing] but shall not participate in the examination in any adversarial manner.'" Executive Order No. 83-137 (Dec. 9, 1983) *Ford*, 477 U.S. at 417.

168. *Ford*, 477 U.S. at 417.

mand of the fourteenth amendment.¹⁶⁹ She reiterated that the “only federal question presented in cases such as this is whether the State’s positive law has created a liberty interest and whether its procedures are adequate to protect that interest from arbitrary deprivation.”¹⁷⁰ If those procedures are adequate, then, “a federal court has no authority to second guess a state’s substantive competency determination.”¹⁷¹

Justice Rehnquist, with whom the Chief Justice joined, dissented.¹⁷² Justice Rehnquist felt that the Florida procedures conformed to the common law tradition as well as current practice on which the court purports to rely, as at common law it was the executive who decided whether the condemned was competent for execution.¹⁷³ Thus, stated that in removing the determination of sanity from the executive branch, the Court did so “not in keeping with but at the expense of ‘our common-law heritage.’”¹⁷⁴ Justice Rehnquist found that since there already existed a uniform view among the states that the insane should not be executed, it would be superfluous to “create a constitutional right that no State seeks to violate. . . .”¹⁷⁵ Relying on *Solesbee v. Balkcom*, Justice Rehnquist reasoned that:

[W]holly executive procedures can satisfy due process in the context of a post-trial, post-appeal, post-collateral attack challenge to a State’s effort to carry out a lawfully imposed sentence. Creating a constitutional right to a judicial determination of sanity before that sentence may be carried out, whether through the Eighth Amendment or the Due Process Clause, needlessly complicates and postpones still further any finality in this area of the law. The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may

169. *Id.*

170. *Id.*

171. *Id.*

172. *Ford*, 477 U.S. at 417 (Rehnquist, J., dissenting).

173. *Id.*

174. *Id.*

175. *Id.* at 419.

be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his execution.¹⁷⁶

Justice Rehnquist reasoned that since the Florida law at issue embodied the principle that the insane should not be executed, and also provided for the means (through executive branch procedures), to evaluate claims of insanity, the petitioner's due process rights were fully protected.¹⁷⁷

In contrast to Justice O'Connor's opinion that the Florida statute had created a liberty interest protected by the due process clause, Justice Rehnquist stated that the only right the Florida statute offered the condemned prisoner was the opportunity to apprise the Governor of the fact that the prisoner may be insane.¹⁷⁸ In his interpretation of the Florida law, Justice Rehnquist placed great emphasis on the fact that the language of the statute read "[i]f the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to a Dept. of Corrections mental health treatment facility."¹⁷⁹

Thus, for Justice Rehnquist, the fact that the state's highest executive examined a prisoner's claim of insanity satisfied due process.¹⁸⁰ Accordingly, he concluded that the Florida law did not grant the petitioner "the sort of entitlement that gives rise to the procedural protections for which he contends," and dissented from the majority's opinion.¹⁸¹

In ruling that the Florida procedures for determining competency for execution were unconstitutional, the Court gave recognition to the fact that due process requires impartiality in a decision concerning the fate of a man's life.

Although Justice Rehnquist asserted that the insane should

176. *Id.*

177. *Id.* at 418.

178. *Id.* at 419.

179. *Id.*

180. *Id.* at 418.

181. *Id.* at 419.

be protected from execution, such protection is illusory where an ex parte proceeding is the means by which such protection is to be afforded. It cannot be assumed that a Governor will accept and consider all evidence proffered on behalf of the condemned. Indeed, in Ford's case, his counsel was prohibited from participating in the state-psychiatric examination of him. Moreover, as Justice O'Connor notes, the Florida Governor's office refused to acknowledge whether it would even review the psychiatric materials submitted by Ford's attorney.¹⁸² The failure to receive evidence from a condemned person who asserts a claim of incompetency results in a one-sided and hence, distorted, analysis. State-appointed psychiatrists cannot be afforded a presumption of impartiality. "By eliminating the opportunity to be heard, Florida denies the decisionmaker potentially important probative information on a matter that is often subject to reasonable professional disagreement."¹⁸³

The five justice majority in *Ford v. Wainwright* held that a condemned prisoner has an eighth amendment right not to be executed while insane. In so holding, the Court concluded that both the common law and the current practices of the states supported such a decision. As a result of the constitutionalization of such a right, states will have to provide safeguards that comply with the due process demands of the fourteenth amendment.

Although the Court agreed that the Florida procedures were

182. *Id.* at 417.

183. In criticizing the Florida procedures used to determine the petitioner's competency for execution the American Psychiatric Association, in an amicus curiae brief stated:

1. The psychiatric evaluation process itself is flawed by design. By tolerating quick group evaluations by the state-appointed psychiatrists, the Florida procedures do not allow for the kind of careful and comprehensive examination that is necessary to reach reliable professional opinions on the issue of competency.
2. The failure to allow consideration of the reports and opinions of psychiatric experts retained by the prisoner violates basic principles of fairness. By eliminating the opportunity to be heard, Florida denies the decisionmaker potentially important probative information on a matter that is often subject to reasonable professional disagreement.
3. The determination of a prisoner's competency depends not only on a medical diagnosis, but also on the ability to relate prisoner's competency to be subject to cross examination information might have led him to a different conclusion, and the level of confidence with which he holds that opinion.

Amicus curiae brief, A.P.A. at 7.

unconstitutional, there was no consensus over what procedure a state must follow to protect the right not to be executed while insane. While the plurality opinion made it clear that an ex parte decision made by the executive branch will not suffice, the Court left to the individual states the task of developing adequate procedures.¹⁸⁴

The only concrete guidelines set by the *Ford* decision can be gleaned from the Court's perceived inadequacies in Florida's procedure for determining competency. While it can be said with some certainty that "an opportunity to be heard" must be afforded the condemned, it is not clear exactly what that standard demands. Given that the Court yielded three opinions on the issue, each of which differed on the question of what processes are necessary to satisfy due process, the Supreme Court's failure to mandate explicit procedures for determining the competency for execution will likely result in future litigation on the issue.¹⁸⁵

DISCUSSION

Ford v. Wainwright raises the spectre of issues ranging from the quality of legal services afforded the indigent to the role of the mental health profession in judicial insanity determinations. Much debate and analysis is possible on either topic: a brief overview will be provided here.

The notion that condemned inmates flood the judicial system with frivolous appeals was advanced by Justice Lewis Powell in a 1983 speech to the Eleventh Circuit Judicial Conference.¹⁸⁶ Powell maintained that persons "convicted five or six

184. *Ford*, 477 U.S. at 410 n.4. As a result of the decision in *Ford*, Florida Governor Graham requested the Supreme Court of Florida to promulgate a rule regarding competency to be executed. See, "In re Emergency Amendment to Florida Rules of Criminal Procedure (Rule 3.811, Competency to be Executed). 497 So. 2d 643 (Fla. 1986). The emergency rule provides for judicial review of a determination by the Governor (pursuant to section 922.07) that a condemned prisoner is competent for execution. Written submissions from the parties shall be considered by the judge assigned to hear the motion, but oral argument, including the live testimony of witnesses, is discretionary.

185. As Professor Perlin notes, "the difficulty which is always faced in the application of a plurality opinion will be increased here where the states have enacted such a wide range of statutory vehicles for making the critical determination, and where it is truly not clear what sort of procedures a state need enact to meet *Ford's* standards." Perlin, *supra* note 148, at 76.

186. Hengstler, *Attorneys for the Damned*, A.B.A. J., Jan. 1, 1987, at 56.

years ago" persist in having "[t]heir cases of repetitive review move sluggishly through our dual system."¹⁸⁷ Complaining about the burdens inflicted upon overburdened judges in having to examine eleventh-hour applications for stays of executions made by counsel for death row inmates, Justice Powell maintained that the system irrationally permits abuse of process.¹⁸⁸ Indeed, one of the fears expressed by Justices O'Connor and Rehnquist in *Ford* was that false and spurious claims would be made by defendants who had "nothing to lose."¹⁸⁹

New York University Law Professor Anthony Amsterdam, in a speech to the American Society of Criminology, noted that statistics do not support the assertion that in capital cases appeals are often frivolous and repetitive.¹⁹⁰ "Between 1976 and 1983, the federal courts of appeals decided a total of 41 capital habeas appeals and ruled in favor of the condemned inmate in 30, or 73.2 percent of them."¹⁹¹ Amsterdam stated:

Consider for a moment what this means. In every one of these cases, the inmate's claims had been rejected by a state trial court and by the state's highest court, at least once and often a second time in state post-conviction proceedings; the Supreme Court had usually denied certiorari at least once and sometimes twice; and a federal district court had then rejected the inmate's claims of federal constitutional error infecting his conviction and/or death sentence. Yet in over 70 percent of the cases, a federal court of appeals found merit in one or more of the inmates' claims. These figures surely suggest that the 'repetitive review' condemned by Justice Powell is not entirely without justification or social benefit in a society which cares not to kill people in violation of its fundamental law.¹⁹²

Amsterdam suggested that the Supreme Court was guilty of

187. *Id.*

188. Amsterdam, *The Supreme Court and Capital Punishment*, 14 *HUMAN RIGHTS* 50 (Winter 1987).

189. *See supra* text accompanying notes 164 & 176.

190. Hengstler, *supra* note 186, at 56.

191. *Id.*

192. *Id.* at 57. For a review of state and federal post-conviction procedures, see Amsterdam, *supra* note 188.

“betraying America’s heritage,” stating, “patient, painstaking review of the legal claims of condemned inmates has been the rule of judicial responsibility, not because the task was convenient, efficient or gratifying, but because its omission was unthinkable. That it should come to be begrudged within our generation tells us much about ourselves.”¹⁹³

One explanation which has been offered for the number of appeals taken before a meritorious claim is noticed is the quality of counsel afforded most capital inmates.¹⁹⁴

Judge Alvin Rubin, in *Riles v. McCotter*,¹⁹⁵ (a case which affirmed the death penalty for Raymond Riles, who was convicted of murder during an armed robbery), concurred that if Riles’ counsel at trial had been more capable, the jury might not have imposed the death penalty.¹⁹⁶ Judge Rubin emphasized that the Constitution does not require that the accused be represented by effective counsel, only that the representation not be ineffective.¹⁹⁷ He concluded that, “[c]onsequently, accused persons who are represented by ‘not-legally-ineffective’ lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence.”¹⁹⁸

The importance of effective legal representation is highlighted in capital cases, where the stakes involved are higher than in other cases.

In a clinical study of fifteen death row inmates scattered throughout five states, researchers concluded that “many condemned individuals probably suffer a multiplicity of unrecognized psychiatric and neurological disorders that are relevant to considerations of mitigation.”¹⁹⁹ The researchers questioned why such serious disorders had never previously been identified or presented at the trial, sentencing, or appellate stages.²⁰⁰ The au-

193. *Id.* at 56.

194. *Id.* at 57.

195. 799 F.2d 947 (5th Cir. 1986).

196. *Id.* at 955.

197. *Id.*

198. *Id.* (emphasis omitted).

199. D. Lewis, J. Pincus, M. Feldman, L. Jackson & B. Bard, *Psychiatric, Neurological, and Psycho-educational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 842 (July 1986) [hereinafter Lewis].

200. *Id.* at 844.

thors concluded that:

[T]he possibility exists that death row inmates comprise an especially neuropsychiatrically impaired prison population whose pervasive inadequacies make them less capable than other defendants either of obtaining competent representation at the time of trial or assisting their attorneys in the time-consuming work of documenting the kinds of neuropsychiatric impairments that would be significant for purposes of mitigation.²⁰¹

Capital punishment, as the most severe and irremediable form of punishment imposed, is intended to be utilized only where serious offenses have been committed and where few mitigating factors are present.²⁰² Thus, the importance of effective legal representation is highlighted in capital cases not only because of the greater stakes involved, but also because there are potential unique mitigating factors surrounding a portion of death row inmates. Without the aid of effective counsel such mitigating circumstances will probably go unnoticed and consequently unfairly affect the fate of the condemned.

Because prisoners have no constitutional right to an attorney after direct appeal, in many states the condemned are not entitled to legal representation on a habeas corpus appeal.²⁰³ And even in states which do provide funds for indigent capital offenders, compensation is generally so low that most private attorneys do not become involved.²⁰⁴

Gary Hengstler, a news editor for the American Bar Association Journal, notes that "[a]mong the concerns surrounding the death penalty, none is greater than the quality of representation available to indigents."²⁰⁵ United States Court of Appeals Judge Abner J. Mikva notes that approximately 99.5 percent of the almost 1,800 prisoners on death row are indigent.²⁰⁶

Many authors have also recognized the disparate treatment

201. *Id.*

202. *Id.* at 838.

203. Hengstler, *supra* note 186, at 57 (quoting Ronald Tabak, special counsel at Skadden, Arps, Slate, Meagher and Flom).

204. *Id.* (No slight is intended toward attorneys in the public sector.)

205. *Id.*

206. *Id.*

of minority group members in the application of the death penalty.²⁰⁷ It is well-documented that prosecutors possess an enormous amount of discretion in deciding which avenues of prosecution to pursue and that "decisions of prosecutors to seek the death penalty are related to [such factors] as the race of the victim and defendant."²⁰⁸ Thus, it has been noted that, "Our legal system is incapable of providing justice in these highly emotional cases."²⁰⁹

THE ROLE OF MENTAL HEALTH PROFESSIONALS IN THE "CURE THAT KILLS"²¹⁰

Heated debate surrounds the role of psychiatrists and other mental health professionals in these insanity inquiries.²¹¹ One aspect of the debate involves the reliability of psychiatric evaluations in general. In *Ford v. Wainwright*, Justice Powell, (quoting from *Addington v. Texas*)²¹² noted that the question of the petitioner's sanity required a subjective judgment, the determination of which depends "substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'"²¹³ Justice

207. *Id.* Tabak, concludes:

[A] popular misconception about capital punishment is the belief that our legal system guarantees the fair imposition of the death penalty. . . . My experiences over the last four years — which have ranged from a victory in the United States Supreme Court to the execution of a client — have left me shaken by the inability of our legal system to treat fairly the indigent defendants accused of capital crimes. I have been amazed to find an extreme lack of fairness in every stage of death sentence cases and at least one fundamentally unfair aspect to every capital case I have handled.

Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980's*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 798-99 (1986).

208. Meltner & Wolfgang, *Introduction*, 74 J. CRIM. L. & CRIMINOLOGY 659 (1983). It has been noted that "for a case to become a capital case, the prosecutor must decide to seek the death penalty. This decision frequently involves political considerations. Since most prosecutors are elected officials, they are subject to community pressure in deciding what penalty to seek." Tabak, *supra* note 207, at 799. See also Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 301 (1962).

209. Tabak, *supra* note 207, at 848.

210. Adler, *The Cure That Kills*, THE AMERICAN LAWYER 1 (1986).

211. See, e.g., Radelet & Barnard, *supra* note 32.

212. 441 U.S. 418 (1979). In *Addington*, the Supreme Court concluded that a standard of clear and convincing evidence was the appropriate burden of proof in involuntary civil commitment cases.

213. *Ford*, 477 U.S. at 415 (quoting *Addington*, 441 U.S. at 430).

Marshall also commented on the role of the psychiatric profession in sanity determinations. Quoting from his opinion in *Ake v. Oklahoma*, he noted that psychiatrists frequently disagree on what behavioral symptoms constitute mental illness and the appropriate diagnosis to be attached to the behaviors.²¹⁴

While the accuracy of psychiatric diagnoses and evaluations may always be criticized, for purposes of this paper, it will be assumed that the practice of psychiatry is a necessary and valuable aspect of insanity inquiries. However, there are certain issues unique to the treatment of a death row inmate that must be recognized. Therefore, the focus of the discussion will concentrate on the use of mental health professionals in the care and treatment of those prisoners awaiting execution.

One of the most critical areas of debate is the dubious reliability of psychiatric evaluations performed in a prison setting.²¹⁵ It is important to note that the environment in which an evaluation occurs often influences the diagnosis that is made by the psychiatrist.²¹⁶ Thus, it has been suggested that when a court-appointed psychiatrist examines a defendant sitting in a locked jail cell or in a clinical setting, his diagnosis of that person is naturally going to be influenced somewhat by the context in which the interview takes place.²¹⁷

An additional area for concern is the degree to which the psychological stress attendant to an existence on death row itself, is likely to produce behavioral aberrations.²¹⁸ Indeed, "[i]t is difficult to imagine a source of psychological stress more exacting than being forced to live the spasmodic certainty and uncertainty of being sentenced to die."²¹⁹ Justice Stevens has observed:

In capital cases, however, the punishment is inflicted in two states. Imprisonment follows immediately after con-

214. *Id.* (quoting *Ake*, 470 U.S. at 75).

215. Ward, *supra* note 32, at 76.

216. Gordon, *Crystal-Balling Death?*, 30 BAYLOR L. REV. 49 (1978).

217. *Id.*

218. West, *Psychiatric Reflections on the Death Penalty*, 45 AMER. J. ORTHOPSYCHIATRY 689, 694 n.30 (1975) ("the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture"). *Id.* at n.30.

219. Strafer, *Volunteering for Execution*, 74 J. OF CRIM. L. & CRIMINOLOGY. 860, 867 (1983).

viction: but the execution normally does not take place until after the conclusion of post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral review in the federal judicial system, and clemency review by the executive department of the State. However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution. If the death sentence is ultimately set aside or its execution delayed for a prolonged period the imprisonment during that period is nevertheless a significant form of punishment. Indeed, the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself.²²⁰

Doctors Bluestone and McGahee, in their landmark study of prisoners on death row in 1962, made a very similar observation.²²¹ Their case studies of eighteen men and one woman awaiting death in Sing Sing prison supports the hypothesis that stress from an impending death sentence causes inmates to resort to a number of defense mechanisms²²² of mainly three types—denial,²²³ projection,²²⁴ and obsessive rumination.²²⁵ It

220. *Coleman v. Balkom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari).

221. Bluestone & McGahee, REACTION TO EXTREME STRESS: IMPENDING DEATH BY EXECUTION, 119 AMER. J. PSYCHIATRY 393-96 (1962).

222. *Id.* at 395.

223. The authors suggest that:

[T]he most common form of denial is isolation of affect. 'So, they'll kill me; and that's that'—this said with a shrug of the shoulders suggests that the affect appropriate to the thought has somehow been isolated. A second common form of denial is to minimize the gravity of the present situation and to take for granted the fact that an appeal would be successful. The third and most extreme manifestation of denial, used by only one individual, was to believe delusionally that a pardon had been granted.

Id. at 395.

224. The authors state that

projection is an obvious, and not uncommon, mechanism. Typically, it takes the form of persecutory delusions. At least three of our prisoners considered themselves persecuted by specific groups in the community. This mechanism converts dissolute criminals into martyrs. It is a comforting delusion. While it does not deny that death is just around the corner, it tries to lend it dignity and meaning.

has also been concluded that Bluestone and McGahee's descriptions of the defense mechanisms of the condemned prisoners examined in their study suggest the presence of underlying psychosis in several of the inmate-subjects.²²⁶ However, Professor Kenner notes that it is important not to confuse an inmate's use of defense mechanisms with symptoms of a major mental illness.²²⁷ To do so, according to Professor Kenner, would place the death row inmate in a "no-win-situation."²²⁸ If the condemned, by using defense mechanisms to alleviate some of the pain of impending death was to be declared unfit for execution, the condemned would be placed in the anomalous position of being executed when he feels the pain of his upcoming death the most, that is, after his defense mechanisms are no longer successful.²²⁹

The use of such defense mechanisms and the observation of mental illness in condemned inmates is not surprising given the inhumane conditions pervading death rows and the crippling and life-negating effects of such degrading surroundings.²³⁰ According to recent studies and lawsuits, death row inmates generally are not integrated into the prison population, do not have access to rehabilitative programs, have little opportunity to exercise, and are confined to their cells for extraordinarily long periods of time.²³¹ It has long been recognized that chronic periods of inactivity coupled with severe physical restrictions such as in-

In some men there seems to be an almost quantitative reciprocal relationship between the use of projection and introjection so that they are either overly paranoid or depressed.

Id.

225. The authors observed three kinds of obsessive rumination. The first involved thinking "furiously about something else," so that the "depressing thought is elbowed out of consciousness by the crowd of other ideas." *Id.* The authors cite a "morbid obsessional concern about the preparing of appeals or pleas for clemency" as an example. *Id.* Another type of obsession exhibited was the "preoccupation with religion to the exclusion of everything else." *Id.* at 396. "The third type of obsessive rumination is the intellectual: a dipping into philosophical thought by a man whose life had hitherto been devoted to hedonistic pursuits." *Id.*

226. Lewis, *supra* at 839.

227. Kenner, *supra* note 31 at 255.

228. *Id.*

229. *Id.*

230. Strafer, *supra* note 219, at 869. For a review of documented nation-wide death row conditions, see *id.* at 870 n. 37.

231. Strafer, *supra* note 219, at 230-31.

cell confinement causes increased tension and violence.²³² Such conditions only exacerbate the unique stresses experienced by the death row population who often await for years, in abysmal conditions, for "decisions entirely beyond their control and possible comprehension."²³³ Indeed, it has been suggested that "[w]hile the sentence of death itself is a source of considerable and often debilitating stress, the 'social environment' in which the trauma of imminent death is experienced can itself 'play a critical role in determining the nature and outcome of coping efforts.'"²³⁴

In contrast to the dying patient whose 'social environment' often is made life-affirming through the intentional enhancement of personal autonomy, conditions on death rows are designed to be life-negating. The remote physical locations of the prisons, limited visitation rights, and the indignities forced upon both inmate and visitor when those rights are invoked stand in stark contrast to the support systems available to a terminally ill patient. Apparently abandoned by the living, the condemned are subjected to 'massive deprivations of personal autonomy' on death row.²³⁵

The same author also concludes that:

[T]he image of death row existence as itself a 'living death' is reflected in the attitudes of death row inmates whose expressions of suicidal impulses or desires to waive their appeals are continually connected to their thoughts about 'living' on death row.²³⁶

The rule prohibiting the execution of an insane inmate has

232. *Id.* at 873 n.48.

233. Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AMER. J. PSYCHIATRY 167, 167 (1972).

234. Strafer, *supra* note 219, at 871 n.38.

235. *Id.*

236. *Id.* at 871, 872. Strafer notes that, "[t]he lure of suicide, either by direct action or by enlisting the assistance of the State, as a release from this intense psychological torture may be as great for the innocent as for the guilty. Isidore Zimmerman once came within a few minutes of being electrocuted. When the time finally approached he reportedly welcomed the news and was disappointed when he was reprieved. Zimmerman was later fully exonerated for the crime for which he once 'willingly' sought to be executed." *Id.* at 869.

several ramifications on the role of the psychiatrist or other involved mental health professional. Initially, when a claim of mental incompetency or insanity is raised by a condemned, a mental health practitioner will be asked to perform an evaluation of the condemned's competency for execution. If it is determined that the condemned is not competent, then presumably another mental health practitioner will be requested to provide treatment. Finally, a mental health practitioner will be asked to render an opinion on whether a condemned who has undergone treatment has been restored to sanity.²³⁷ An affirmative answer can ring the death bell for the condemned.

Perhaps, in the final analysis, the question becomes whether and to what degree a psychiatrist ethically may participate at all in either a diagnostic or therapeutic capacity.²³⁸ One author, Barbara Ward, observes that while doctors, who are sworn to preserve life, have always been involved with the death penalty process in some form, ("by issuing death certificates following executions, examining an inmates's neck to determine the optimal rope length for hanging, examining and counseling death row inmates, and resuscitating condemned inmates who attempt suicide") the role of a participating psychiatrist in the competency for execution proceedings differs substantially.²³⁹ She notes that while "competent inmates in the capital prison population would have died anyway, psychiatric participation in this process may help effectuate an execution which might not otherwise have occurred."²⁴⁰

Some commentators suggest that psychiatrists should take no part in such competency proceedings—that it denigrates the entire profession.²⁴¹ The fact is stressed that as a physician, the psychiatrist is "sworn to devote himself to the preservation of human life, [and that] dealing out opinions whereby the survival or destruction of another human being hinges on the turn of a word" perverts the role of the psychiatric profession as a

237. Ewing, *Diagnosing and Treating Insanity on Death Row: Legal and Ethical Perspectives*, 5 BEHAV. SCI. & L. 175, 180-81 (1987).

238. Ward, *supra* note 32, at 76.

239. *Id.* at 84.

240. *Id.* at 84-85.

241. Radelet & Barnard, *supra* note 32, at 45 n.25.

whole.²⁴² Doctors Radelet and Barnard counter that the problem in accepting this position is that if psychiatrists opposed to the death penalty refuse to evaluate prisoners for competency to be executed, the alternative would be to encourage participation by psychiatrists who are, perhaps, less principled.²⁴³

Others would argue that the psychiatrist should only participate to the extent of examining the prisoner and reporting the level of mental disease or impairment but avoid the ultimate question of competency to be executed. Still others would argue that the psychiatrist should do a psychiatric examination, arrive at a diagnosis using DSM-III²⁴⁴ criteria, and then attempt to bridge the (inevitable) gap between medical diagnosis and legal opinion by rendering a recommendation regarding competency to be executed.²⁴⁵

It has been suggested that many of the difficulties with utilizing mental health professionals in insanity-competency proceedings arise from the absence of procedural safeguards and the imprecision of statutory procedures.²⁴⁶ One factor often raised is the lack of a coherent, intelligible, or workable standard of competency which the psychiatrist can apply.²⁴⁷ Indeed, Radelet and Barnard observe that "[t]he first ethical problem for physicians involved in this process directly relates to the issues of vagueness and lack of clarity. . . ."²⁴⁸ Granting that the "[psychiatric] profession has made great advances in recent years in attempting to specify definitions and increase the relia-

242. West, *supra* note 218, at 694. West notes that "[m]any psychiatrists refuse any longer to serve as expert witnesses in capital cases, only to find themselves consequently criticized for lack of social responsibility." *Id.* Professor Ewing opines: "[t]o render a clinical judgment which has the practical effect of authorizing the execution of a convicted capital defendant is clearly contrary to the fundamental ethical commitments of psychology and psychiatry to healing and the relief of human suffering." Ewing, *supra* note 237, at 182.

243. Radelet & Barnard, *supra* note 32, at 45.

244. "DSM-III is the common abbreviation for the standard manual of psychiatric diagnoses." Bazelon, *The Dilemma of Criminal Responsibility*, 72 Ky. L.J. 263, 270 n.11 (1983-1984).

245. Radelet & Barnard, *supra* note 32, at 45.

246. Ward, *supra* note 32, at 76.

247. *Id.*

248. Radelet & Barnard, *supra* note 32, at 45.

bility of psychiatric diagnoses" they note that "[i]ncompetency. . . is a legal rather than a medical concept."²⁴⁹

It involves assessments and opinions, not diagnoses and facts. The lack of clarity in the statute's definition of 'competency to be executed' means that the individual psychiatrists are given wide latitude in defining the status they are asked to assess, creating the possibility for capricious decisions. If the legal definition of incompetency is imprecise, then other factors, such as the psychiatrist's opinion of the death penalty, the heinousness of the offense, and the amiability of the defendant may, at least unconsciously, affect the assessment.²⁵⁰

They explain that while the accuracy of psychiatric diagnoses and evaluations may always be subject to criticism, an evaluation to determine one's competency to be executed is one of the few done by psychiatrists whereby a diagnosis can become a question of life or death.²⁵¹ Thus, Radelet and Barnard conclude that the magnitude of the interests at stake "make the question of the validity and reliability of psychiatric diagnoses and opinions of more crucial significance than in any other area of psychiatric practice."²⁵²

To compensate for the lack of clarity and the important issues at stake, Doctors Radelet and Barnard note that psychiatrists who participate in insanity inquiries must perform as thorough and detailed an examination as possible.²⁵³ "On ethical grounds alone, the magnitude of the harm to the subject from incorrect conclusions would seem to justify a 'super' level of care in psychiatric assessments. . . when the death sentence may be involved."²⁵⁴ They note that the three psychiatrists who examined Alvin Ford were criticized by defense psychiatrists for failing to conduct a detailed examination and for utilizing inade-

249. *Id.*

250. *Id.*

251. *Id.* at 45-46.

252. *Id.* at 46.

253. *Id.*

254. *Id.* at 43 (citing S.L. HALLECK, P. APPLEBAUM, J. BAPPEPORT & G.E. DIX, REPORT OF THE TASK FORCE ON THE ROLE OF PSYCHIATRY IN THE SENTENCING PROCESS 181-215 (1984)).

quate and unspecified techniques of evaluation.²⁵⁵ The three psychiatrists appointed by the Florida Governor interviewed Ford for only thirty minutes, in surroundings not necessarily conducive to performing an insanity evaluation, and failed to provide specific details as to the procedures used to arrive at their evaluation that Ford was competent for execution.²⁵⁶ Defense psychiatrists claimed that the physicians failed to perform a reliable forensic evaluation:²⁵⁷ Radelet and Barnard emphasize that such competency evaluations must be performed with the highest level of professional skill; "no other standard is possible when the purpose is deciding who shall live and who shall die."²⁵⁸

Some psychiatrists note that their ethics are compromised by this "catch-22" situation in that a decision not to render treatment allows for an individual to continue to live in a state of pain and suffering.²⁵⁹ "The suffering of psychotics is one of the most intense sufferings that can be experienced," says psychiatrist Paul Appelbaum, Chairman of the American Psychiatric Association's commission on judicial action. "We don't feel comfortable not treating these people [under death sentences], but we feel even less comfortable treating them."²⁶⁰

In a debate over the propriety of treating condemned mentally ill inmates at the annual American Psychological Association ("A.P.A.") meeting in 1987, Dr. Loren H. Roth argued that in such a situation the psychiatrist is taking part in treating, not executing the prisoner.²⁶¹ Noting that the state was responsible for the imposition of the death sentence, Roth maintained that psychiatric intervention could not be withheld from a psychotic individual because the treating doctor was uncomfortable with the outcome of the patient's restoration to competency.²⁶²

However, Dr. William Webb, Chairman of the Ethics Committee of the A.P.A. states: "You can put on blinders to the sys-

255. *Id.* at 46.

256. *Id.*

257. *Id.*

258. *Id.*

259. Adler, *supra* note 210, at 29.

260. *Id.*

261. *Forensic Experts Debate Ethics of Restoring Prisoners' Competency to Allow Their Execution*, PSYCHIATRIC NEWS, June 5, 1987, at 15.

262. *Id.*

tem and say you are just concerning yourself with the pain of the person's psychosis—you treat that and let the legal system go on. [But] it approaches the ethical dilemma of the Nuremburg situation. If the process is unethical and you participate in it in some way, then you may share responsibility."²⁶³

Thus, treatment for the purpose of restoring an individual to competency takes on a hideous connotation where in the "course of curing, doctors may be killing."²⁶⁴ Steven Adler, author of "The Cure That Kills," notes that the issues and conflicts raised by the *Ford* decision will multiply "[a]s some of Florida's 248 death row inmates establish incompetence by reason of insanity, they will be transferred under Florida law to the Corrections Mental Health Institution (CMHI), where—if all goes well in treatment—they will be rendered healthy enough to be executed."²⁶⁵ The same author, after noting that it costs approximately \$60,000 a year per inmate to provide treatment and a safe environment to such prisoners—people who have stunned and offended society with their hideous crimes, questions whether the Supreme Court was wrong.²⁶⁶ Taking issue with the majority's rationale, he argues that:

263. Adler, *supra* note 210, at 29. In a recent article in the *New England Journal of Medicine* it was noted that after World War II, during the war-crimes trials, physicians accused of crimes against humanity uniformly invoked the defense that they were under official orders to perform certain actions and were threatened with personal punishment or loss of their position for failure to cooperate. "The defense was rejected as a violation of the moral imperative to refuse to kill or to harm the prisoners, or to take part in the atrocities in any way." *Sounding Board*, 302 N.E. J. OF MED. (Jan. 1987), at 227.

The same author notes that:

It is important to recognize that such practices have not been limited to one country or one time. In the Soviet prison camps, according to Solzhenitsyn: The prison doctor was the interrogator's and the executioner's right hand man. The beaten prisoner would come to on the floor only to hear the doctor's voice: you can continue, the pulse is normal. . . . If the prisoner is beaten to death he signs the death certificate: 'cirrhosis of the liver' or 'coronary occlusion.' He gets an urgent call to a dying prisoner and takes his time. And whoever behaves differently is not kept on in the prison. (*emphasis added*).

These are extreme examples but the purpose of citing to them is to raise consciousness levels as to the dangers involved when a professional is forced to work under circumstances which can be construed as ethically uncertain. If a mental health professional feels uncomfortable or otherwise is opposed to treating a condemned inmate for the purpose of restoring such person to sanity, what mechanisms will be available for ensuring that that person's employment position will be unaffected?

264. *Id.*

265. *Id.*

266. *Id.* at 31.

Executing the insane may actually have more deterrent value than sparing them, since it will increase the frequency of executions and eliminate an apparent 'loop-hole.' And why does executing Gary Alvord,²⁶⁷ [a current resident at CMHI] who strangled 3 [generations] of women to death, 'offend humanity' any more or less than the 1979 execution of John Spenkelnik, who killed a fellow drifter he was traveling with? And in a more secular society than Blackstone's, it may no longer be as important to require that the condemned person be of sound mind to meet his maker.²⁶⁸

In answer to the question, "is it crueler to execute someone who doesn't understand that he is about to die than to kill someone who does?" Dr. Appelbaum states, "It may be kinder to put to death those people who aren't aware of what's happening to them."²⁶⁹ Dr. Carl Bell of the National Medical Association strongly disagrees. He states that "[people] want to die with dignity, they don't want to die babbling walking down the hall."²⁷⁰

As Ward notes, analyzing the historic rule which proscribes the execution of an incompetent offender forces one to address the ultimate moral question of when the state may properly punish by taking life.²⁷¹ Professor Weihofen observed, "[t]he real issue is whether it is less humane to execute a guilty criminal while he is insane than it is to postpone the execution until we make sure that he understands what we mean to do to him—and then kill him."²⁷²

The answers to these questions are ones upon which honest persons may differ; yet one thing is clear: "if one rejects the idea of executing the insane, the search begins for ways to minimize or eliminate the ethical problems created by treating them."²⁷³

Doctors Radelet and Barnard note that if an inmate is announced incompetent for execution and consequently trans-

267. For a review of the facts of the *Alvord* case, see Ward, *supra* note 32, at 35, 42, 44-45; and Radelet & Barnard, *supra* note 32 at 52-53 n.38.

268. Adler, *supra* note 210, at 31.

269. *Id.*

270. *Id.*

271. Ward, *supra* note 32, at 100.

272. Radelet & Barnard, *supra* 32, at 41 n.18.

273. Adler, *supra* note 210, at 32-33.

ferred to a mental health facility, the mental health staff responsible for treating the prisoner knows that "successful" treatment means that the patient-inmate will die.²⁷⁴ This use of the state's limited treatment resources may be perceived as especially outrageous.²⁷⁵ Some observe that such issues as informed consent and the right to refuse treatment will be implicated in such cases, as well as the refusal by individual mental health practitioners to provide treatment under such conditions.²⁷⁶ "Mental health treatment is supposed to be provided for the benefit of the patient, but in such cases the patient will obviously not benefit."²⁷⁷

In *The Cure That Kills*, Stephen Adler portrays poignantly the ethical catch-22 situation in which mental health professionals may find themselves in treating the mentally incompetent death row inmate.²⁷⁸ He reminds us of the plight of bombardier Yossarian (in Joseph Heller's World War II book), who wants to abandon the battlefield and return home because he is "crazy." "[I]n hearing Yossarian's complaints about the dangers associated with the war, the doctor—who works for the military, decides that [Yossarian] is perfectly sane. . . [and would] be crazy to want to stay on the battlefield. Thus, Yossarian is sent back to war."²⁷⁹

Adler analogizes an inmate's situation at CMHI to that of Yossarian: the treatment team has the power to provide the "same kind of good news to [the patient]—the moment he shows signs of sanity, the treatment team will give him a pat on the back for cooperating so well with the treatment—and a ticket for the first leg of his trip back to death row."²⁸⁰

The debate on the propriety of executing the insane is likely to continue unabated. In an era where crime in America has reached the crisis stage, overcrowded prisons are commonplace, and many feel compelled to offer tough talk and suggest tough measures,²⁸¹ it is probable that many Americans cannot fathom

274. Radelet & Barnard, *supra* note 32, at 49.

275. *Id.*

276. *Id.*

277. *Id.*

278. Adler, *supra* note 210, at 33.

279. *Id.*

280. *Id.*

281. Bazelon, *supra* note 244, at 277. Judge Bazelon notes that "[t]he insanity de-

that an issue even exists. To some, to spend upwards of \$60,000 per year to "cure" Gary Alvord in order to execute him borders the ridiculous. Staunch proponents of the death penalty, whatever their basis for belief in such punishment, would find little sympathy for such a person or be repulsed by his execution, whether he be competent or not.

It is horrendously difficult to come to terms with many of the issues raised by *Ford v. Wainwright*. Where an individual has committed a heinous crime, it may be difficult for Americans as well as health care professionals in some instances, to look upon that individual as worthy of any kind of care. Anger at the criminal as well as a system which will expend substantial financial resources toward his upkeep is a legitimate emotion. Yet, as Judge Bazelon notes in discussing the dilemma of criminal responsibility, "righteous rage even if eloquently or loudly expressed, will not solve the problem."²⁸² Writing about the insanity defense, he notes, "[t]he community must realize that the solution to the problem of crime is not in casting out its outcasts a second time, but in reaching out and fashioning a community to which all can belong."²⁸³ Judge Bazelon observes that "over a century ago, Dostoevsky put these words in the mouth of a minor character in *Crime and Punishment*: 'In this age the sentiment of compassion is actually prohibited by science.' Let it not be said that it is prohibited by law."²⁸⁴

CONCLUSION

"In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." This observation made by Justice Frankfurter explains the very reason for the existence of the opinion in *Ford v. Wainwright*. The "onset of insanity" while on death row is *not* an unusual occurrence and many death row inmates *do* become severely impaired perhaps as a direct result of the stress of an existence on death row. If, as a society we have rejected the taking of the life of an inmate who becomes incompetent while awaiting execu-

fense has become a convenient symbolic target in this war of words." *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

tion, then we as a society must produce a viable alternative for that man's destiny.

The purpose of this paper has been to explore some of those alternatives and to highlight the special issues involving the treatment of death row inmates who become incompetent while awaiting execution. It is the conclusion of this author that requiring the participation of psychiatrists and other mental health professionals is not a viable alternative. Perhaps some mental health professionals will refuse to participate; perhaps as Doctors Radelet and Barnard have postured, less principled psychiatrists will be glad to. Or, perhaps mental health professionals opposed to participating in "the cure that kills" but economically dependent on their positions, will render treatment despite the fact that it is morally repugnant to them. To request this of a profession sworn to alleviate suffering is to request too much. The social costs incurred by involving the mental health profession in this aspect of the administration of justice are too high. Providing treatment in such a situation affords the condemned with inadequate safeguards and also serves to pervert the role of the treating clinicians involved. Too many extraneous factors are implicated: one cannot ignore the issues of informed consent and the inmate's fifth amendment privilege against self-incrimination; one cannot ignore the fact that most capital crimes involve homicidal behavior that is beyond the understanding and sympathy of even trained counselors and physicians. It is not enough to tell psychiatrists and other mental health professionals to be sensitive to the special burdens they bear in treating death row inmates such as Alvin Ford; it is not enough to tell them to be sensitive to the limits of their understanding. It is not enough because such warnings are inadequate in affording protection to the condemned as well as the mental health professionals involved. In such a situation, the condemned will not be provided with the best possible treatment, and the mental health profession should take no part in "helping" an individual escape the agony of mental illness only to preside over his execution. Such participation denigrates the entire profession and the individuals involved—both the condemned and the clinicians—will suffer.

Better alternatives exist. The hellish conditions on death rows should be improved in an attempt to stem some of the

stress associated with existence on death row. Finally, for those inmates who do become incompetent and are in need of the services of the mental health profession, a death sentence should be commuted to life in prison. Such an alternative can still satisfy society's desire for retribution. More importantly, it lends a sense of decency and dignity to the proceedings involved, and fails to implicate an entire profession's ethical and moral code by allowing physicians and other clinicians to provide the treatment and care they are sworn to administer.

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