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COMPETENCY FOR EXECUTION:
PROBLEMS IN LAW AND PSYCHIATRY

BARBARA A. WARD*

The death penalty has been historically limited by a proscription against executing the mentally incompetent. Today, courts up to the Supreme Court of the United States are considering whether inmates have a constitutional right to be spared from execution while they are incompetent. An issue which remains even if the right is not constitutional but only statutory is who should determine whether a condemned prisoner is competent for execution and, if incompetent, who should treat him. Psychiatrists in particular are confronted with the dilemma of reconciling their ethical obligation to treat the mentally ill with the realization that restoring an inmate to competency helps to bring about his execution. In this Article, Barbara A. Ward explores the legal and ethical dimensions of this problem in the context of the most compelling moral issue in the American criminal justice system—capital punishment.

There are times when law and justice are themselves on trial.1

THE DEATH penalty has been accompanied in Anglo-American law by a rule proscribing the execution of mentally incompetent capital inmates. Although many explanations have been offered, there is no agreement as to the rule's purpose. Thirty-five of the forty-one states with a death penalty embody the rule in a variety of statutory and common law formulations.2 Generally, when an inmate under a capital sentence is found incompetent, his execution must be stayed and he must be transferred to a hospital for treatment. When he has recovered, he is again subject to execution. The state procedures vary widely. Some of the critical differences relate to the following factors: who may raise the question of competence, what kind of process is then due, who examines the


An earlier version of this Article was written for Dr. Alan A. Stone's Psychiatry and the Law seminar at Harvard Law School. I wish to express my gratitude to Dr. Stone and to Dr. Paul S. Appelbaum for their guidance and support. I also would like to thank Greg Frizzell for a quick and insightful eleventh-hour review.

2. See Appendix for citations.
inmate and with what degree of thoroughness, what standard of competence is to be applied, who makes the decision, and what procedures surround the question of restoration to competency.

The purpose of this Article is to discuss issues that are raised in law and psychiatry as a result of the prohibition against executing the incompetent. The purpose of the death penalty, the rationales for the competency rule, and the standards of competency for execution are discussed. It will be argued that the justifications for capital punishment should suggest why some inmates receive the death penalty and others are exempted. The principles underlying the requirement of competence for the death penalty, in turn, should determine the level of impairment needed before a prisoner is spared from execution. The principles and rationales underlying the requirement of competency for execution should also determine the level of procedural protections to be afforded an inmate who claims he is incompetent for execution. However, because there is no social consensus as to the purpose of capital punishment, there can be no consensus about why the incompetent are exempt, what the standard of competency should be, or what procedural protections should be provided.

Also addressed are due process issues surrounding an inmate's claim of incompetency in light of recent advances made in treating mental illnesses with chemical therapy. The acute psychotic reactions which may result from the stress of death row confinement may be treatable with antipsychotic drugs. Considerations of in-

3. Since the 1950's, drugs have become increasingly important in the treatment of psychiatric disorders. See, e.g., Klerman, Neuroleptics: Too Many or Too Few?, in RATIONAL PSYCHOPHARMACOTHERAPY AND THE RIGHT TO TREATMENT 1, 3 (F. Ayd ed. 1975); Crane, Clinical Psychopharmacology in its 20th Year, 181 SCIENCE 124-25 (1973) (“In the last 15 years, neuroleptic agents have replaced most forms of treatment for psychoses and other serious mental ailments.”).

A neuroleptic drug or agent is one which affects the nervous system so as to produce sedative, analgesic, and tranquilizing effects. 3 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE N-41 (1985). Psychotropic drugs comprise a broader category of medications which affect an individual's mental functions, including the subconscious thought processes. See id. at P-301, P-307; Guthel & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 Hofstra L. Rev. 77, 83 (1983). Neuroleptic and psychotropic medications which are frequently administered to persons suffering from psychosis have been referred to as antipsychotic drugs. See infra note 48; see generally Winick, Psychotropic Medication and Competence to Stand Trial, 1977 AM. B. FOUNDATION RESEARCH J. 769 (1977). Some common psychotropic medications are sold under the trade names Haldol, Thorazine, Prolixin, Mellaril, and Stelazine. See Winick, Psychotropic Medication, 1977 AM. B. FOUNDATION RESEARCH J., at 778. See generally PHYSICIANS’ DESK REFERENCE (Med. Economics C. 40th ed. 1986).
formed consent, the right to refuse treatment, and the standards of competency for each assume a special importance in this context. Questions have been raised as to whether psychiatrists ethically should take part in such proceedings. Other questions addressed include whether the psychiatric examiner is qualified and disinterested, whether the psychiatric evaluation is adversarial, and what the appropriate standards are regarding the extent of the psychiatric evaluation.

I. The Problem: Insanity on Death Row

The years 1967 to 1977 witnessed a de facto moratorium on executions in the United States. In 1972, the Supreme Court vacated the sentences of three capital defendants in Furman v. Georgia, holding that the sentences violated the eighth and fourteenth amendments by inflicting cruel and unusual punishment. The Court’s concern with the arbitrary and discriminatory infliction of the death penalty prompted state legislatures to refine their capital sentencing statutes. Four years after Furman, the Court upheld the first group of the revised death penalty statutes—those of Florida, Georgia, and Texas—in Gregg v. Georgia, and the majority of states proceeded to enact new capital punishment laws. Slowly, the newly condemned inmates began to be executed; finally, in 1984, the rate of execution rose dramatically, with more than twenty prisoners executed, more than twice as many in that one year than in the previous twenty years combined. The tedious appeals process meant that murderers were condemned to death faster than the judicial system could dispose of their cases, and the nation’s death row population swelled. As of May 1, 1986, there were 1,714 inmates on death row. Now, with some prisoners having been on death row for as long as a decade, the states have begun to encounter the phenomenon of some condemned inmates asserting that their prolonged confinement under sentence of death has left them mentally incompetent.

Over thirty years ago, Justice Frankfurter wrote, “In the history of murder, the onset of insanity while awaiting execution of a

5. 408 U.S. 238 (1972).
death sentence is not a rare phenomenon." The physical and psychological pressures besetting capital inmates have been widely noted.\(^9\) Prisoners on death row must live with the knowledge of their impending death.\(^1\) Justice Brennan, concurring in Furman v. Georgia,\(^2\) noted that "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."\(^3\) Courts and commentators have argued that the extreme psychological stress accompanying death row confinement is an eighth amendment violation in itself or is an element making the death penalty cruel and unusual punishment.\(^4\)

Capital inmates, segregated from the general prison population, exist in a milieu apart from that of their noncapital comrades.\(^5\) Death row residents typically experience a lack of exercise, poor diet, close quarters, social isolation, no educational or work programs, strained family relations, and family visits which are infrequent and burdened with security restrictions.\(^6\) These conditions

11. Id. ("One of the least common and possibly the most stressful of all human experiences is the anticipation of death at a specific moment in time and in a known manner.").
13. Id. at 288-89 & n.36 (Brennan, J., concurring). See also Solesbee, 339 U.S. at 14 (Frankfurter, J., dissenting); Commonwealth v. O'Neal, 339 N.E.2d 676, 680-81 (Mass. 1975); Gottlieb, Capital Punishment, 15 CRIME & DELINQ. 1, 8-10 (1969).
are sufficiently different from those in the general prison population to warrant civil rights litigation challenging prison conditions peculiar to death row.\(^\text{17}\)

Although comprehensive empirical data is lacking, a handful of social scientists have performed limited studies of death row residents. In a frequently cited article, Bluestone and McGahee reported a study of eighteen men and one woman on death row in the Sing Sing Correctional Facility.\(^\text{18}\) Although the conditions of the inmates’ confinement might be expected to produce severe depression and anxiety, those symptoms were conspicuously absent. Using projective tests,\(^\text{19}\) the authors determined that the most prominent defense mechanisms\(^\text{20}\) used to repel stress reactions were denial, projection, and obsessive rumination. The most common form of denial\(^\text{21}\) employed was isolation of affect.\(^\text{22}\) A second form of denial involved minimizing the gravity of the situation and expecting a successful appeal. One prisoner manifested a third and extreme form of denial, delusionally believing that a pardon had been granted.\(^\text{23}\) Projection\(^\text{24}\) typically assumed the form of persecu-

\(^{17}\) See, e.g., Smith v. Coughlin, 748 F.2d 783 (2d Cir. 1984); Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970) (per curiam), on remand, 331 F. Supp. 1123 (E.D. La. 1971).

\(^{18}\) See Bluestone & McGahee, supra note 15, at 393.

\(^{19}\) Id. at 394; see also Kaufman, Discussion, 129 AM. J. PSYCHIATRY 171 (1972). In projective testing, the subject is shown ambiguous materials, such as inkblots or incomplete sentences and drawings, and asked to say what they make him think of or how his prevailing mood or thought patterns are affected. The subject’s responses are interpreted by a trained examiner. The two most common forms of projective testing are the Rorschach inkblot test and the thematic apperception test. 3 J. SCHMIDT, supra note 3, at P-278.

\(^{20}\) An ego defense mechanism is a conscious or unconscious psychic maneuver by which a person defends himself, in his own mind, against unpleasant or unacceptable feelings such as guilt, anxiety, and frustration. 1 J. SCHMIDT, ATTORNEYS’ DICTIONARY OF MEDICINE D-18 (1985).

\(^{21}\) In denial, the ego refuses to recognize the facts of reality in order to save itself from anxiety and mental pain. Id. at D-29.

\(^{22}\) Bluestone & McGahee, supra note 15, at 395. Affect is an immediately expressed and observed emotion. A feeling state becomes an affect when it is observable, for example, as overall demeanor or tone and modulation of voice. AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 353 (3d ed. 1981) [hereinafter cited as DSM-III]. A flat affect is a diminished emotional reaction to a particular situation. Therefore, a death row inmate who nonchalantly comments, “So they’ll kill me and that’s that,” is said to display flat affect. The affect is isolated because feelings one would normally associate with being on death row—deep depression or anxiety—are not evident in the inmate’s outward appearance.

\(^{23}\) Id. at 395. The authors distinguished denial from the phenomenon they observed in several subjects, who were so immersed in the present that they experienced no emotions relating to the past or future.

\(^{24}\) A person using projection denies having an unacceptable characteristic or emotion and attributes it to another person. 3 J. SCHMIDT, supra note 3, at P-278.
tory delusions, with at least three subjects considering themselves persecuted by specific groups in the community. Obsessive rumination was employed by inmates who coped with painful emotions by thinking furiously about other things, such as appeals, religion, or philosophy. Of the thirteen prisoners profiled in the article, six showed delusional tendencies.

Bluestone and McGahee studied death row inmates over relatively short intervals, whereas Gallemore and Panton examined capital prisoners in North Carolina using a sequential study. This technique enabled them to assess psychological adaptation over extended periods of confinement. Gallemore and Panton evaluated eight men upon their admission to death row and periodically reevaluated them for at least two years. The examiners used a variety of testing techniques, including extensive social histories, psychiatric interviews, and psychological testing, such as the Minnesota Multiphasic Personality Inventory (MMPI) and the Beta

25. A delusion is a false personal belief, not generally accepted by other members of the person's culture, which is "based on incorrect inference about external reality and firmly sustained in spite of what everyone else believes and in spite of what constitutes incontrovertible and obvious proof or evidence to the contrary." DSM-III, supra note 22, at 356. In delusions of persecution, the central theme is that a person or group, usually the patient or someone close to him, is being injured or plotted against by known or unknown enemies. Id. at 357; 1 J. SCHMIDT, supra note 20, at D-26.

26. Bluestone & McGahee, supra note 15, at 395. One inmate believed he was the victim of a "Jewish plot" because the judge, district attorney, and his court-appointed lawyer all were Jewish. This inmate would grow depressed upon bad news of his appeal, and paranoid and grandiose when a stay of execution was granted. Id. at 394. Furthermore, he alternated his use of projection with introjection, a mental maneuver by which a person turns upon himself animosity or hostility felt toward another. See 2 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE I-88 (1984). Bluestone and McGahee noted in some subjects "an almost quantitative reciprocal relationship between the use of projection and introjection so that they are either overly paranoid or depressed." Bluestone & McGahee, supra note 15, at 395.

27. Obsessive rumination is a neurotic state marked by preoccupation with particular, frequently trivial, thoughts. 3 J. SCHMIDT, supra note 3, at O-5. Neurosis is the less serious of the two major mental disorders, the other being psychosis. See infra note 48. Usually caused by an unsuccessful attempt to resolve subconscious emotional conflicts, neurosis frequently manifests itself in impairment of judgment and thought, although generally there is no appreciable degeneration of the personality or loss of understanding of external reality. Id. at N-45; see also DSM-III, supra note 22, at 9-10, 364-65.

28. Bluestone & McGahee, supra note 15, at 395-96. For example, one prisoner spoke for an hour about whether a pronoun in a legal document should be "who" or "whom." Id. The two inmates who were obsessed with religion both had accomplices who were involved in their crimes and received the death penalty, although neither accomplice had killed anyone. Bluestone and McGahee theorized that the inmates' guilt feelings about involving their confederates were blunted by this preoccupation with religion. Id. at 396.

29. Id. at 393-95; see also Kaufman, supra note 19, at 171.
31. The MMPI is a questionnaire administered primarily to mental patients. It consists
Intelligence Test. Follow-up psychiatric interviews and repeat MMPI assessments disclosed that three men became significantly less functional with obvious deterioration while five appeared to adjust adequately over time. Gallemore and Panton noted that ego defense mechanisms seemed to "harden" with the passage of time on death row. Most of the inmates described a lessening of anxiety over time and alluded to a point of psychological "acceptance" of their circumstances.

Drawing firm conclusions from these two isolated studies is impossible. The projective tests used by Bluestone and McGahee may have probed more deeply than the battery of psychological tests employed in the Gallemore and Panton study. Both samples were small, making it impossible to generalize from the results. However, the eventual acceptance described by Gallemore and Panton does comport with other, less scientific findings. For example, Professor Robert Johnson from American University interviewed death row prisoners and discerned a pattern of shock, denial, and depression coupled with "a fatalistic belief that the person is a pawn in a process that will coldly and impersonally result in his death." The final statements of executed criminals, moreover, often evince a certain resignation and psychological acceptance of their fate even though they may maintain their innocence, denounce the perfidy of the criminal justice system, or attack the morality of capital punishment.

of 550 questions in the form of negative and positive statements pertaining to a variety of personality aspects, such as general health, sexual attitudes, political attitudes, and many psychopathological items pertinent to psychiatric diagnosis and treatment. The subject is asked to answer each question in one of three ways: "true" if he thinks the item applies to him and "false" if it does not; if he cannot determine whether it is true or false he indicates an inability to answer true or false. Following administration of the questionnaire, the subject's responses are interpreted according to nine MMPI psychopathological scales which include depression, hysteria, paranoia, and schizophrenia. Comprehensive Textbook of Psychiatry 528-29 (A. Freedman & H. Kaplan eds. 1967).

32. The Beta Intelligence Test is designed to evaluate the mental level or capacity of subjects who are unable to read English. 1 J. Schmidt, supra note 20, at B-41.
34. Id. at 170.
35. Kaufman, supra note 19, at 171.
36. See R. Johnson, Condemned to Die: Life Under Sentence of Death 94 (1981); see also id. at 98 n.10. The sequence distilled by Professor Johnson is consistent with Gallemore and Panton's finding that even though the long-term death row inmates utilized less denial than Bluestone and McGahee's group, they resorted to projection more frequently. Thus, the long-term prisoners increasingly attributed their predicament to persecution by law enforcement, judicial, and correctional agents. See Gallemore & Panton, supra note 10, at 170.
37. See, e.g., Pleas Fail to Prevent Execution, Tulsa Tribune, Jan. 10, 1986, at 1A, col. 2 (final statement of Terry James Roach to family and fellow death row inmates: "I leave you
Although the physical and psychological pressures of death row confinement have been widely noted, noticeably absent from these findings have been data demonstrating whether the various mental and behavioral abnormalities existed prior to death row confinement or directly resulted from the conditions of death row confinement. The facts in two Florida cases, *Ford v. Wainwright*\(^{38}\) and *Alvord v. State*,\(^{39}\) suggest a positive correlation between death row confinement and mental incompetency. In the former case, Alvin Ford is purported to have become psychotic only after living on death row for several years.\(^{40}\) In the latter case, Gary Alvord, although regarded as mentally ill since he was seven years old, has allegedly suffered increased impairment since living on death row.\(^{41}\)

It has been estimated that as many as fifty percent of Florida’s death row inmates become intermittently insane:

> They go in and out. Like most people with mental illness, they have crisis periods, and other periods when they can function. A lot depends on stress, bad diet, lack of medication, lack of exercise . . . . Unless you can manipulate the environment, they can only deteriorate.

Some of these people are much too crazy to help their attorneys prepare appeals. They might have been able to assist their attorneys at trial time, three years, five years, earlier, but now they are totally psychotic, irrational. It doesn’t take an expert to tell that.

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39. 459 So. 2d 316 (Fla. 1984).
40. Brief for Petitioner-Appellant at 2-8, *Ford*, 752 F.2d 526 (No. 84-5372).
We see them become catatonic, curl up in the fetal position and suck their thumbs, and the prison system gives them I.V.s and says they are faking insanity. Five to ten percent of the inmates go so far over the edge that we can never bring them back. We watch this happen to them. We saw it happen to Ford.\textsuperscript{42}

Ford, his attorneys allege, was not psychotic prior to December 1981.\textsuperscript{43} Gradually, he began to lose touch with reality, first believing that announcers at a Jacksonville radio station talked to him over the air. His delusions became increasingly persecutory and grandiose, although he had interludes of clarity.

On October 20, 1983, after two psychiatrists reported that Ford was a paranoid schizophrenic and incompetent for execution, Ford's lawyers invoked section 922.07, Florida Statutes, to determine his competency.\textsuperscript{44} Governor Bob Graham appointed a commission of three psychiatrists to examine Ford to "determine whether he [understood] the nature and effect of the death penalty and why it [was] to be imposed upon him."\textsuperscript{45} By December 1983, Ford's mental condition had deteriorated; he became uncommunicative and began to speak in a fragmented, code-like fashion.\textsuperscript{46} His behavior at a press conference prior to his scheduled execution in June 1984 was a pathetic illustration of his condition.\textsuperscript{47}

Two of the three psychiatrists appointed by the Governor to examine Ford found him suffering from psychosis\textsuperscript{48} and the third

\textsuperscript{42} Sherrill, \textit{In Florida, Insanity Is No Defense}, 1984 \textit{The Nation}, 551, 555-56 (quoting Scharlette Holdman, Director, Florida Clearinghouse for Criminal Justice).
\textsuperscript{43} Brief for Petitioner-Appellant at 4, \textit{Ford}, 752 F.2d 526.
\textsuperscript{44} \textit{Driven Crazy on Death Row?}, Tallahassee Democrat, Dec. 9, 1985, at 1B, col. 2. \textit{Fla. Stat.} \textsection 922.07 (1985) proscribes execution of the mentally incompetent; most states which impose the death penalty have similar provisions. See Appendix.
\textsuperscript{45} \textit{Fla. Stat.} \textsection 922.07(1) (1985).
\textsuperscript{46} See Brief for Petitioner-Appellant at 4-8, \textit{Ford}, 752 F.2d 526.
\textsuperscript{47} One reporter gave this description of Ford's behavior at that press conference: "Hello Satan, hello Satan, turn them back," Ford began. Then he spoke for a bit about David and Goliath and force fields and, for no apparent reason, began to laugh. He told one questioner that he had not spoken to his mother because she was traveling on "flying saucer number 210." Finally, a reporter asked him whether he was acting crazy. "God told me to act crazy," he said, "because you all have been acting crazy to me."
\textit{Is He Sane Enough To Die?}, \textit{Newsweek}, June 11, 1984, at 69.
\textsuperscript{48} See letter from Walter E. Afield, M.D., to Governor Bob Graham (Jan. 19, 1984) (on file, \textit{Florida State University Law Review}) (Ford's behavior did not fit any standard description but was labeled psychotic.) [hereinafter cited as Afield letter]; Letter from Umesh M. Mhatre, M.D., to Governor Bob Graham (Dec. 28, 1983) (Ford was suffering from psychosis with paranoia.) [hereinafter cited as Mhatre letter].

Psychosis is a mental disorder in which a person's personality is much more seriously
found him suffering from a "severe adaptational disorder." All three, however, found him competent for execution under Florida law. A psychiatrist who examined Ford at the request of his attorneys diagnosed him as suffering from "schizophrenia, undifferentiated type, acute and chronic." Similarly, a defense psychiatrist who reviewed the evaluations found symptoms consistent with a diagnosis of paranoid schizophrenia.

Gary Alvord, in contrast, has been in and out of mental hospitals for most of his life, having been diagnosed as a paranoid schizophrenic at an early age. Even so, the allegations submitted on Alvord’s behalf indicate that prior to 1984 Alvord generally "appeared competent and rational." Yet by 1983, after almost ten years on death row, Alvord’s condition had deteriorated, and he was totally unable to assist his lawyers. As his next friend petition alleged:

[H]e refuses to discuss any aspect of his case with counsel, based upon his stated belief that counsel is in league with the State - and the Polish government - to force him to take his own life. At the same time he believes that his body is in Poland and that he is immortal.

... When discussing his beliefs, his mood ranges from irrational and agitated to flat and unaffected. There is often inappropriate laughing or crying. He has come to believe that Hitler is trying to destroy the Polish race and that he is being tortured

affected than in neurosis. See supra note 27. Psychosis is characterized by gross impairment in reality testing. "[T]he individual incorrectly evaluates the accuracy of his perceptions and thoughts and makes incorrect inferences about external reality, even in the face of contrary evidence." Delusions or hallucinations, unaccompanied by insight into their pathological nature, indicate psychosis. DSM-III, supra note 22, at 367; see also 3 J. Schmidt, supra note 3, at P-306 to P-307.

49. See letter from Peter B.C.B. Ivory, M.D., to Governor Bob Graham (Dec. 20, 1983) (on file, Florida State University Law Review) (Ford’s disorder was severe but appeared contrived and recently learned.) [hereinafter cited as Ivory letter].

50. Letter from Harold Kaufman, M.D., to Richard H. Burr, Esq. (Dec. 14, 1983) (on file, Florida State University Law Review) (possibility that Ford could have lied or put on a performance was highly unlikely).

51. See Affidavit of George W. Barnard, M.D. (May 21, 1984) (on file, Florida State University Law Review) [hereinafter cited as Barnard affidavit]. Dr. Barnard intimated that the examination of Ford by the three psychiatrists appointed by Governor Graham amounted to nothing more than a perfunctory mission in a vast bureaucratic machine. Id. at 6-7.

52. Tanay letter, supra note 41, at 1-5.


54. Id. at 6.
because he knows of the world-wide plot against the Polish people.\textsuperscript{55}

In late 1984, following a series of appeals in which Alvord's lawyers had unsuccessfully petitioned both the Florida Supreme Court and federal district court on alternative grounds for post-conviction relief,\textsuperscript{56} Alvord's attorney requested that Governor Graham invoke the procedures of section 922.07, Florida Statutes, to examine Alvord's mental condition.\textsuperscript{57} On November 26, 1984, the panel of psychiatrists appointed by Governor Graham found Alvord incompetent for execution under Florida law,\textsuperscript{58} the first time that such a finding had been made regarding a Florida inmate since the 1940's.\textsuperscript{59} Alvord was moved from death row to a hospital, where presumably he will remain until his recovery.

The recent case of \textit{Groseclose ex rel. Harries v. Dutton}\textsuperscript{60} poignantly illustrates the physical and psychological stresses of death row confinement. Capital inmates wishing to waive post-conviction

\textsuperscript{55} \textit{Id.} at 6-7.

\textsuperscript{56} Like most death penalty cases in which an inmate furiously pursues post-conviction relief, Alvord's case was characterized by a myriad of appeals in both state and federal courts. See \textit{Alvord v. State}, 459 So. 2d 316 (Fla. 1984) (per curiam), for a complete procedural history of the case. As of this writing, the final action taken in this case was an executive order by Governor Bob Graham on Nov. 29, 1984, staying the execution of Gary Eldon Alvord. Fla. Exec. Order No. 84-222 (Nov. 29, 1984).

\textsuperscript{57} See letter from William Sheppard, Esq., to Governor Bob Graham (Nov. 16, 1984) (on file, \textit{Florida State University Law Review}).


\textsuperscript{59} Michael Radelet and George Barnard report that:

\begin{quote}
We were able to identify only one case in which a death row inmate in Florida was found incompetent to be executed. Guy H. Eoff killed his wife and attempted suicide on April 24, 1946, in Belle Glade. He was sentenced to death on July 31, 1946. Psychiatric testimony placed his mentality as that of a child between 10 years old to early adolescence, but the psychiatrist found him sane and competent to stand trial. A few hours after being condemned, Eoff again attempted suicide. He was then found incompetent for execution, and confined to a mental hospital until November, 1965. The hospital staff then determined that his competency had been restored, and he was returned to the prison for execution. On September 14, 1965 - after nearly 20 years of living under a death sentence - the governor commuted the sentence to life imprisonment.
\end{quote}


In 1979, Governor Graham ordered a psychiatric examination of Alvord to determine whether he was competent to be executed. On advice of counsel, Alvord invoked his fifth amendment privilege against self-incrimination and declined to be examined. \textit{Id.}

\textsuperscript{60} 594 F. Supp. 949 (M.D. Tenn. 1984).
remedies must do so voluntarily and competently, and it was alleged by third parties that because of inhumane prison conditions Ronald Harries was incompetent voluntarily to waive these remedies. Harries was diagnosed by his psychiatrist as suffering from manic-depressive illness, an emotional disorder characterized by extreme mood shifts ranging from euphoria to depression. According to this diagnosis, when certain prison activities were curtailed, Harries entered a depressive stage lasting about a year and a half. During his depressive stage, Harries wanted to waive his post-conviction remedies. Another psychiatrist examining Harries found that he suffered from sensory deprivation, likely resulting from deplorable living conditions including "limited, if not cramped, living space within the cell, poor ventilation resulting in extremely warm temperatures, no direct sunlight, little direct access to other people and limited opportunities for proper exercise." The state's psychiatrists found that while Harries suffered from sensory deprivation, it did not affect his competency to make a valid waiver. Harries testified that he decided not to pursue any available post-conviction remedies because it would mean he would have to live on death row "for six to ten years under deplorable conditions." Finding the conclusions of Harries' psychiatrist more credible and convincing than the testimony of the state's psychiatrists, the federal district court held that the conditions of death row confinement caused Harries involuntarily to waive his post-conviction remedies. The court was convinced by "assertions of death-row inmates like Ronald Harries, that they would rather be executed than endure such circumstances."

The Harries court perceptively recognized the need to evaluate inmates upon admission to death row and periodically thereafter. Such examinations can aid in determining whether subsequent deterioration results from longstanding, chronic mental illness or

61. See Gilmore v. Utah, 429 U.S. 1012, 1013 (1976); see also infra text accompanying notes 174-77.
63. Id.
64. Id. at 956.
65. Id. at 955.
66. Id. at 956.
67. Id. at 955.
68. Id. at 961. The court also found that, even if Harries had waived his remedies voluntarily, the conditions on death row violated the inmate's "Eighth Amendment right to die with dignity." Id. at 962.
from acute reactions to the inmate’s situation. The question whether the illness is acute or chronic has social, legal, and psychiatric ramifications regarding the problem of competency for execution. If most of the incompetent death row inmates were found to be “situationally psychotic,” rather than having a severe mental illness as might be defined in the American Psychiatric Association’s “Diagnostic and Statistical Manual of Mental Disorders” (referred to as DSM-III), then wide-ranging correctional reforms should be demanded. Additionally, if confinement on death row were found to induce acute psychosis, then the medical profession might more willingly gravitate toward a Kubler-Ross approach and provide a more humane death row environment through counseling designed for a population facing death by execution.

If, however, the condemned psychotic population were found to be suffering, in the main, from chronic mental illness, the contours of the problem would shift. Holding aside the issue of different standards of competency for different stages of legal proceedings, inmates who are insane when they arrive on death row provide living indictments of the mental health and legal systems’ failure to deal adequately with the criminally insane. Alvord is a prime example of this failure. His medical history catalogs numerous escapes from mental hospitals and institutions for the criminally insane and, finally, a leave of absence granted despite progress notes consistently indicating his propensity for violence. In December 1972, he failed to return from that leave and, six months later, he was wanted in Florida for the strangulation murders of three women—the crime for which he was ultimately sentenced to death. As Dr. Alan Stone has noted, psychiatry should not be the

69. An acute illness has a sudden onset and a short but severe course. 1 J. Schmidt, supra note 20, at A-73. Illness which is chronic follows a prolonged course although it may be less severe. Id. at C-165.

70. By situational psychosis the author means an acute mental disorder which is induced by specific environments, such as the adverse conditions accompanying death row confinement. See supra note 48 for a general definition of psychosis.

71. Elisabeth Kubler-Ross found that patients dealing with their impending deaths often pass through five stages: denial and isolation, anger, bargaining, depression, and acceptance. See E. Kubler-Ross, On Death and Dying 34-121 (1967). Mental health professionals applying her approach to a death row population would seek to help the inmates through these psychological stages in order to achieve psychological acceptance of their impending executions.

72. See National Medical Ass’n Section on Psychiatry and Behavioral Sciences, Position Statement on the Role of the Psychiatrist in Evaluating and Treating “Death Row” Inmates 3-4 (undated) [hereinafter cited as National Medical Ass’n Position Statement].

73. See Tanay letter, supra note 41, at 1-7.

74. Id. at 7. Alvord was convicted of three counts of first-degree murder and sentenced
scapegoat for the failures of the criminal justice system and the unwillingness of society to take moral responsibility for crime. Reform of the mental health and criminal justice systems is needed if the psychotic capital population is comprised mainly of the chronically mentally ill.

In the final analysis, even with empirical data, distinctions between inmates suffering from situational psychosis triggered by death row confinement and those with longstanding mental illness may be of limited use in competency evaluations. Although Alvord lived in mental institutions for most of his life, he allegedly was usually rational until the stress of death row and his impending execution catapulted him into psychosis. If a portion of the death row population is marginally mentally ill to start with, then it is reasonable to expect that a number of inmates will deteriorate when faced with the deplorable conditions on death row and their imminent death. This deterioration, although expected, tends to collapse the distinction between chronic and acute mental illness, making analysis problematic at best.

II. The Rationales for the Competency Rule, the Purposes of the Death Penalty, and the Standard of Competency for Execution

The rule against executing the incompetent cannot be separated from the justifications for capital punishment because the justifications should suggest why the incompetent are exempt. Unless society reaches an agreement on the justifications for capital punishment, there will be no consensus on the reasons for exempting the incompetent.

The rationale for exempting the incompetent from execution should, in turn, inform the standard of competency for execution. Because competency for execution is a moral as well as medical and legal concept, the standard of competency for any legally rele-

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76. See supra text accompanying notes 52-54.
77. See, e.g., M. Radelet & G. Barnard, supra note 59, at 5:

Confusion surrounding the application of this law is in part attributable to a lack of agreement surrounding the purpose of capital punishment. That is, the answer to the question of why some prisoners should not be executed is dependent upon society's answer to the question of why others should be executed and what procedures are necessary to insure the legitimacy of the capital punishment process.

Id.
vant action must depend upon the basic policy or principle underlying the requirement that an individual be competent to perform or be exempted from that particular activity.

Similarly, the rationale for the rule should determine the procedures for deciding whether a capital inmate is competent for execution. Before the level of due process to be accorded an incompetent capital inmate can be determined, it is necessary to know the purpose and significance of the exemption.78

A. Rationales for the Competency Rule

Although a fair amount has been written about competency for execution, no new rationales for the rule have been suggested beyond the traditional common law explanations cataloged by Justice Frankfurter in Solesbee v. Balkcom.79 The sheer number of rationales may indicate that the rule was designed to address social concerns which are now obsolete.80 However, an exploration of the purported rationales reveals that the confusion surrounding the rule results not from the obsolescence of its original purpose but rather from persisting moral dilemmas surrounding capital punishment itself.

As a general matter, the rule requiring competency for execution is part of a pattern in the criminal law requiring competency to commit a crime,81 stand trial,82 plead,83 be sentenced,84 and to waive post-sentencing review in a capital case.85 Sparing a defendant from an unfair trial or plea, however, and sparing one who has exhausted his remedies at law are fundamentally different. Mental illness arising after trial, plea, or sentencing does not raise the question of guilt or the propriety of punishment.

One rationale for the rule, proffered by Blackstone and Hale, is

78. Cf. Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381, 383 (1962) ("[O]nly when [the exemption's] importance is correctly gauged can we decide what degree of procedural thoroughness should accompany application of the rule.").
80. See Hazard & Louisell, supra note 78, at 383.
84. Saddler v. United States, 531 F.2d 83, 86 (2d Cir. 1976) (per curiam).
that a competent prisoner might have been able to make allegations which would stay judgment or execution.\textsuperscript{86} It is unlikely, however, that a defendant who recently became incompetent might suddenly remember something that he would not have recalled earlier in the proceedings.\textsuperscript{87} This rationale, moreover, is overbroad because perfectly sane inmates, given enough time, might be able to develop new defenses or devise better appeals.\textsuperscript{88} Rarely may a defendant reopen his trial.\textsuperscript{89}

A second rationale, suggested by Blackstone and others, is that madness is punishment in itself.\textsuperscript{90} This rationale fails by its own terms because the inmate's recovery subjects him to execution.\textsuperscript{91} That critique, however, is more appropriately an explanation of why the rationale is untenable today as opposed to at common law, for then many such inmates, probably incurable anyway, had their sentences commuted to life.\textsuperscript{92} Nonetheless, the rationale can be challenged on other grounds because it fails to account for temporary psychotic deterioration which can be expeditiously cured with neuroleptic drugs.

A third rationale, essentially theological, is that an incompetent person is unfit to make peace with God: "[I]t is inconsistent with Religion, as being against Christian Charity to send a great Offender quick, as it is still'd, into another World, when he is not of a capacity to fit himself for it."\textsuperscript{93} This reasoning survives in judicial opinions. For example, Justice Frankfurter, responding to the argument that increased due process would give rise to endless litigation, remarked that it would be far better for the state to accommodate possibly unmeritorious claims than to "have on its conscience a single execution that would be barbaric because the victim was in fact, though he had no opportunity to show it, mentally unfit to meet his destiny."\textsuperscript{94} Similarly, in \textit{Musselwhite v.}

\textsuperscript{86} 1 M. Hale, \textit{Pleas of the Crown} 34-35 (1736); see also 4 W. Blackstone, \textit{Commentaries} *395-96.
\textsuperscript{87} See, e.g., Hazard & Louisell, \textit{supra} note 78, at 383-84.
\textsuperscript{88} See West, \textit{supra} note 16, at 695.
\textsuperscript{89} Weihofen, A Question of Justice: Trial or Execution of an Insane Defendant, 37 A.B.A. J. 651, 651-52 (1951).
\textsuperscript{90} See, e.g., 4 W. Blackstone, \textit{supra} note 86, at *395-96. The often cited Latin equivalent is furiosus solo furore punitur.
\textsuperscript{91} Hazard & Louisell, \textit{supra} note 78, at 384.
\textsuperscript{94} Caritativo v. California, 357 U.S. 549, 559 (1958) (Frankfurter, J., dissenting).
The Supreme Court of Mississippi stated that it is a "part of due process that there be available to [a capital inmate] as a rational person avenues toward . . . spiritual consolation." This theological rationale is supported by the writings of Saint Thomas Aquinas but rebutted by Archbishop William Temple, who dismissed the view that "eternal destiny depends in any degree on the frame of mind you were in at the particular moment [of death] rather than on the general tenor of the life." These divergent views illustrate the difficulty of advancing a theological justification for the competency rule in a pluralistic society. Moreover, if the rationale itself is to inform the standard of competency, then an inmate's realization of his moral guilt arguably should be a component of the competency test. The first amendment problems raised by such a standard cannot be gainsaid. From the psychiatric perspective, a sociopath would never realize his moral guilt and could never be executed, though sociopathy probably is not a category of mental illness which should exempt an inmate from execution. More to the point, why should psychiatry be involved in assessing moral guilt at all?

A fourth rationale for the rule is that executing an insane person has no value of general deterrence as distinguished from specific deterrence or incapacitation, which would surely be accomplished by executing even the insane. The general deterrence debate is as heated in this context as in the context of capital punishment itself. Executing an incompetent, Coke wrote, cannot serve as an example to others. In an equally ancient rebuttal, Hawles remarked that "the End of Punishment is the striking a Terror into

95. 60 So. 2d 807 (Miss. 1952).
96. Id. at 811.
97. Hazard & Louisell, supra note 78, at 387 & n.21 (analyzing Aquinas, Treatise on Angels, in Summa Theologica; Aquinas, Summa Contra Gentiles, bk. 3, ch. 146).
98. Id. at 388 (quoting Gowers, A Life for a Life? (1956)).
100. Weihofen, supra note 89, at 652.
102. Sociopathy is a common term for an antisocial personality disorder, which includes individuals who are always in trouble, do not learn from experience, lack responsibility and judgment, show emotional immaturity, and continuously rationalize their behavior. See 3 J. Schmidt, supra note 3, at S-108. Adult sociopaths are characterized by criminality, aggressive sexual behavior, substance abuse, and the failure to sustain work or family responsibilities. DSM-III, supra note 22, at 317-21.
103. See infra note 128.
104. E. Coke, Third Institute 6 (1680).
others, but the execution of a Madman had not that effect; which is not true, for the Terror to the living is equal, whether the Person be mad or in his senses."106 More than two centuries later, Weihofen concurred when he wrote, "[I]f the purpose [of exempting the incompetent from execution] is to serve as an example to others, the demonstration that not even supervening insanity will halt the execution of one who commits a capital crime will . . . make the in terrorem effect so much the stronger."106 A more contemporary explanation is based upon general criminal law rationales. A person about to break the law cannot foresee that he will become insane after sentencing; rather, he relies on not being apprehended or does not care if he is apprehended.107 Thus, exempting an inmate who becomes insane after sentencing should not substantially dilute the deterrent effect of the death penalty, and life would not be taken unnecessarily.108 However, if the only rationale for not executing the mentally incompetent is to prevent the unnecessary taking of life, this reasoning must be flawed because it assumes that the death penalty has deterrent value, a risky proposition at best.109

A fifth explanation of the rule has been based on humanitarian grounds, that the execution of an insane person is "a miserable spectacle, both against Law, and of extreme inhumanity and cruelty . . . ."110 This rationale has been labeled as "nothing less than an oblique attack on the death penalty itself."111 As Weihofen notes, the quintessential issue in executing the incompetent 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."112 Justice Traynor put this formulation most bluntly:

Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for

105. Solesbee, 339 U.S. at 17-18 (Frankfurter, J. dissenting) (quoting J. Hawles, Remarks on the Tryal of Charles Bateman, in 3 STATE TRYALS 651, 652-53 (1719)).
106. Weihofen, supra note 89, at 652.
108. Id.
109. Id.
110. Solomon, Capital Punishment as Suicide and as Murder, 45 AM. J. ORTHOPSYCHIATRY 701 (1975) (arguing that capital punishment is not a deterrent but may contribute to the incidence of murder); see, e.g., West, supra note 16, at 692.
111. E. COKE, supra note 104, at 6.
112. Hazard & Louisell, supra note 78, at 384.
sane men, a curious reasoning that would free a man from capital
punishment only if he is not in full possession of his senses?\textsuperscript{113}

The humanitarian rationale, however, could have force if the
threshold of competency for execution were low, akin to a "wild
beast" standard.\textsuperscript{114} Few would contest that it would be "inverted
humanitarianism" to compel an inmate to relinquish a well-organized
defense mechanism by which he acknowledged his impending
execution but fit it into a scenario he could live with.\textsuperscript{116} Contrast
that situation, however, with a patently psychotic or mentally re-
tarded individual with little awareness of his predicament. This
scenario is analogous to the situation in \textit{Superintendent of
Belchertown State School v. Saikewicz},\textsuperscript{118} in which the Supreme
Judicial Court of Massachusetts held that the probate court and
guardian ad litem could withhold radical chemotherapy from a ter-
minally ill, profoundly retarded sixty-seven-year-old man. In mak-
ing this determination, the court reasoned in part that:

'If he is treated with toxic drugs he will be involuntarily im-
mersed in a state of painful suffering, the reason for which he will
never understand. Patients who request treatment know the risks
involved and can appreciate the painful side-effects when they ar-
rive. They know the reason for the pain and their hope makes it
tolerable.'\textsuperscript{117}

\ldots

\ldots Saikewicz would have no comprehension of the reasons for
the severe disruption of his formerly secure and stable environ-
ment occasioned by the chemotherapy. He therefore would expe-
rience fear without the understanding from which other patients
draw strength.\textsuperscript{118}

A rejection of the humanitarian rationale assumes that the exe-

\textsuperscript{113} Phyle v. Duffy, 208 P.2d 668, 676-77 (Cal. 1949) (en banc) (Traynor, J., concurring); \textit{see also} Bingham v. State, 169 P.2d 311, 315 (Okla. Crim. App. 1946) ("Any investigation of
the mental condition of the prisoner is for the sole purpose of determining whether it would
be consistent with public decency and propriety to take away the life of a person who was
not sane enough to realize what was being done.").

\textsuperscript{114} \textit{See infra} text accompanying notes 174-75.

\textsuperscript{115} The prevalence of such defense mechanisms on death row, religious or otherwise,
has been well documented. \textit{See}, \textit{e.g.}, Bluestone & McGahee, \textit{supra} note 15, at 395-96; Gallemore & Panton, \textit{supra} note 10, at 170-71; Hussain & Tozman, \textit{supra} note 16, at 187; \textit{see also}
\textit{supra} notes 15-58 and accompanying text and \textit{infra} text accompanying notes 162-63.

\textsuperscript{116} 370 N.E.2d 417 (Mass. 1977).

\textsuperscript{117} \textit{Id.} at 430 (quoting the guardian ad litem).

\textsuperscript{118} \textit{Id.} at 432.
cution will be carried out eventually. Thus, the rationale has greater force where a death sentence is commuted to a life sentence. Likewise, the humanitarian rationale is sufficient for anti-death penalty advocates who would favor the elimination of a death sentence for any reason.\textsuperscript{119}

The sixth explanation for the rule is based on retribution. Retribution may be defined simply as "the application of the pains of punishment to an offender who is morally guilty."\textsuperscript{120} The retributive theory of competency for execution is predicated upon an assumption that every wrong act must be avenged by a punitive act of equal quality. Presumably, killing an insane person does not satisfy the societal interest in reprisal for the previous wrong as well as does killing a sane person. Therefore, imposing the death penalty on incompetent prisoners exacts a punishment less valuable than the crime itself.\textsuperscript{121} In Radelet and Barnard's view, only if the primary goal of capital punishment is retribution does the exemption of the incompetent make sense:

Because of the immense suffering caused by the prisoner's criminal actions, he is to suffer in anticipation of his death, and this goal cannot be achieved if the prisoner does not appreciate his impending fate because of mental illness. The mental illness prevents the inmate from suffering in anticipation of death more than he already does in living with the illness.\textsuperscript{122}

The force of the retributive rationale, and a suggestion of how it relates to the standard of competency for execution, emerged in \textit{Musselwhite v. State}.\textsuperscript{123}

\textit{[T]here is agreement among the examining physicians that at the time of the hearing the petitioner had lost awareness of his precarious situation. Amid the darkened mists of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if he were taken to the electric chair, he would not quail or take account of its significance.}\textsuperscript{124}

The retributive theory of punishment underlying this reasoning

\begin{itemize}
  \item \textsuperscript{119} M. Radelet & G. Barnard, \textit{supra} note 59, at 8.
  \item \textsuperscript{120} H.L.A. Hart, \textit{Punishment and Responsibility} 9 (1968).
  \item \textsuperscript{121} Hazard & Louisell, \textit{supra} note 78, at 387.
  \item \textsuperscript{122} M. Radelet & G. Barnard, \textit{supra} note 59, at 5.
  \item \textsuperscript{123} 60 So. 2d 807 (Miss. 1952).
  \item \textsuperscript{124} \textit{Musselwhite}, 60 So. 2d at 809.
\end{itemize}
was partially responsible for the court’s decision to stay the execution of a convicted murderer on the ground of insanity.

The element of the retributive theory which requires the inmate to be competent so that society can satisfy its subjective desire for justice has been explained from different perspectives. Put generally, if retribution is “an expression of society’s moral outrage,”\(^{125}\) then this societal goal “may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance.”\(^{126}\) This principle has been explained in psychoanalytic terms:

[T]his theory justifies the death penalty as a vicarious punishment for crimes committed vicariously; punishment gives the law-abiding a release. For the psychological explanation to have basis, however, the public must be able to identify with the prisoner, and this they cannot do if he is insane. But, the rationale based on the retributive theory, in its several variations, lasts only so long as the prisoner remains insane. Once he recovers his sanity, the reason for the rule disappears.\(^{127}\)

One commentator, Ehrenzweig, agrees that one of the purposes of retribution is to counteract society’s subconscious impulses for violence because failure to punish one who violates the code of conduct threatens our own repressive, superego-based mechanisms.\(^{128}\) He would not agree, however, that society needs to identify with the person to be punished in order for the penalty to serve as a vicarious punishment for crimes committed vicariously. Rather, he asserts that the various insanity defenses will succeed or fail depending on whether society consciously desires to copy the crime.\(^{129}\) Ehrenzweig argues essentially that the questions raised by the different insanity defenses cannot be answered unless we know why we punish.\(^{130}\)

If the rule against executing the incompetent is designed to satisfy society’s demand for retribution, then the standard of competency for execution should be low: retribution is served if the in-

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126. Note, Incompetency to Stand Trial, 81 HARV. L. REV. 454, 459 (1967); see also Ford, 752 F.2d at 531 (Clark, J., dissenting).
127. Hazard & Louisell, supra note 78, at 387 (footnote omitted).
129. Id. at 437-38.
130. Id. at 433-39.
mate recognizes the fact of his crime and the reasons for his punishment. The ultimate arbiter of competency under a retributory rationale should be a jury, which is uniquely able to implement such a standard of competency and which, comporting with society's demand for retribution, must confront the inmate in an open forum and assess his fitness for execution.

A retributory explanation for the rule is the only persuasive traditional rationale. Equally persuasive, however, is an alternative theory which may be labeled the tacit clemency rationale. This theory essentially holds that the number of death penalties imposed should be decreased in various ways in order to abate the net impact of the death penalty. Underlying this idea is a humanitarian notion that society accepts the death penalty but conceals a certain ambivalence about its ultimate justice or humanity. Society expresses this ambivalence by covertly seeking to abate the net impact of the death penalty. One method of reducing the number of executions is to erect barriers such as the requirement of competency. If the purpose of competency is to grant tacit clemency, then the standard of competency for execution should be complex, allowing psychiatric input and with it the perception of scientific precision. The procedures for assessing competency should be more invisible than those in an open forum, comporting with the covert nature of the rationale.

The common law rationale that a condemned person must be prepared to meet his Maker incorporates similar humanitarian notions which comport with this postulate of ambivalent societal guilt. It can be argued that society wants a clean conscience, which might not be the case if it executes an incompetent person. An example of this phenomenon occurred in Ceylon in 1976 when a capital inmate lapsed into a drug-induced coma after attempting suicide. The government proceeded with the hanging, producing public furor. Although such outrage is often explained as reflecting society's "lack of retributory satisfaction," it is equally explainable as disclosing societal guilt at having a death penalty in the first place. It is easier, perhaps, to justify capital punishment when it is imposed on a purportedly competent adult than when it is inflicted on the mentally or physically helpless.

The often stated rationale that a condemned inmate must be able to assist his attorney is similarly explainable under the tacit

132. See, e.g., Ehrenzweig, supra note 128, at 439.
clemency theory as a fairness idea, which has been labeled the "image of fair play" rather than fair play itself.

[T]he state would at least want to go through the ritual of evaluating mentally ill prisoners for competence so that an image is presented that the prisoner had a fair chance to contest the impending execution. Public support for the death penalty might diminish if citizens believed the state's powers were being launched against prisoners who could not offer a sane defense.\textsuperscript{133}

Fair play and the image of fair play, however, are not necessarily inconsistent if both are seen as evincing society's ambivalence about the death penalty. Executing only the competent enables society to minimize the inherent barbarity of capital punishment; paradoxically, society thereby grafts dignity onto the death penalty. When inmates proceed to the electric chair with calm resignation, society must breathe a collective sigh of relief. A culture which executes rational adults who have played all their cards can do so with much more confidence than one which blithely leads the comatose or mentally impaired to their deaths.

Finally, although the retributory explanation and the tacit clemency theory are not necessarily mutually exclusive, absent societal agreement about the purposes of the death penalty and the reasons the incompetent are exempt, there is no \textit{a priori} reason why one model is more appropriate than the other. Exposing these unspoken rationales might force society to confront its moral intuitions about the purposes of punishment and the ultimate justice of the death penalty in the modern world.

\textbf{B. The Legal Principle of Competency}

The fundamental notion underlying the principle of competency is personhood. The question, in any context, is whether an individual should be recognized as a person with a legally, socially, or medically cognizable voice. It is not surprising, therefore, that a capital inmate must be competent for execution, however anomalous the concept may seem. This requirement is eminently consistent with the retributory rationale for the death penalty. If those who break the social contract deserve punishment only if they are responsible, society recognizes the malfeasant as an accountable agent meriting criminal sanction. The punishment represents soci-

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\textsuperscript{133} M. Radelet \& G. Barnard, \textit{supra} note 59, at 7.
\end{flushright}
ety's recognition of the act or crime and the responsibility, or personhood, of the lawbreaker. Hegel articulated this notion when he wrote that "punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being." Freedman distinguishes medical from legal competency. The former, he asserts, is a functional concept measured by one's ability to participate in relationships and productive activity. Legal competency, in contrast, is situation specific. One may be competent to contract with a house painter but not to contract for futures on the commodities exchange. The difference is that a person is able to understand the contingencies and variables involved in one transaction but not in the other. Additionally, Freedman distinguishes the conceptual and policy levels involved in competency determinations. While a policy may be addressed through political and legislative accommodation, a concept is less malleable because it represents a moral choice or value judgment of what is important about a particular activity. In the death penalty context, competency for execution depends on why society desires execution in the first place.

According to Freedman, competency is both empirical and moral. Some individuals are clearly incompetent, but many more are "marginally competent," that is, competent to make some decisions or to take responsibility for some actions, but not others. Because a legal standard of competency is situation specific, it tends to collapse into a policy judgment rather than an empirical or functional competency test. For example, in the areas of civil commitment and the right to refuse treatment, this policy judgment often assumes a paternalistic cast. Although in the death penalty context this kind of policy judgment would be something of an inverted paternalism, it does comport with some of the traditional rationales for the rule, such as the notion that no one should meet his Maker while incompetent, and that one should be able to consult with his attorney and assist in last-minute efforts for

134. G.W.F. Hegel, The Philosophy of Right 107, reprinted in Philosophical Perspectives on Punishment (G. Ezorlczky ed. 1972); see also Moore, Legal Conceptions of Mental Illness, in Mental Illness: Law and Public Policy 25 (B. Brody & H. Englehardt eds. 1980) ("By attaching legal consequences to conduct, the law necessarily regards individuals as responsible agents.").


136. Id. at 58-59.

137. Id. at 59.

138. See, e.g., A. Stone, supra note 75, at 3-36.
clemency.

Competency, therefore, cannot be determined without reference to the activity for which it is required, and a fortiori, to the moral values underlying the requirement of competency for a particular activity. By the same token, because competency is a legal standard, a practical, empirical component is necessary for even-handed implementation. Thus, the rationale for the rule that an individual must be competent for execution requires an understanding or recognition of why the incompetent are exempt from execution. This rationale, in turn, must generate a legal standard of competency which can be implemented with objectivity and reviewability; otherwise, a person's subjective opinion about the death penalty will influence the standard of competency required for execution. The rationale and the standard of competency, in turn, must dictate the procedures by which competency is evaluated. Briefly, if the prohibition against executing the incompetent is rooted, unconsciously or otherwise, in society's distaste for the death penalty, then procedures to ensure the effectiveness of the rule will be more stringent than if the rationale is that retribution is not achieved by executing an insane person.

C. Standards of Competency for Execution

In 1950, Justice Frankfurter opined in Solesbee v. Balkcom that the legal problems raised by insanity arising in the death cell "happily do not involve explorations of the pathological processes which give rise to the conflict between so-called legal and medical insanity." Unfortunately, this does not seem to be the case today.

The test of insanity for execution at common law has been disputed by commentators. Hazard and Louisell state that the test appears to have been "whether the defendant is aware of the fact that he has been convicted and that he is to be executed." Others have argued that the standard could only have been the kind of insanity recognized when the rule was originally developed,
that is, a "kind of obvious frenzy or imbecility" which may be labeled a "wild beast" standard.

The standards of competency for execution in the states today are varied and problematic in their possible interpretations. In twenty-two states, the inmate simply must be "insane" or some equivalent formulation. Possibly, in those states the legal definition of insanity for other purposes would be extended to the execution context. In one state, the test is whether the inmate understands the nature and effect of the death penalty and why it is to be imposed upon him. Two states require that the inmate also be able to consult with his attorney. Four states employ a broad standard that the inmate must have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for initially, the purpose of his punishment, and his impending fate; to know any facts which might make his punishment unjust or illegal; and to be able to convey that information to his


145. For a national survey of each state's standard of competency for execution, see Appendix.


149. See Georgia: 1976 Op. Att'y Gen. Ga. 223, 225 (available on LEXIS, States library, GAAG file); North Carolina: N.C. Gen. Stat. § 15A-1001 (a) (1983); see also Missouri: Mo. Ann. Stat. § 552.060 (1) (Vernon Supp. 1986) ("[a]s a result of mental disease or defect, he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.").
attorney. Another broad test used in one state is that an inmate is incompetent for execution if as a result of a mental disease or defect either he is unable to comprehend the nature of the proceedings against him or the punishment prescribed, or he is unable to assist his attorney in his defense. One particularly obtuse standard is whether an inmate’s mental illness has “so lessened his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care.” Lastly, one state may retain what amounts to a “wild beast” standard, that is, “a state of general insanity, the mental powers being wholly obliterated."

Holding aside the problem of who implements the standard of competency and what the standard would be in light of the rule’s rationale, the initial difficulty is that the standards themselves may be essentially incomprehensible. Radelet and Barnard’s critique of the Florida standard presents a comprehensive discussion of this problem. For example, it is unclear what is meant by “understand[ing] the nature and effect of the death penalty and why it is to be imposed.” Differentiating cognitive from affective understanding and appreciation is difficult in all psychiatric settings; in the context of the death penalty, it is particularly problematic. As an illustration, the psychiatrist examining Arthur Goode found that, while he had an intellectual understanding of his impending execution, he lacked an emotional appreciation of it. Whether or


152. See Commonwealth v. Moon, 117 A.2d 96, 102 (Pa. 1955) (emphasis in original). Note the similarity of this test in particular to a common civil commitment criterion that a person “likely to cause harm to himself or to suffer substantial mental or physical deterioration” may, in certain cases, be civilly committed. See Stromberg & Stone, A Model State Law on Civil Commitment of the Mentally Ill, 20 Harv. J. on Legis. 275, 330 (1983).

153. See Bingham, 169 P.2d at 314 (dictum).

154. See M. Radelet & G. Barnard, supra note 59, at 10-16.

155. The meaning of “understanding” in the context of informed consent to medical care “may be so complex as to defy definition or description.” See Meisel & Roth, Toward an Informed Discussion of Informed Consent: A Review and Critique of the Empirical Studies, 25 Ariz. L. Rev. 265, 286 (1983); see also id. at 286-309.

156. M. Radelet & G. Barnard, supra note 59, at 10-11. Goode died in Florida’s electric chair in 1984 for raping, torturing, and murdering a 10-year-old boy. The difference between cognitive and affective understanding can be demonstrated by Goode’s testimony about his ghastly deed:

I have no remorse whatsoever. I’m extremely proud of knowing that I, Arthur Frederick Goode, was the last person to see Jason alive or any of the other victims
not Goode was competent for execution, the cognitive and affective poles of the "understanding" criterion raise a provocative ethical question. Isolation of affect is an effective defense mechanism. Is it not more inhumane to deny an inmate this comforting defense than to insist that he quail and tremble at the prospect of his impending death? Some would argue that this quailing and trembling is precisely what pushes a person to come to terms with his life and to make peace with God. Thus, absent any societal consensus as to the permissible range of answers, an examining psychiatrist, when asked to determine whether an inmate understands the nature of the death penalty, is faced with a troublesome decision. The "nature and effect of the death penalty" criterion is subject to as many possible explanations as the ambiguous "understanding" criterion. For example, some people find the death penalty unjust and immoral. Others believe that capital inmates are executed because they are societal scapegoats. However, specifying a range of permissible explanations for the nature and effect of the death penalty would clarify the Florida statute. What constitutes an acceptable explanation may be illuminated by referring to an operative theory of competency. If the unifying principle of competency is the notion of personhood, any explanation should be acceptable so long as "recognizable reasons" are given. Recognizable reasons are those which consist of acceptable premises and conclusions related to those premises even if the evaluator does not necessarily agree with them. As Freedman notes, such an approach simultaneously preserves both individual autonomy and ensures that the inmate is provided the medical care which he desperately needs.

Freedman's approach suggests a solution to some of the problems raised by Radelet and Barnard. If an inmate's understanding of the death penalty is so inaccurate that he believes it will never be inflicted upon him, then his proffered reasons

which I have murdered. Also, that I was the last person who heard the sweet, sexy voice. I was also the last person who had kissed his precious warm lips before I, Arthur Goode, had murdered him. These are some of the things I'm proud of. Jason was so cute and sexy-looking that I raped him while I beat him with my belt. . . . I would have the nerve to murder a little boy right here in this courtroom, in front of this jury[,] just to prove that I would do such a thing, only if it was authorized by the Court, which I know it is not.

See Sherrill, supra note 42, at 553 (quoting trial transcript).

157. See supra note 22 and accompanying text.

158. M. Radelet & G. Barnard, supra note 59, at 11-12; see also supra note 38 and accompanying text.

159. Freedman, supra note 135, at 64.

would not be recognizable. An example of this kind of thinking was displayed by Ford, who, before he became uncommunicative, believed he was on death row only because he chose to be there, and that he would not be executed because the case of "Ford v. State" had outlawed capital punishment.\textsuperscript{161}

Other capital inmates have been examined by Bluestone and McGahee. One such inmate developed a highly effective defense mechanism by which his criminality "became not only justifiable, but even respectable. He rationalized his crimes by emphasizing the hypocrisy and perfidy of society on the one hand and by comparing himself with policemen and soldiers and others who live honorably 'by the gun' on the other."\textsuperscript{162} In fact, this defense mechanism proved so successful that when the inmate's execution appeared imminent, he declined an opportunity to seek executive clemency, choosing instead to continue his martyr's role. Another prisoner developed "a poorly elaborated paranoid system" in which he supposedly was betrayed and framed by his girlfriend and a co-defendant. Yet, "despite the looseness of his persecutory thinking, it was accompanied by a clear-cut elevation in his mood and reduction of anxiety."\textsuperscript{163}

The defense mechanisms reported by Bluestone and McGahee, however delusional or denial-based, provided the inmates with recognizable reasons for their executions. Were the inmate required to understand the nature and effect of the death penalty and why it was to be imposed, despite their delusional thinking, these inmates would be competent for execution. To hold them to a more stringent standard would force them to recognize their guilt and moral turpitude, a different test which would create evaluation problems. For example, inmates who are sociopaths are unable to feel remorse; therefore, they could never pass such a competency test.

This discussion illustrates the importance of the nexus between the rationale for the rule exempting the incompetent from execution and the standard of competency. To attempt to formulate a standard of competency for execution is to stumble in the dark unless one first understands why the incompetent are exempt. It is impossible to know why the incompetent are exempt unless one knows why capital punishment is imposed in the first place.

Commentators have proposed different tests to correspond with

\textsuperscript{161} See Brief for Petitioner-Appellant at 4, \textit{Ford}, 752 F.2d 526.
\textsuperscript{162} Bluestone \& McGahee, \textit{supra} note 15, at 394-95.
\textsuperscript{163} Id. at 395.
the different stated rationales for the rule. For example, Weihofen has written:

If the reason for refusing to execute an insane convict is that "he who sins must suffer," then ability to appreciate his impending fate is important, to make sure that he will suffer the torture of realizing what is about to happen to him. But if the purpose of capital punishment is not vengeance, but only to rid society of an undesirable member, insanity would seem to be irrelevant for it does not make him any the less undesirable. . . . [So too] if the purpose of the rule is to enable the condemned man to prepare himself for the next world, a realization of his moral guilt should be added to the test. If the reasoning is that he should have an opportunity to suggest matters in extenuation, make arguments for executive clemency or offer other reasons why the sentence should not be carried out, then the test should be ability to recollect and to present any reasons.164

Although Weihofen was unable to form an opinion about the rule's rationale, others have done so and have formulated a standard of competency suggested by that rationale. Ford's attorneys argued to the United States Court of Appeals for the Eleventh Circuit that a consult-with-counsel element should be added to Florida's requirement that the inmate understand the nature and effect of the death penalty and why it is to be imposed upon him. They asserted that a consult-with-counsel element is necessary because "executing the presently incompetent violates the eighth amendment in part because it takes advantage of the prisoner's mental disorder to foreclose his final right to challenge his sentence."165 Thus, Ford's counsel favor a test identical to the competency-to-stand-trial standard—that is, an examination of whether the inmate has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him."166

While the consult-with-counsel component may appear to be the ultimate legalistic argument, the tests for competency at other criminal proceedings are similarly cognitively and legally grounded. For example, the test for competency to plead is whether the ac-

165. See Brief for Petitioner-Appellant at 4, Ford, 752 F.2d 526.
cused understands the nature of the plea. The test for sanity prior to sentencing is whether the defendant can understand the nature of the proceedings or exercise his right to allocution. Both of these stages involve punishment, but nowhere is it required that the defendant have an affectively based appreciation of his crime or that he demonstrate his understanding of why he is to be punished. He must merely understand the nature of the proceedings against him. These tests contain an implicit requirement that the inmate understand, at least on an intellectual level, that he must pay for his crime. This idea has substantial philosophical support. Hobbes, a social contractualist, insisted that those who break the rules must pay, and a person who is insane at the time of punishment is not being effectively punished or paying his social debt. Expanding upon Hobbes’ theory and other philosophical underpinnings of punishment, it follows that executing the incompetent “would water down the tie that retributionists feel between responsibility and desert. A widespread acceptance of finding the insane guilty, and of punishing the insane could only have the long-range effect [of] eroding the claim that the responsible are responsible and owe a debt.” Once again, the retributory rationale seems to be a major basis for the rule.

Feltham argues that because the insanity which triggers the execution competency rule has to be supervening, at least at common law, competency tests for prior procedural stages are inapposite: “The tests for the common law as to execution must require a lesser, or at least a different degree of insanity to that required by the former tests.” He continues that “perhaps the most convincing purpose for which the rule has been said to exist in modern circumstances is that punishment should not be inflicted upon a person incapable of comprehending the reason why he is punished.”

168. Saddler v. United States, 531 F.2d 83, 86 (2d Cir. 1976) (per curiam). Legally, allocution is the formal inquiry of the prisoner by the court as to “whether he has any legal cause to show why judgment should not be pronounced against him on verdict of conviction.” BLACK’S LAW DICTIONARY 70 (5th ed. 1979).
170. J. Kantor, supra note 169, at 4-5.
171. Feltham, supra note 144, at 467-68.
172. Id.
explain why capital punishment is different from incarceration. The test Feltham favors is the test of *In re Smith*:

After sentence of death, the test of insanity is whether the prisoner has not "from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court."  

While this standard requires a high level of cognitive ability, it still does not fully account for the retributory rationale. Arguably, such acute cognitive understanding necessarily implies that the inmate will concomitantly suffer in anticipation of his fate. Suffering, however, does not ineluctably follow understanding, particularly when one considers the phenomenon of sociopathy and the elaborate defenses the human psyche is capable of constructing to protect itself from anxiety, guilt, and depression. Cognitive awareness must be a component of the standard of competency for execution so that an inmate who has not exhausted his post-conviction remedies can assist in his appeals. The Supreme Court has mandated that a capital inmate must be competent to waive post-sentencing review. In *Rees v. Peyton*, the Court held that the standard of competency to waive post-conviction review is "whether [the defendant] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."  

The question of volunteering for execution has been called the "Gilmore issue" after the Supreme Court held that Gary Gilmore was competent to waive post-sentencing review. The Court found that Gilmore had "made a knowing and intelligent waiver of any and all federal rights he might have asserted . . . and, specifically, that the State's determinations of his competence knowingly

175. *Id.* at 314.
176. The events leading up to Gilmore's execution are narrated in N. Mailer, *The Executioner's Song* (1979).
and intelligently to waive any and all such rights were firmly grounded."\(^{177}\)

The *Rees* and *Gilmore* standards for competency to waive post-sentencing review raise collateral issues\(^{178}\) which, while related to this discussion, are not concerned with its central thesis. Nonetheless, the *Gilmore* issue may illuminate the execution competency question because the Supreme Court has mandated that a capital inmate wishing to waive post-conviction review must do so rationally, knowingly, and intelligently, and with appreciation of his position. The state's determination of the inmate's competency, moreover, must be based on firmly grounded reasons.\(^{179}\) The *Gilmore* standard, thus, supports the recognizable reasons criterion for evaluating competency.\(^{180}\) If the Court has recognized in one posture that recognizable reasons aid the determination of competency, this concept could be extended to evaluations of competency for execution, such as Florida's criterion of whether an inmate understands the nature and effect of the death penalty and why it is to be imposed upon him.

What, then, should be the standard of competency for execution? If the rule is designed to ensure society's demand for retributory satisfaction, the standard should be low. Certainly, the inmate must understand the nature and effect of the death penalty and why it is to be imposed upon him, for this recognition is the essence of retribution. Although the distinction between cognitive

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178. For example, an inmate who volunteers for execution when the state's death penalty statute has not yet been upheld on eighth amendment grounds raises substantial questions because society has an independent stake in not inflicting cruel or unusual punishments. The meaning of voluntariness or competence in this context is also unclear. A capital inmate's desire for death may be based upon suicidal wishes either preceding the crime or following his death row confinement. Whether the government should participate at all in these "state-administered suicides" is questionable. The propriety of next friend intervention on behalf of the inmate also has been litigated. For comprehensive discussions of these questions, see generally Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483 (1983); Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983); Note, *supra* note 147. See also *Hays v. Murphy*, 663 F.2d 1004 (10th Cir. 1981); *infra* text accompanying notes 266-70; and discussion of Groseclose *ex rel. Harries v. Dutton*, 594 F. Supp. 949 (M.D. Tenn. 1984), *supra* text accompanying notes 60-68.

179. *See Hays v. Murphy*, 633 F.2d 1004, 1008-14 (10th Cir. 1981) (holding that psychiatric evaluations to determine inmate's competency to waive post-conviction review were inadequate, considering the irreversible nature of the death penalty).

180. *See supra* text accompanying notes 159-63.
and affective understanding muddies the waters, insisting upon affective appreciation would automatically exempt sociopaths from execution as well as inhumanely require the obliteration of psychological coping mechanisms. Pure cognitive understanding, therefore, satisfies society's urge for retribution. If a tacit clemency theory underlies the rule, then the standard of competency for execution should be higher, corresponding in complexity with the complexity of the rationale. Accordingly, the standard of In re Smith, which imposes many requirements and raises substantial interpretive and evaluative questions, is one appropriate test under the tacit clemency theory. Absent societal consensus on the purposes of the death penalty and the exemption of the incompetent, there is no reason why one of these standards of competency is more appropriate than the other.

III. Evaluating a Claim of Insanity

Areas of concern regarding the evaluation of an insanity claim include questions as to who may bring the claim, the degree of due process to be afforded, who is to evaluate the claim, and the role psychiatrists play in that evaluation. Psychiatric participation involves both legal and ethical considerations.

A. The Eighth Amendment, Due Process, and Competency for Execution

Although the law in every state with a death penalty forbids the execution of an incompetent person, no court has decided the issue under the eighth amendment. The Supreme Court has considered the question four times, but has decided it on due process grounds and has never reached the eighth amendment issue. Because these cases preceded the incorporation of the eighth amendment into the due process clause, it is fair to say that they

183. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").
185. See Robinson v. California, 370 U.S. 660 (1962). When Solesbee was decided, the due process clause was held to guarantee fundamental procedural rights accompanying only
no longer control the question of whether executing the incompetent is constitutionally prohibited. This Term the eighth amendment and due process questions are again before the Supreme Court in *Ford v. Wainwright.*

While it is beyond the scope of this Article to explore whether executing the incompetent violates the eighth amendment, a brief discussion of these cases is warranted. In constitutional law the nature of the right determines what process is due; therefore, it is necessary to examine briefly the legal dilemmas underlying the issue which has dominated litigation over competency for execution: the degree of process due an inmate who claims to be incompetent for execution. These eighth amendment and due process questions profoundly affect legal and psychiatric issues such as how a claim of insanity is initially evaluated, who may raise such a claim, whether a denial of the claim is appealable, how extensive the evaluations of the purported incompetency must be, who evaluates the inmate and by what standard, the adversarial character of the evaluation, who ultimately decides the question, the degree of deference to medical opinion, the reliability of psychiatric examinations conducted in a prison setting, and the implementation of the legal standard of competency by the evaluators and trier of fact. These problems in turn raise grave ethical questions concerning whether psychiatrists should participate in the competency determination at all and, if so, to what extent.

In 1897, the Supreme Court first considered the question of competency for execution in *Nobles v. Georgia.* *Nobles* involved an attack on a state procedure which mandated that a claim of post-sentencing insanity was to be evaluated by the sheriff, who would then initiate an inquiry by a twelve-member jury and report the verdict to the sentencing court. The inmate, Nobles, asserted that the claim of insanity had to be determined by a jury in an ordinary

determinations of guilt or innocence and generally, for example, not to apply to sentencing proceedings, Williams v. New York, 337 U.S. 241, 245-46 (1949) (there are inherent differences, for due process purposes, between trial and post-conviction procedures), or to punishment itself, *Solesbee,* 339 U.S. at 12.

186. No. 85-5542 (U.S. argued Apr. 22, 1986), reviewing 752 F.2d 526 (11th Cir. 1985). The case was submitted to the Court shortly before this Article went to press.

187. For extensive analysis of this problem, see, e.g., *Ford,* 752 F.2d at 528-35 (Clark, J., dissenting); Brief for Petitioner-Appellant at 13-33, 45-59, *Ford,* 752 F.2d 526; Suggestion for Rehearing En Banc at 5-15, id.; cf. *Kaine,* suprana note 178, at 483 (discussing cases in which the defendant refused to pursue post-conviction relief); Note, *suprana* note 147, at 775-805 (same).

188. 168 U.S. 398 (1897).
judicial proceeding with all common law trial safeguards. The Court rejected the challenge, reasoning that such a procedure would give the inmate control over the execution, with its indefinite postponement depending “solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.”\textsuperscript{189} The linchpin of the decision was that the exemption of the incompetent from execution was not a right but a mere privilege: “He has had the benefit of a jury trial, and it is now the court only which must be satisfied on the score of humanity.”\textsuperscript{190} Thus, because at common law the inmate had no absolute right to a jury trial on the issue of supervening insanity, the matter was purely one of legislative regulation.\textsuperscript{191} Accordingly, the Court ruled that Georgia's procedure did not deny the inmate due process.

The next significant\textsuperscript{192} consideration by the Supreme Court came in 1950 in \textit{Solesbee v. Balkcom}.\textsuperscript{193} \textit{Solesbee} involved another due process challenge to Georgia law. This time, the inmate claimed he was entitled to notice and an adversarial hearing at which he could have counsel, cross-examine witnesses, and present his own evidence. He further argued that if the governor entrusted the final decision to an administrative board, its findings must be subject to judicial review. The Court upheld the Georgia Supreme Court's finding that the procedure did not deny the inmate due process and compared the procedure to a reprieve or grant of clemency, powers generally vested in the executive and free from judicial review. According to the Court, the Georgia procedure 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.”\textsuperscript{194} As in \textit{Nobles}, the Court was concerned with the danger of repeated claims of insanity by a sane inmate,\textsuperscript{195} which could have the effect of staying the execution indefinitely. In his famous dissent, Justice Frankfurter rejected the analogy to sentencing and gubernatorial reprieves. He argued that reprieve from execution while insane was

\begin{footnotesize}
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  \item \textsuperscript{189} Id. at 406.
  \item \textsuperscript{190} Id. at 407 (quoting \textit{Laros v. Commonwealth}, 84 Pa. 200, 211 (1877)).
  \item \textsuperscript{191} Id. at 409.
  \item \textsuperscript{192} In 1948, the Court avoided the due process question by adverting to the availability of further state remedies. \textit{See Ex parte Phyle}, 186 P.2d 134, 139-40 (Cal. 1947), cert. \textit{dismissed sub nom. Phyle v. Duffy}, 334 U.S. 431, \textit{reh'g denied}, 334 U.S. 862 (1948). For discussion of this complex litigation, see \textit{Hazard & Louisell, supra} note 78, at 393 n.41.
  \item \textsuperscript{193} 339 U.S. 9 (1950).
  \item \textsuperscript{194} Id. at 11.
  \item \textsuperscript{195} Id. at 12.
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not solely a matter of executive discretion but was instead subject to due process safeguards which require that the inmate have at least the right to make a presentation on his own behalf.\footnote{196} The last of the major Supreme Court cases, \textit{Caritativo v. California},\footnote{197} decided in 1958, involved a challenge to a statute which vested in the prison warden sole responsibility for initiating a judicial proceeding to determine an inmate's sanity. The California Supreme Court had held that unless the warden initiated a sanity inquiry, the courts lacked jurisdiction to consider the inmate's sanity or to review the warden's determination.\footnote{198} The Supreme Court upheld this decision in a one-sentence opinion, citing \textit{Solesbee}.\footnote{199} Justice Frankfurter again dissented, joined by Justices Brennan and Douglas. Without asserting that the due process clause required a formal adversarial hearing or judicial proceeding, Justice Frankfurter suggested that "some procedure be established for assuring that the warden give ear to [such a claim]."\footnote{200} 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.\footnote{201}

Alvin Ford's attorneys argued that both eighth amendment and due process jurisprudence have changed so dramatically in the past thirty years\footnote{202} that \textit{Solesbee} and its progeny no longer dictate what process is due an inmate claiming post-sentencing insanity.\footnote{203} The thrust of their due process argument\footnote{204} is that the \textit{Solesbee} cases were decided when the protections of the due process clause applied only to rights, and not privileges.\footnote{205} In the 1970's, however,

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\item[196.] \textit{Id.} at 14-26 (Frankfurter, J., dissenting).
\item[197.] 357 U.S. 549 (1958) (per curiam).
\item[199.] Caritativo v. California, 357 U.S. 549 (1958) (per curiam).
\item[200.] \textit{Id.} at 557 (Frankfurter, J., dissenting).
\item[201.] \textit{Id.} at 556-59.
\item[202.] \textit{See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 10-8—10-13 (1978)} (overview of due process law).
\item[203.] The continuing vitality of the various state procedures concerning execution of the incompetent, especially in view of recent due process and eighth amendment jurisprudence, is questioned in Note, \textit{supra} note 147, at 543-52.
\item[204.] For a full discussion of the argument, see Brief for Petitioner at 36-48, \textit{Ford}, 752 F.2d 526 (No. 84-5372); Brief for Petitioner-Appellant at 45-58, \textit{id.}; Suggestion for Rehearing En Banc at 11-14, \textit{id.}.
\end{enumerate}
the Court repudiated the concept that constitutional rights turn upon whether a governmental benefit is classified as a right or privilege\textsuperscript{206} and instead, in \textit{Mathews v. Eldridge}, endorsed a more flexible test balancing three separate factors:

\[\text{[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.}\textsuperscript{207}\\

In \textit{Ford}, the state argued that the Florida procedure of a gubernatorial determination of sanity satisfies these due process demands.\textsuperscript{208} However, Ford's counsel argued that not only do the procedures not satisfy \textit{Mathews} but also that "the extraordinarily weighty individual interest at stake in death penalty cases justifies heightened due process protections so that safeguards which might suffice in less sensitive contexts will not meet the mark here."\textsuperscript{209} A life interest, they argued, deserves stricter scrutiny than a mere property or liberty interest and, because the Supreme Court has recognized execution as a "qualitatively different" penalty,\textsuperscript{210} heightened due process protections are required for death sentences.\textsuperscript{211}

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  \item \textbf{B. Raising an Insanity Claim}\textsuperscript{212}
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The initial questions regarding the assertion of an insanity claim involve who may raise such a claim and how, who evaluates the initial claim and by what standard, and whether a denial of further

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  \item \textsuperscript{206} See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970) (state could not terminate welfare benefits without affording recipient opportunity for evidentiary hearing prior to termination).
  \item \textsuperscript{208} Brief for Respondent-Appellee at 39-49, Ford, 752 F.2d 526 (No. 84-5372).
  \item \textsuperscript{209} Brief for Petitioner-Appellant at 56, Ford, 752 F.2d 526. See also Brief for Petitioner at 40, id.
  \item \textsuperscript{210} Woodson v. North Carolina, 428 U.S. 280, 305 (1976).
  \item \textsuperscript{211} Brief for Petitioner-Appellant at 58-59, Ford, 752 F.2d 526. See also Radin, \textit{Cruel Punishment and Respect for Persons: Super Due Process for Death}, 53 S. Cal. L. Rev. 1143 (1980). The government's response to this argument was simply that Solesbee controls the issue. Brief for Respondent-Appellee at 49, Ford, 752 F.2d 526.
\end{itemize}
review is appealable.

At common law, there was no established procedure for raising an insanity claim. If a suggestion of insanity was made to the court, the judge could, in his discretion, hold a preliminary hearing and impanel a jury if the inmate had established a prima facie case.\(^2\) While some states have retained this common law procedure, \(^2\) most states have promulgated specific statutory directives. Overwhelmingly, the warden, sheriff, or prison superintendent is the initiator and initial evaluator of the claim.\(^2\) Two states name the court or judge,\(^2\) two states name the governor,\(^2\) one state specifies a broad range of parties,\(^2\) and in many states it is simply unclear.\(^2\) "Reasonable grounds" and "good reason" are typical standards by which insanity claims must be evaluated.\(^2\) Because these terms are undefined, it is unclear whether the reviewing party may be compelled to make a sanity inquiry. In most jurisdictions, the question is unsettled as to whether mandamus will lie against a reviewing party who refuses to pursue the claim.\(^2\)

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\(^2\) See, e.g., Caritativo v. California, 357 U.S. 549, 550 (1958) (Harlan, J., concurring) (statute imposes duty upon warden continually to evaluate sanity of capital inmates); McCorquodale v. Stynchcombe, 236 S.E.2d 486, 490 (Ga. 1977) (governor's denial of further action on insanity claim not subject to judicial review); State ex rel. Johnson v. Alexander,
C. Evaluating the Claim

Once the inmate's sanity is in question, the next step is to determine the means by which the claim is to be evaluated. In those states retaining the common law rule, presumably the reviewing court has discretion over the appropriate procedure.221 Once again, state statutes vary widely. Although the vast majority of state procedures require or imply that psychiatrists, physicians, or other medical experts will examine the inmate to form an opinion as to competency for execution,222 they contain widely varying degrees of specificity regarding the thoroughness of the examinations, their adversarial character, the independence of the evaluators, and whether the findings must be in writing. In four of the sixteen states providing for psychiatric or medical examinations, the examining body is the ultimate arbiter of competency.223 In the remain-

49 P.2d 408, 413 (Utah 1935) (initiation of proceeding entirely within discretion of statutorily designated officers); cf. Shank v. Todhunter, 75 S.W.2d 382 (Ark. 1934) (warden's discretion to initiate review will not be questioned absent an affirmative showing of abuse of discretion or unquestioned neglect of duty); McCracken v. Teets, 262 P.2d 561, 563 (Cal. 1953) (to overcome presumption that warden fulfilled duty to make sanity determination, and in order for mandamus to lie, inmate must produce "substantial evidence" that warden did not perform his duty); State v. Allen, 15 So. 2d 870, 873 (La. 1943) (trial court's refusal to appoint a "lunacy commission" to determine capital inmate's sanity not an abuse of discretion under the evidence, which included affidavits, testimony, and the judge's extrajudicial observation of the inmate).

221. See supra note 213. At common law, typically, a jury was impaneled to hear the claim. See Feltham, supra note 144, at 470. Accord Barrett v. Commonwealth, 259 S.W. 25, 27 (Ky. 1923) (although right to jury trial is not inherent, usually a jury is impaneled).


ing twelve states, the ultimate decision-maker is the court,\textsuperscript{224} the governor,\textsuperscript{225} the governor and council,\textsuperscript{226} or a jury.\textsuperscript{227} In two states, the inmate is examined by an undefined "commission." In one of those states, the commission is the ultimate decision-maker; in the other, it is the governor.\textsuperscript{228} In three states, the inmate is evaluated by state hospital officials who make the final determination.\textsuperscript{229} Lastly, three states have statutory provisions which appear to mimic the common law practice that the court will evaluate and decide the issue, and may in its discretion impanel a jury or conduct a hearing.\textsuperscript{230}

Many state statutes are silent as to the conduct of the hearings. Several, such as Florida's, are clearly ex parte.\textsuperscript{231} Some statutes are silent as to defense participation in the proceedings; however, because of their judicial character, they allow or require some adversarial character.\textsuperscript{232} Only four states have provisions explicitly


\textsuperscript{225} Florida: FLA. STAT. § 922.07 (1985); Georgia: GA. CODE § 17-10-61 (1982); Maryland: MD. ANN. CODE art. 27, § 75(c) (Supp. 1985).


\textsuperscript{227} Arizona: ARIZ. REV. STAT. ANN. §§ 13-4021 to 13-4024 (1978); California: CAL. PENAL CODE §§ 3700-3703 (1982); Oklahoma: OKLA. STAT. ANN. tit. 22, § 1005-1008 (West 1958); Wyoming: WYO. STAT. ANN. §§ 7-13-901 to 7-13-902 (Supp. 1985); see also People v. Riley, 235 P.2d 381 (Cal. 1951) (statutory proceeding does not purport to be a true adversarial one with all common law trial safeguards but it is a special proceeding of a civil nature; unanimous jury verdict not required).


favoring defense advocacy in competency proceedings.\textsuperscript{233}

The burdens of production and of proof in the proceedings rest with the prisoner. This comports with the civil nature of these proceedings.\textsuperscript{234} Presumably the inmate must prove his case by a preponderance of the evidence.\textsuperscript{235}

\subsection*{D. Psychiatric Participation in Evaluating Insanity Claims}

Heated debate surrounds the role of psychiatrists and other mental health professionals in these insanity inquiries. It appears that many of the problems arise out of the lack of procedural safeguards and the imprecision of the statutorily mandated procedures. One contributing factor is the absence of a coherent, intelligible, or workable standard of competency for the psychiatrist to apply. This void raises the question of whether psychiatrists should offer diagnoses or prognoses regarding sanity. Another arena of debate is the dubious reliability of psychiatric examinations performed in a prison setting. The ultimate question, perhaps, is whether and to what extent psychiatrists ethically may participate at all in such proceedings.

Discussing this topic is complicated by the differing state standards for evaluating competency. As noted, in some states, evaluation by a panel of experts provides a conclusive determination of competency. In others, the medical evaluation is merely preliminary to a more formal judicial inquiry or to an ultimate decision by an executive. The following analysis notes these distinctions when relevant but, in the main, simply highlights some of the difficulties inherent in any psychiatric evaluation of competency for execution. Compounding these problems is the troubled yet necessary relationship between law and psychiatry, particularly in death penalty cases.\textsuperscript{236} The issues which most frequently arise in this context include the problem of informed consent, conflicts of interest, whether the evaluators are subject to cross examination, whether

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\item \textsuperscript{233} Indiana: \textsc{Ind. Code Ann.} \textsection{} 11-10-4-3 (Burns 1981); Nevada: \textsc{Nev. Rev. Stat.} \textsection{} 176.435 (1983); North Carolina: \textsc{N.C. Gen. Stat.} \textsection{} 15A-1001 to 15A-1002 (1983); Utah: \textsc{Utah Code Ann.} \textsection{} 77-19-13 (1982).
\item \textsuperscript{234} See People v. Riley, 235 P.2d 381, 386 (Cal. 1951); Leick v. People, 345 P.2d 1054, 1055 (Colo. 1959) (en banc); People v. Carpenter, 150 N.E.2d 100, 103 (Ill. 1958), cert. denied, 358 U.S. 887 (1958); People v. Geary, 131 N.E. 652, 655 (Ill. 1921).
\item \textsuperscript{235} Cf. Welch v. Beto, 355 F.2d 1016 (5th Cir.), cert. denied, 385 U.S. 839 (1966); State v. Allen, 15 So. 2d 870 (La. 1943).
\item \textsuperscript{236} See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (requiring sentencing hearings in capital cases in which both sides may introduce evidence of aggravating and mitigating circumstances).
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the defense can offer its own experts, whether the psychiatrists should offer ultimate opinions, and whether psychiatrists can apply standards of competency which are undefined or incoherent.

1. Informed Consent

It has been argued that due process requires that a capital inmate receive notice and a hearing regarding his insanity evaluation, but that

traditional forms of notice are of little value to an insane prisoner who acts alone. A genuinely insane person can be expected neither to comprehend fully the manner in which a sanity investigation will be initiated, nor to understand or challenge the nature of the sanity inquiry while it is conducted.

The appointment of counsel might protect the inmate’s due process interests but this analysis ignores the reality that the inmate’s counsel typically will raise the insanity claim in the first place. Lack of counsel is not peculiar to the execution competency situation but is endemic in the capital inmate population. Perhaps a more central concern should be the issue of informed consent. A true incompetent will not understand the process, nature, purpose, or consequences of an insanity evaluation. Ultimately, if the psychiatrists find the inmate competent for execution, a new death warrant will issue in due course. The problem then is the method and scope of informed consent. A psychiatrist is ethically bound to “fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination.” Informed consent assumes heightened importance in capital cases. In *Estelle v. Smith*, the Supreme Court held that a defendant being evaluated for competency to stand trial must be informed before the evaluation that he has a right to remain silent and that his statements can be used either for or against him for sentencing purposes. In *Smith*, a psychiatrist who had examined

237. See Note, supra note 147, at 553.
238. Id. at 555 (footnotes omitted).
239. Id. at 556.
242. Id. at 461-69; see also Miranda v. Arizona, 384 U.S. 436 (1966) (prescribing warnings of which a criminal suspect or defendant must be advised prior to custodial interrogation).
the defendant for competency to stand trial testified against him at the capital sentencing stage, although they had not had contact since the initial examination. The Court held that when a psychiatrist testifies for the prosecution at the capital sentencing phase, he becomes an agent of the state, entitling the examinee to full protection under the fifth and sixth amendments.\(^{243}\) Because a psychiatrist examining an inmate for competency to be executed, like the psychiatrist in *Smith*, does not have a "neutral" status, *a fortiori*, the same protections prescribed in *Smith* should be afforded in an execution competency examination. The psychiatrist should explicitly inform the inmate that the results of the examination may be used against him and that the inmate has the right to refuse the examination.\(^{244}\)

The question becomes more complex, however, when one considers that such an examination probably would not be taking place absent serious questions concerning the inmate's competency. While competency for execution and competency to give informed consent are not the same, under many execution competency standards they are similar. The American Psychiatric Association (APA) Task Force on Sentencing recommended that informed consent include:

- an explanation that the psychiatrist is not functioning in a traditional medical role, but is serving as an agent of the court (or of the defense or prosecution) for the purpose of gathering data that may be relevant to the sentencing decision. The circumstances under which information divulged during the evaluation may be disclosed to the prosecution or the court should be made explicit. Finally, psychiatrists should explain, as best they can, how the defendant may be helped or harmed by the information in the report.\(^{246}\)

The APA Task Force concluded, however, that when it appears the defendant is incompetent to give informed consent, "the psychiatrist should stop the examination, inform the party who requested

\(^{243}\) *Smith*, 451 U.S. at 473.

\(^{244}\) Even psychiatrists examining inmates at the behest of the defense may be agents of the state if the prosecution may obtain the results of defense examinations by means of reciprocal discovery or otherwise. See American Psychiatric Ass'n, Psychiatry in the Sentencing Process 28 (1984) [hereinafter cited as APA Sentencing Report]; cf. Fed. R. Crim. P. 16(b) (if defense requests discovery, upon compliance, government may request and defense must supply reciprocal discovery).

\(^{245}\) APA Sentencing Report, supra note 244, at 16-17.
the evaluation of the defendant’s condition, and allow the legal system to arrive at a solution to the problem.” Thus, the APA sentencing guidelines, while helpful to the issue of competency for execution, provide no conclusive guidance. Two minimal criteria do emerge, however, and they should provide a baseline for informed consent for an examination of competency for execution. First, the defense attorney should be given notice of such examinations and the opportunity to be present. Second, the inmate and his counsel should be informed of the possible consequences of the examination, namely, that a finding of competency could result in the reissuance of a death warrant.

2. The Examiners and the Examination

Problems arise when one considers the possible conflicts of interest of examiners and the exact nature of their task. What is the extent of the examination? What conclusions are demanded and to what degree of certainty? To what extent are the psychiatric opinions subject to checks and balances, such as cross-examination and testimony by adversarial psychiatrists? To what degree is any psychiatric examination necessarily limited when it takes place in a prison setting? Underlying these specific concerns is the general recognition by the Supreme Court and others that psychiatric diagnoses are subject to a substantial degree of uncertainty.

a. Conflicts of Interest

At minimum, to make a proper determination of competency for execution, qualified and disinterested examiners must be employed. Even in those states using psychiatrists or other medical personnel, however, the examiners generally are appointed by a state agent. The pool from which the examiners are selected is crucial; frequently it is either mandated that the examiners be state-employed or they end up being state-employed anyway. Radelet and Barnard report that, in Florida, “[o]f the three commissions of

246. Id. at 17.
247. Accord Note, supra note 147, at 556-57; cf. APA SENTENCING REPORT, supra note 244, at 17 (defense counsel should always have notice of psychiatric exams and can best explain many legal risks and benefits of such exams to client).
248. See Addington v. Texas, 441 U.S. 418, 429 (1979); Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CAL. L. REV. 693 (1974); APA SENTENCING REPORT, supra note 244, at 21 (The limitations on psychiatric expertise “may result from deficiencies in the examination . . . or from the current state of psychiatric or medical knowledge about particular issues.”)
psychiatrists appointed by the governor in the first six months of 1984, one psychiatrist from the main state mental hospital sat on all three, while another from the same institution sat on two."

Thus, it is possible for the state to employ psychiatrists who will find all prisoners competent for execution. The lack of objectivity of the panel may be exacerbated if state employees feel pressured to find prisoners competent, particularly in states like Florida where the governor appoints the panel. The problem is further compounded when one considers that state psychiatrists finding an inmate incompetent for execution might subsequently be required to treat him in a state or correctional hospital.

Some of these conflicts might be minimized if the examiners were selected from a rotating list of psychiatrists willing to participate in such examinations. Although the pool might be biased because psychiatrists opposed to participation in the death penalty process probably would opt out, this bias might be mitigated by the participation of psychiatrists opposed to the death penalty but willing to participate on other grounds. Likewise, a rule that the psychiatrists conducting such examinations would not subsequently have to treat the inmate if he were found incompetent would alleviate possible conflicts of interest.

b. Adversarialness

A further issue in competency examinations is whether, and to what degree, the psychiatric evaluation is adversarial. In a related posture, the Supreme Court has underscored the importance of adversarialness when psychiatrists participate in capital sentencing. In Gardner v. Florida, the Court held that a defendant’s due process rights were violated when his death sentence rested in part upon a presentence investigation report which the defendant had no opportunity to deny or explain.

In Florida, as in many other states, defense counsel and the prosecutor may be present at the examination, but there is no provision for advocacy. Indeed, in Florida the governor “has a publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person

249. M. Radelet & G. Barnard, supra note 59, at 29 n.36.
250. Id. at 20-21.
251. See infra text accompanying notes 277-82.
253. Id. at 362.
under sentence of death is insane." 255 Particularly in states where a panel of examiners is appointed and its opinion is submitted to a factfinder in a nonadversarial setting, fairness demands that some procedure exist for challenging the examiners’ findings.

A related question is whether indigent inmates are entitled to court-appointed psychiatrists. Although it has been held in Georgia256 and Illinois257 that indigent inmates are not denied due process by their inability to employ adequate psychiatric assistance for execution competency proceedings, these decisions may have been undercut by a recent Supreme Court decision. In Ake v. Oklahoma,258 the Court held that where an indigent defendant made a preliminary showing of insanity, he was entitled to the assistance of a state-provided psychiatrist at the capital sentencing stage if he could not otherwise afford one.

c. Extent of the Workup

Once an examining panel has been appointed, questions arise regarding the extent of the psychiatric evaluation or workup and the level of certainty the examiners must reach. These issues are related to the standard of competency for execution because an incoherent or unworkable standard will increase the unreliability of the examination.

No legal authority prescribes standards for the psychiatric workup required for an execution competency examination. Related persuasive authority indicates that the examination should be as complete as possible. The APA Task Force recommends that psychiatric examinations for sentencing purposes, particularly capital sentencing, should be eminently thorough, including a complete psychiatric and medical history, a general psychiatric evaluation and, if necessary, neurological examinations and neuropsychological testing.259 A heightened level of psychiatric certainty is necessary in capital cases. The qualitative difference of the death penalty requires a “corresponding difference in the need for relia-

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256. McCorquodale v. Stynchcombe, 236 S.E.2d 486, 489-90 (Ga.) (due process not violated if indigent inmate is unable to afford psychiatric examinations beyond those conducted by state), cert. denied, 434 U.S. 975 (1977).
257. People v. Carpenter, 150 N.E.2d 100, 104 (Ill. 1958) (rejecting petitioner’s argument that his expert testimony was overwhelmed by that of the state, which had “practically unlimited financial resources”).
259. APA SENTENCING REPORT, supra note 244, at 17-19.
bility in the determination that death is the appropriate punishment in a specific case."^{260} Whether this mandate extends to the post-sentencing phase has not been decided, although it has been urged that "a finding of competence [for execution] requires more certainty, clarity, and comprehensiveness than a finding of incompetency."^{261} Certainly, it cannot be gainsaid that a life interest is at stake. The only remaining question then must be whether a capital inmate is different from a defendant who is merely at risk of being sentenced to life imprisonment.

Cases in which inmates have refused to seek post-conviction relief in anticipation of impending execution have mandated complete psychiatric workups and high levels of certainty. In *Gilmore v. Utah,*^{262} Justice Marshall's dissent sharply criticized Chief Justice Burger's view,^{263} expressed in his concurrence, that Gilmore competently, knowingly, and intelligently waived post-sentencing review:

Less than five months have passed since the commission of the crime; just over two months elapsed since the sentence was imposed. That is hardly sufficient time for mature consideration of the question, nor does Gilmore's erratic behavior . . . evidence such deliberation. No adversary hearing has been held to examine the experts, all employed by the State of Utah, who have pronounced Gilmore sane.^{264}

... 

As The Chief Justice notes, the opinion of the Prison Psychiatrist, the only doctor who has considered Gilmore's competency since the waiver decision was publicly announced, was based on a review of Gilmore's medical records and a one-hour interview.^{265}

Similarly, in *Hays v. Murphy,*^{266} the Tenth Circuit held that substantial questions of the prisoner's competency to waive his post-conviction review had been raised, and that the psychiatric evaluations were insufficient to determine "the critical question of competency."^{267} The prisoner, Thomas (Sonny) Lee Hays, had been examined for thirty minutes on death row by four mental health

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262. 429 U.S. 1012 (1976).
263. Id. at 1013-17 (Burger, C.J., concurring).
264. Id. at 1019 (Marshall, J., dissenting) (footnotes omitted).
265. Id. at 1019 n.2 (Marshall, J., dissenting) (emphasis in original).
266. 663 F.2d 1004 (10th Cir. 1981).
267. Id. at 1009.
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professionals. In declaring this evaluation inadequate to determine the validity of the waiver, the court noted the brevity of the interview, the fact that only one of the examiners had had previous contact with Hays, the absence of psychiatric and psychological testing, and the absence of progress notes relating Hays' mental condition over time.\textsuperscript{268} Lastly, the Tenth Circuit noted both the inappropriateness of conducting a psychiatric examination on death row and the coercive impact of the death row environment on an inmate's will to live:

\textit{[T]he atmosphere on death row where the interview occurred did not provide a clinical setting conducive to an accurate determination in such an inquiry. Dr. Baker stated "[f]he atmosphere in that place [death row] is such that I can well understand why somebody would despair of living," and Dr. Beller said "it was quite noisy and we would get close in order to ask the man questions and to hear his responses."}\textsuperscript{269}

The examiner's comment raises two issues. First, death row is not an appropriate setting for competency evaluations. These evaluations should be conducted in a neutral, noncoercive environment. Second, the doctor's comment reiterates the point that the very stress of death row confinement can not only lead to mental aberrations, but also create a risk that an inmate's decision to forego post-sentencing review may be effectively coerced.\textsuperscript{270}

If psychiatrists are to participate in this process, at the very least their findings should be written, setting forth the reasons for their conclusions. These need not be ultimate opinions on whether a prisoner is competent for execution. Written findings give the examination retrospective accountability. While two states explicitly require that the examiners report their findings "in

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\item \textsuperscript{268} Id. at 1011-13 & nn.12-16. Similar criticisms have been made of the state's evaluation of Alvin Ford. See, \textit{e.g.}, \textit{Ford}, 752 F.2d at 532 (Clark, J., dissenting); Brief for Petitioner-Appellant at 9-10, \textit{Ford}, 752 F.2d 526; M. Radelet & G. Barnard, \textit{supra} note 59, at 18; Affidavit of Seymour L. Halleck, M.D. (May 21, 1984) (on file, \textit{Florida State University Law Review}) [hereinafter cited as Halleck affidavit].
\item \textsuperscript{269} \textit{Hays}, 663 F.2d at 1011 n.12 (emphasis and brackets in original) (quoting district court record).
\item \textsuperscript{270} \textit{See supra} note 178 and text accompanying notes 60-68.
\end{itemize}
writing" or in a report. Florence Ford and Alwood poignantly illustrate the dangers of a lack of accountability. The three psychiatrists who found Ford competent for execution based their opinions on a half-hour examination with about ten people present. They reported their findings in conclusory letters ranging in length from one to three pages. The commission which found Alvord incompetent for execution set forth its finding in a terse, one-paragraph letter which simply tracked the language of the statute: "Mr. Alvord does not understand the nature and effect of the death penalty and he does not understand why it should be imposed upon him." This lack of accountability undermines both the reputation of the psychiatric profession and public support for the rule against executing the incompetent. In those jurisdictions providing for open cross-examination of experts, this problem may be substantially cured.

3. Ethics of Psychiatric Participation

The most troubling question facing medical professionals in the capital punishment context is whether they should ethically participate at all. Doctors take an oath to preserve life, yet paradoxically they have been intimately involved with the death penalty process—by issuing death certificates following executions, examining an inmate's neck to determine the optimal rope length for hanging, examining and counseling death row inmates, and resuscitating condemned inmates who attempt suicide. Doctors have also been asked to administer the death penalty through lethal injections. Yet, the problems of psychiatrists in the execution competency posture are qualitatively different. While competent inmates in the capital prison population would have died anyway, psychiatric participation in this process may help effectuate an execution


273. See Afield letter, supra note 48; Ivory letter, supra note 49; Mhatre letter, supra note 48. These findings were severely criticized by defense psychiatrists. See Barnard affidavit, supra note 51; Halleck affidavit, supra note 268.

274. Ivory, Ferris & Mhatre letter, supra note 58.

275. See supra note 233 and accompanying text.
which might not otherwise have occurred. The ethical issues in the examination or certification and treatment stages are distinct: While the examining psychiatrist may save an inmate temporarily from execution by finding him incompetent, the treating psychiatrist helps bring about an execution which would not have occurred but for the treatment.

Radelet and Barnard have identified four positions which are useful models for analyzing the ethical dilemmas facing examining psychiatrists. First, under the principled approach, it is argued that "this arena is no place for a psychiatrist to function and that all psychiatrists should refuse to participate." The argument that it is better to participate than to allow nonliberal thinkers to dominate the field is not sufficient moral justification for complicity in this activity. Under the principled approach any psychiatric participation is opposed. The problem with the principled approach is that it would produce nonrepresentative participation by psychiatrists who are not opposed to the death penalty or to medical participation in its processes.

Because the statutes and procedures are already in place, it is preferable that liberal thinkers participate rather than surrender by default to hired guns. This is the consequentialist approach. One of the drawbacks of the consequentialist position is that, in practice, it may produce professional dishonesty on personal or political grounds. For example, psychiatrists opposed to the Vietnam War may have issued psychiatric exemptions more liberally than those not opposed. Similarly, psychiatrists favoring legalized abortion before Roe v. Wade may have authorized abortions as medically necessary more freely than those opposed. The benefits of the consequentialist position have been emphasized in capital sentencing and appeals because participation may save a defendant from death. The execution competency posture, however, may be different because an inmate who has been sentenced to death is in a less favorable position than one who has not yet been sentenced or one who has not exhausted his remedies. Thus, notwithstanding

278. For example, FLA. STAT. § 922.07 (1985) provides that the governor shall stay the execution and appoint a commission of three psychiatrists to examine an inmate when he is informed that such inmate may be insane.
279. 410 U.S. 113 (1973) (constitutional right of privacy encompasses decision whether to terminate pregnancy).
280. See, e.g., Bolsen, Strange Bedfellows: Death Penalty and Medicine, 248 J. AM. MED. ASS'N 518, 519 (1982).
his beneficent intentions, the psychiatrist may be facilitating the 
immate's execution. On the other hand, psychiatric participation 
may produce a temporary stay. Once the principled approach is 
bypassed and the consequentialist basis accepted, psychiatrists can 
argue for increased safeguards to ensure fairness. Radelet and Bar-
nard believe the strongest ethical objection to physician participa-
tion in the execution competency process is the absence of proce-
dural safeguards.281 This ethical dilemma would be alleviated with 
procedures ensuring that psychiatrists' opinions could be chal-
lenged by equally credible psychiatrists.282 This analysis evinces a 
professional concern: psychiatrists are asked to participate in this 
process, and refusal would be both morally wrong and profession-
ally unwise. The need, therefore, for increased due process protec-
tions is crucial.

The version of the consequentialist position advanced by the 
National Medical Association (NMA) is perhaps the most extreme 
of the genre. While the NMA does not support or oppose capital 
punishment, it does advise psychiatrists to evaluate and treat in-
mates who are incompetent for execution, on the ground that fail-
ure to do so "would constitute a failure to perform a psychiatrist's 
duty, i.e., provide evaluation and treatment to the mentally ill."283 
The NMA views the death penalty as a jurisprudential issue and 
not a medical one. Furthermore, it asserts that inmates facing exe-
cution deserve the same kind of psychotherapy as a terminally ill 
patient.284 Distinguishing medical and psychiatric issues from legal 
and political issues may be viewed as avoiding the essential and 
difficult questions. Alternatively, it may simply evince the ulti-
mately pragmatic view which underlies the consequentialist 
approach.

The third ethical posture may be termed the empirical approach. 
This argument is that psychiatrists should examine the prisoner 
and report the degree of mental disorder or impairment but should 
avoid the ultimate question of competency for execution.285 This 
approach is similar but not identical to a previously advocated ap-
proach that "psychiatrists will not be expected to draw legal con-
clusions, but are instead to determine whether the prisoner's con-

282. Id. at 21. 
284. Id. at 3. 
dition satisfies more factual, medical standards."

The fourth ethical position may be termed the psycholegal approach. Under this approach, the psychiatrist should examine the prisoner, arrive at a diagnosis using DSM-III criteria, and render an opinion regarding competency for execution. This method was used in Ford, where psychiatrists used medical terminology and offered a legal opinion based on the statutory standard of competency. Two of the state psychiatrists and the three defense psychiatrists found Ford psychotic. All three members of the commission nevertheless found him competent for execution.

Though the importance of more thorough examinations cannot be overstated, even the kind of workup done in a teaching hospital would not cure the failings of the psycholegal approach. There is a moral and epistemological abyss between a DSM-III diagnosis and an opinion on whether a prisoner is competent for execution because competency is a moral or normative as well as empirical concept. The psycholegal model asks psychiatrists to make a leap of faith from a medical or functional diagnosis to a legal and moral opinion about an inmate’s fitness to receive the death penalty.

All of these positions—the principled, the consequentialist, the empirical, and the psycholegal approaches—are controversial. An ultimate preference depends upon one’s moral and political position on the death penalty, colored perhaps by professional concerns. Mental health professional organizations may be forced into the consequentialist position because refusal to participate might be interpreted as an abdication of their professional duty. As long as the rule against executing the incompetent persists in American jurisdictions, psychiatrists and psychologists will be called upon to participate. Given a desire not to abdicate responsibility in this area, perhaps the most defensible model is the empirical position. Using this approach, the examiners would make the usual DSM-III diagnoses, carefully avoiding opinions or language suggestive of an opinion on the ultimate question of competency for execution.

286. Note, supra note 147, at 558 n.147.
288. Id. at 18.
289. See, e.g., Shah, Legal and Mental Health System Interactions, 4 Int’l J.L. & Psychiatry 219, 250 (1981); American Psychiatric Ass’n, Statement on the Insanity Defense 17-19 (Dec. 1982) (psychiatric testimony about “ultimate issues” like sanity or criminal responsibility requires leap in logic from medical concepts to legal or moral constructs); APA Sentencing Report, supra note 244, at 22-23 (whether forensic psychiatrists should frame their conclusions in medical or legal terms is a subject of longstanding dispute).
E. Who Should Determine Competency For Execution?

We have seen that the requirement of competency for a particular activity depends upon society’s moral values. This underlying moral rationale should form a legal standard of competency for that activity which can be implemented evenhandedly. The rationale and the standard of competency, in turn, should dictate the procedures by which competency is evaluated.

If the prohibition against executing the incompetent is rooted, consciously or unconsciously, in society’s distaste for the death penalty, then the procedures society will demand to ensure the rule’s effectiveness will be more stringent than if the rationale were based upon retribution. The procedures, moreover, will tend to be more invisible if the underlying motivation is society’s ambivalence about the death penalty. If the prohibition against executing the incompetent is explained as a tacit clemency device, the most appropriate forum for evaluating insanity claims is an administrative board. Composing this panel mainly of mental health professionals would cloak its findings in scientific mystification befitting society’s denial of its true motives.

This reasoning underlies a suggestion that an administrative board hear insanity claims with the aid of psychiatric evaluation. Implicit in this theory is an express repudiation of a formal adjudicatory forum:

The prisoner’s entitlement to remain alive while insane should depend entirely on medical opinion that is unlikely to be illuminated by a judge or jury. The addition of a judge or jury only increases the likelihood of arbitrary rejection of the medical opinion and of erroneous evaluation of that opinion.

One might argue that psychiatrists should not draw legal conclusions, but contend that they should be the ultimate decision-makers. If one accepts this anomalous position, then the standard of insanity should be whether the prisoner understands the nature of the proceedings, the purposes and extent of the punishment, the fate awaiting him, and whether he possesses sufficient understanding to be aware of facts which may make his punishment unjust and is able to convey those facts to his lawyer. This is exactly
the position taken by a commentator who asserts that, "although the determinations will still be largely medical, the conclusions will be more factual than legal."\textsuperscript{293} The author explains neither why psychiatrists are uniquely able to make this "factual" determination nor why or how this determination is somehow apolitical, unaffected by the psychiatrists' feelings about the death penalty. Underlying these logically inconsistent assertions is an assumption that the rule against executing the incompetent is a tacit clemency device, and that an administrative-type panel of psychiatrists might be more inclined to find inmates incompetent, perhaps because it would be more invisible than a judicial forum, and perhaps also because advocating a judicial setting for what until now has been an executive prerogative would be too large a political leap. When this position is fully analyzed, its anti-death penalty underpinnings emerge.

On the other hand, if the rationale for the rule against executing the incompetent is that society's demand for retribution is not satisfied by executing an incompetent, pathetic prisoner, the standard of competency should be lower and the evaluation procedures less stringent. A standard like Florida's—that the inmate understand the nature and effect of the death penalty and why it is to be imposed upon him—may be little more than a "wild beast" test, but perhaps it is the only theoretically defensible criterion given a retributory rationale.

The demand for retribution is more consciously motivated than the bases of the tacit clemency rationale, as demonstrated by its explicitness and visibility in literature and popular culture. Accordingly, the procedures for assessing competency under this rationale should be aboveboard. Society, in the form of a jury, should evaluate the prisoner and make the ultimate determination of competency for execution. Psychiatric input into this process should be discouraged or limited because society might thereby "attempt to improve the image of execution by cloaking it in the aura of medicine."\textsuperscript{294} If a retributory basis for the death penalty and the exemption of the incompetent are to be meaningful, then society, represented by a jury, should look the inmate in the eye and pass judgment on his fitness for execution. As Dr. Paul Appelbaum has warned in the context of capital sentencing, "Society's demand for psychiatric input . . . may be serving as a substitute

\textsuperscript{293} Id. at 562 n.170.

\textsuperscript{294} Bolsen, supra note 280, at 519 (discussing the lethal injection method of execution).
for some hard thinking about the purposes of punishment, and particularly about the role of the death sentence in the modern world.”

IV. CONSEQUENCES AND IMPLICATIONS OF A FINDING OF INCOMPETENCY

Moral as well as legal issues surround the psychiatrist’s participation in certifying an inmate as incompetent, treating him, and then recertifying him as competent because recertification brings about the reinstatement of the death penalty. A finding of incompetency triggers a process which brings into sharp focus such issues as the extent of information an inmate should have before consenting to treatment, the inmate’s right to refuse treatment, and the overall ethics of psychiatric participation in competency restoration.

A. Ethics of Physician Participation in Competency Restoration

The ethical dilemmas facing a physician or psychiatrist after an inmate has been found incompetent for execution are twofold. First, should the psychiatrist agree to treat the inmate to make him ready for execution? Second, should he participate in a recertification process, assuring the state that the inmate is indeed competent for execution? Even psychiatrists who participate in the initial proceedings on consequentialist grounds might find these prospects so abhorrent that they would refuse on principle to participate in restoration to competency.

Should a psychiatrist agree to treat a prisoner found incompetent for execution? Even assuming that this psychiatrist was not involved in the initial certification process and thus is not subject to a conflict of interest, the problem is not easily settled. On the one hand, a physician’s duty is to treat illness. A psychiatrist may believe that capital punishment is morally wrong. However, to refuse to treat a mentally ill person is to deny that mental illness causes great suffering even if the failure to treat would cheat the executioner. Perhaps the most humane action is to treat such an individual, and thereby allow him to prepare for and meet death with equanimity. Another way to view this position is to separate

the medical from the legal or political issues, recognizing that it is
the physician's duty to treat illness, and that capital punishment is
a social or legal question not within the ambit of medicine.296

The Florida State Hospital Human Rights Advocacy Committee
took a different position. After Gary Alvord was found incomp-
etent for execution, he was sent to the Florida State Hospital at
Chattahoochee. After considering that the Florida statute does not
define "restoration to sanity" or specify exactly who is to make
that determination, the Committee recommended "[t]hat no indi-
vidual who has been determined to lack the mental capacity to be
executed be sent to a State treatment facility for mental health
treatment without his sentence being commuted to life imprison-
ment."297 The Committee based its decision in part on the Ameri-
can Psychiatric Association's position that "'a physician serving
the State as executioner, either directly or indirectly, is a perver-
sion of medical ethics and his or her role as healer and
comforter.'"298

Assuming a psychiatrist agrees to treat such a patient, the sec-
ond ethical question is whether he should be involved in the recer-
tification process. Again, eliminating the problem of conflicts of in-
terest by assuming that the psychiatrists who participated in the
initial certification or treatment process are not the same as those
who participate in recertification of the inmate's competency for
execution, is such involvement an ethical performance of a physi-
cian's duty? As Radelet and Barnard note, "If incompetence is
found, a later assessment of competence by psychiatrists is tanta-
mount to imposing a new death sentence. In the first evaluation
nonintervention leads to death; here intervention by psychiatrists
is required for death."299 This reasoning reveals that Radelet and
Barnard accept a consequentialist basis for participation in the
first instance, and that they proceed on that basis even at the
recertification stage:

Instead of coming into a situation where the psychiatrist is told
the prisoner might be incompetent, the latter intervention rests
on a possibility that an established incompetent person may be

297. Letter from Peter D. Ostreich, Chairman, Florida State Hospital Human Rights
Advocacy Committee, to Honorable Marcia Beach, Chairwoman, Florida Statewide Human
Rights Advocacy Committee 1-2 (Dec. 6, 1984) (on file, Florida State University Law
Review).
298. Id. at 2.
competent. The criteria used to determine (and measure) incompetence may be different than those used in evaluating recovery from it. While we would argue that the ethical issues are qualitatively the same at both points, they are perhaps even more clear at the latter point because of a quantitative difference. Again, we take the position that a finding of competence places more responsibility on the physician for certainty, clarity, and comprehensiveness than a finding of incompetence.\textsuperscript{300}

To evaluate Radelet and Barnard’s eminently pragmatic position, one must consider that they deal with death row inmates regularly and work in a political environment where capital punishment has tremendous popular support. If Florida psychiatrists adopted a principled approach to the treatment and recertification phases, their position would likely have little effect. The most obvious response to such an approach would be to amend the Florida statute to resemble that of many other states, whereby a hospital official would perform the recertification. There is surely no paucity of pro-death penalty psychiatrists in Florida, on the state payroll and otherwise, who would happily acquiesce. Radelet and Barnard implicitly recognize this reality and argue for more stringent criteria, with the hope that more liberal-thinking psychiatrists will recognize the stakes and willingly participate, applying higher standards of professional competence. Because theirs is a consequentialist position, it does not answer the principled argument, but it does suggest that opinions on the entire range of competency for execution issues are inevitably affected not only by one’s position on the death penalty but also by perceived political realities.

\textbf{B. Treating an Inmate Found Incompetent for Execution}

Once a psychiatrist or hospital has assumed the task of treating an inmate found incompetent for execution, additional problems arise. In recent years, law and psychiatry have flowed with literature and litigation on informed consent and the right to refuse treatment. What are their contours in this context?

\textit{1. Competence and Informed Consent}

Informed consent must include knowledge of: “(1) the risks, discomforts, and side effects of the proposed treatments, (2) the anticipated benefits of such treatments, (3) the available alternative

\textsuperscript{300} Id.
treatments and their attendant risks, discomforts, and side effects, and (4) the likely consequences of a failure to be treated at all.\textsuperscript{301} Clearly, the "risks and benefits of treatment" must include the possibility that if treatment makes the inmate competent he will be returned to death row. Conversely, the inmate also should be apprised that by becoming competent he might better come to terms with his impending execution.

The likely consequences of a failure to treat a capital inmate include the possibilities that the inmate will improve anyway because he is no longer on death row or that he will remain mentally ill and perhaps never become ready for execution. Although incompetence for execution does not necessarily imply incompetence to make treatment decisions, it is likely that if one does not understand the nature and effect of the death penalty, neither will he understand these contingencies. Another aspect of this problem is that an inmate may have no right whatsoever to refuse treatment. Even if this were the case, the inmate still should be informed of the treatment's effects. Moreover, he or his lawyer or guardian should still have the last word on the kind of treatment he should receive.

The question of whether to treat the capital inmate can be approached from both legal and philosophical perspectives. One possible response is to invoke the inmate's legal right to refuse treatment. A second response is to treat the inmate. If he became competent, his lawyer could then assert that medical science should not be used to cure someone in order that he might then be executed. Both of these positions reflect ultimate concern for individual autonomy, but they are qualitatively different. The first position zealously guards the inmate's right not to be executed while incompetent but implicitly grafts onto that right his lawyer's assumption that the prisoner would not want to die at the hands of the state at any price. In so assuming, a lawyer blinds himself to the reality that mental illness causes great suffering. More importantly, he denies the prisoner the benefit of the doubt; that is, that the inmate might prefer to be well and confront his execution with a healthier mind rather than remain in hospitals the rest of his life suffering from severe mental illness. A lawyer who prefers that his client be treated, however, may recognize the anguish that mental illness inflicts upon his client.

\textsuperscript{301} Meisel, Roth & Lidz, \textit{Toward a Model of the Legal Doctrine of Informed Consent}, \textit{134 Am. J. Psychiatry} 285, 286 (1977).
These two positions illustrate the moral purposes served by the doctrine of informed consent. One philosophical tradition, the utilitarian theory, aims at protecting people from harm. This principle is risk/benefit-oriented, reasoning that “morally right actions or practices are those that result in a positive balance of pleasure over pain, happiness over unhappiness, or other beneficial consequences over undesirable ones.” A second philosophical strand focuses on respect for individual autonomy. “[T]he ethical precept that underlies this moral theory is expressed in terms of individual autonomy and human dignity. This precept more often is expressed in the language of basic rights such as the right to life, liberty, autonomy, and the patient’s right to decide.” It has been suggested that these different moral theories and value judgments underlie each of the various tests of competency. Those valuing individual autonomy will favor a weaker test of competency while those with a utilitarian bent will opt for more stringent tests, thereby supporting “the exercise of benevolent paternalism in psychiatry, placing the health, well-being, and survival of patients above their freedom and autonomy.” Thus, it is not difficult to perceive a certain paternalism in the first position, however benevolent, and a more person-oriented strain in the second.

These different moral theories reemerge in the ethical dilemmas of psychiatrists participating in the capital or noncapital sentencing process. The utilitarian strain arises in the form of the psychiatrist’s obligation, as an agent of the court, to do justice and to protect society as a whole. The person-centered model, on the other hand, is evinced in the argument that a psychiatrist’s primary obligation is to look out for the examinee’s best interests even when they conflict with those of society. The APA Task Force on Sentencing recognizes that these two extremes cannot exist separately in the real world, as the polemic between the two positions demonstrates. Even the most person-centered psychiatrist or lawyer acts with an eye toward systemic concerns, and even the most societally oriented lawyer or psychiatrist recognizes and remembers his oath

302. See generally J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); J.S. MILL, UTILITARIANISM (1863).
304. Id.
305. Id. at 367.
306. Id.
307. See APA SENTENCING REPORT, supra note 244, at 7.
to guard zealously his client's best interests.

While there is no answer to this moral dilemma, psychiatrists, lawyers, and judges must straddle the line and accommodate these divergent moral values. Even if one believes the death penalty is immoral, it is wrong to assume that an inmate in such a position would refuse treatment and that if he accepted treatment, he must have done so incompetently. It safely can be said, nevertheless, that there should be a high standard of competency to accept or refuse treatment in this situation solely because of the risk of death—however far down the road it may lie.

2. The Right to Refuse Treatment

Although the Supreme Court has never recognized a constitutional right to refuse treatment for the civilly committed patient or the criminally committed prisoner, a number of lower federal courts have recognized such a right based on the constitutional right of privacy or personal autonomy, the eighth amendment prohibition of cruel and unusual punishment, and the first amendment guarantee of freedom of religion. The right to refuse treatment, however, has never been held to be absolute. Rather, the individual's interests are to be balanced against those of the state or mental institution. In its most expansive form, the right, once asserted, entitles the patient to a hearing to determine his competency to make treatment decisions. If the patient is adjudged incompetent, a substituted judgment is provided for, usually by a judge or guardian ad litem.

308. See, e.g., Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984), cert. denied, 105 S. Ct. 1187 (1985) (pretrial detainee has constitutionally protected right not to be forcibly administered antipsychotic drugs); Rogers v. Okin, 478 F. Supp. 1342, 1366-67 (D. Mass. 1979) (right to make decision whether or not to refuse medication a fundamental right of privacy), aff'd in part, 634 F.2d 650 (1st Cir. 1980), vacated on other grounds sub nom. Mills v. Rogers, 457 U.S. 291 (1982); Mackey v. Proconier, 477 F.2d 877, 878 (9th Cir. 1973) (administration of succinycholine without prisoner's consent raises serious constitutional questions of "impermissible tinkering with the mental processes"); Rennie v. Klein, 462 F. Supp. 1131 (D. N. J. 1978) (in absence of emergency, some due process hearing required before an involuntary mental patient may be forcibly administered drugs).


311. See, e.g., Rogers v. Commissioner of the Dep't of Mental Health, 458 N.E.2d 308 (Mass. 1983) (judge, using substituted judgment standard, decides whether patient adjudicated incompetent would have assented to administration of antipsychotic medications); cf. Greaves, 744 F.2d 1387 (no clear remedy specified).
Substantial state interests inhere in a correctional facility. Inmates are presumed to have forfeited numerous liberty-based interests by virtue of their incarceration. The Supreme Court held in *Hudson v. Palmer*\(^{312}\) that prisoners are not protected from regular shakedown searches, reasoning that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."\(^ {313}\) On the same day, the Court held in *Block v. Rutherford*\(^{314}\) that pretrial detainees are neither constitutionally entitled to contact visits nor protected from shakedown searches, inasmuch as the jail administration's decision that such practices would jeopardize security should be accorded substantial deference.\(^ {315}\) The state interest in orderly prison administration similarly tipped the constitutional balance in *Commissioner of Correction v. Myers*,\(^ {316}\) in which the Supreme Judicial Court of Massachusetts held that a prisoner could be forced to undergo hemodialysis and medication.\(^ {317}\) The court noted that although the defendant's incarceration did not divest him of his right of privacy and interest in bodily integrity, it did impose limitations on those constitutional guarantees because of the state interest "in upholding orderly prison administration."\(^ {318}\)

The Supreme Court has recognized, however, that defendants do not necessarily forfeit all of their constitutional rights at the prison gate. For example, in *Bell v. Wolfish*,\(^ {319}\) the Court held that pretrial detainees do retain due process rights, although their liberty may be imposed upon absent individualized punitive intent by prison officials.\(^ {320}\) Similarly, in *Cruz v. Beto*,\(^ {321}\) the Court recognized that prisoners must be provided "reasonable opportunities . . . to exercise their first amendment religious freedom[s]."\(^ {322}\) In *Vitek v. Jones*,\(^ {323}\) the Court held that a prisoner could not be involuntarily transferred from a prison to a mental hospital without

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313. *Id.* at 3200.
315. *Id.* at 3234.
317. *Id.* at 458.
318. *Id.*
320. *Id.* at 535-40.
321. 405 U.S. 319 (1972) (per curiam).
322. *Id.* at 322 n.2.
appropriate procedural protections. The Court reasoned that although conviction and sentencing extinguished the inmate's right to freedom from confinement, they did not authorize the state to classify him as mentally ill and to subject him to involuntary behavior modification treatment. The qualitative difference between a penal institution and a mental hospital further subjected the inmate to a stigma distinct from mere incarceration.

No court has ever faced the issue of whether an inmate declared incompetent for execution has a right to refuse treatment, or considered the dimensions of that right. On its face there seems to be no greater state interest than carrying out a lawfully imposed sentence. While the state statutes regarding competency for execution do not specify the terms, conditions, or extent of voluntariness of treatment, they do evince strong state interests in curing inmates so that they might be returned to death row. If a state can execute a prisoner against his will, what prevents it from forcibly injecting him with psychotropic drugs to make him fit for execution? Further analysis will reveal, however, that this may not be the best treatment protocol.

Psychiatrists initially reacted to the newly discovered right to refuse treatment with considerable confusion, alarm, and anger. They viewed the recent decisions as further encroachment by the legal system upon hospital psychiatry, an environment lawyers are ill-equipped to understand. Further consideration revealed that studying why patients refused treatment provided therapeutically useful information. As Appelbaum and Gutheil wrote in their study of drug refusal, the "right" to refuse "fails to take into account the fact that 'refusal' is not a homogeneous concept but a set of behaviors whose meaning and consequences vary according to the patient's clinical state." Appelbaum and Gutheil found that

325. See supra note 3.
327. Appelbaum & Gutheil, Drug Refusal: A Study of Psychiatric Inpatients, 137 AM. J. PSYCHIATRY 340, 344 (1980). See also Stone, The Right to Refuse Treatment, 38 ARCH. GEN. PSYCHIATRY 358, 362 (1981) ("Competent patients . . . have and should have the right to decide about medication. But once appropriate procedural safeguards have been met and
drug refusers fell into three groups: situational, stereotypic, and symptomatic.\textsuperscript{328} By examining the reasons for the refusals, psychiatrists were able to determine on a clinical basis that it might be more therapeutically beneficial to yield to the patient's refusal of medication in certain cases: "Permitting both situational and stereotypic refusers in our study to decline medications, not as a 'right' but as a matter of clinical policy, did not seriously impair their overall treatment and yielded some positive advantages."\textsuperscript{329}

The person-centered approach advocated by Appelbaum and Gutheil, which looks to the individual dynamics of a patient's illness and the reasons for the refusal rather than to abstract principles of individual autonomy, evokes the tensions between the utilitarian and person-centered moral philosophies that come into play in the context of informed consent.\textsuperscript{330} While principles of fairness dictate that inmates who are adjudged incompetent for execution should not be shipped to hospitals and blindly injected with drugs, it does not necessarily follow that they should be allowed to "rot with their rights on," though this may save them from the executioner. Medical personnel who believe it is not their role to prepare someone for execution\textsuperscript{331} certainly should be accorded the prerogative to decline to participate in such treatment. Those who do elect to participate, however, need not necessarily feel that they are facilitating an involuntary execution. A number of capital inmates have elected to die, either by suicide or execution, rather than spend their lives in prison. Moreover, not all incompetent inmates have exhausted state and federal post-conviction remedies or avenues for clemency; therefore, a return to competency does not necessarily mean imminent death.

A further wrinkle in treating those found incompetent for execution is that as the inmate begins to improve, he may also begin fully to appreciate his situation. This realization may result in

\bibitem{328} Appelbaum \& Gutheil, supra note 327, at 342-43. The doctors conducted the study on a 40-bed inpatient unit at the Massachusetts Mental Health Center, the population of which included patients suffering from acute and chronic mental illnesses. Drug refusers who were "situational" refusal medication infrequently and with no apparent pattern. Those patients described as "stereotypic" appeared to respond habitually to a variety of stresses by the predictable response of refusing medication. Finally, drug users who were "symptomatic" methodically refused medication over substantial periods of time in a manner that precluded the hospital from rendering proper care to the patient. \textit{Id.}
\bibitem{329} \textit{Id.} at 345.
\bibitem{330} \textit{See supra} notes 302-07 and accompanying text.
\bibitem{331} \textit{See, e.g., supra text accompanying notes 297-98.
EXECUTION COMPETENCY

drug refusal, the product, perhaps, of an "unwillingness to surrender the positive defensive adaptations of the psychotic state . . . . a fear of losing the supports offered by the hospital and physician . . . or a multifaceted reluctance to reestablish contact with reality."\(^{332}\) This refusal, on the one hand, would be a competent refusal although, depending upon the legal situation, the inmate may not have the right to refuse. On the other hand, the refusal of medication may again cause the prisoner's condition to deteriorate, making him again incompetent, thereby causing the cycle to repeat itself. Further complicating the picture is the inmate who is sent to the hospital, treated and cured, returned to death row, and then deteriorates into situational psychosis caused by the return to the death cell. Whether the prison and hospital administrations may maintain the death row inmate on medication so that he may competently anticipate his impending fate is yet another vexing problem. In another context, the Supreme Court of New Jersey opined that "the law, equity and justice must not themselves quail and be helpless in the face of modern technological marvels presenting questions hitherto unthought of."\(^{333}\) In formulating the rule prohibiting the execution of the incompetent, Blackstone, Hale, Coke, and others could not have foreseen that in the 1980's it is often possible to make a severely disturbed, psychotic person rational and competent relatively quickly. Modern medical technology may now enable us to cure someone with medication and thereby send him to the electric chair when a century ago he would have been incurable and would have spent the remainder of his life in prisons or hospitals. It seems ironic that doctors may impose "artificial competence" upon an inmate and expedite his death;\(^{334}\) however, this is the natural and logical consequence of the rule in the modern world. If we shudder at the thought of an inmate who would have been spared the gas chamber but for an injection of Prolixin, our uneasiness reflects a more basic abhorrence of the death penalty itself.

V. Conclusion

The ancient proscription against executing an incompetent pris-

\(^{332}\) Appelbaum & Gutheil, supra note 327, at 340.


oner raises seemingly intractable dilemmas. When analyzed, these issues are no more perplexing than many of the other problems arising out of the relation between law and psychiatry. Competency for execution seems more insoluble because it forces us to confront directly the ultimately moral question of when the state may properly take life as punishment. Previous attempts to rationalize the rule and to prescribe standards of competency and procedures assuring its effectiveness have proved incoherent because they failed to confront the reality that law and psychiatry rarely, if ever, exist separately from culture and politics.\footnote{Unger, \textit{A Program for Late Twentieth-Century Psychiatry}, 139 AM. J. PSYCHIATRY 155, 164 (1982) ("[T]here are no clear-cut and permanent frontiers between psychiatric and nonpsychiatric discourse."); see also R. Unger, \textit{Passion: An Essay on Personality} (1984).} Analyzing the rule against executing incompetent capital inmates forces us to address the fundamentally moral and political nature of law and psychiatry in a peculiarly charged context. Facing these questions openly might enable society to abolish capital punishment altogether or to acknowledge that its sole purpose is retribution.
APPENDIX

STANDARDS OF COMPETENCY FOR EXECUTION SURVEY OF STATE STATUTORY AND COMMON LAW

Explicit Statutory Proscription Against Execution of the Incompetent and Applicable Standard:

**ALABAMA**


"insane"

**ARIZONA**


"insane"

**ARKANSAS**


"insane"

**CALIFORNIA**


"insane"

**CONNECTICUT**


"insane"

**FLORIDA**


"whether he understands the nature and effect of the death penalty and why it is to be imposed upon him"

**GEORGIA**


"insane"

See also 1976 Op. Atty Gen. Ga. 223, 225 (available on LEXIS, States library, GAAG file) (the competency test is "whether the individual is capable ‘of presently understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense..."
ILLINOIS
ILL. ANN. STAT. ch. 38, § 1005-2-3 (Smith-Hurd 1982)

KANSAS

MARYLAND

MASSACHUSETTS

MISSISSIPPI

to the [proceedings] preferred against him [demand]’”)

“because of a mental condition he is unable to understand the nature and purpose of [the death] sentence.” See also People v. Geary, 131 N.E. 652, 655 (Ill. 1921) (“within the meaning of our statute, the defendant is [sane] . . . when he has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for originally, the purpose of his punishment, and the impending fate which awaits, and a sufficient mind to know any facts which might exist which would make his punishment unjust or unlawful, and sufficient of intelligence to convey such information to his attorney or the court.”).

“sane or insane”

“insane”

“insane”

“insane”
“as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out.”

“lacks mental fitness”

“insane”

“insane.”

See also In re Smith, 176 P. 819, 823 (N.M. 1918) (“If the prisoner has not at the present time, from the defects of his faculties, sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court, then he would not be sane and should not be
NEW YORK

OHIO
Ohio Rev. Code Ann. § 2949.28-.30 (Page 1982)

OKLAHOMA

executed.”).

“insane”

“insane.”
See also In re Keaton, 250 N.E.2d 901, 906 (Ohio Ct. App. 1969) (test under the statute is whether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence requisite to convey such information to his attorneys or the court).

“insane.”
See also Bingham v. State, 169 P.2d 311, 314-15 (Okla. Crim. App. 1946) (test at common law was “a state of general insanity, the mental powers being wholly obliterated and a being in that deplorable condition can make no defense whatsoever and has no understanding of the nature of the punishment about to be imposed”; court also cites with approval test articulated in In re Smith, 176 P. 819 (N.M. 1918)).
SOUTH DAKOTA
S.D. Codified Laws Ann. §§

(mentally incompetent to proceed)

UTAH

"suffering from a mental disease or defect resulting either: (1) In his inability to comprehend the nature of the proceedings against him or the punishment specified for the offense charged; or (2) In his inability to assist his counsel in his defense"

WYOMING

"insane"

Judicial Adoption of Common Law Rule Proscribing Execution of the Incompetent and Applicable Standard:

LOUISIANA
State v. Allen, 15 So. 2d 870, 871 (La. 1943) ("insane").

PENNSYLVANIA
Commonwealth v. Moon, 117 A.2d 96, 102 (Pa. 1955) (The "controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose mental illness. . . . The determinative issue [is] whether that illness so lessen[s] his capacity to use his customary self-control, judgment and discretion as to render it necessary or advisable for him to be under care.") (emphasis in original).

TENNESSEE
Jordan v. State, 135 S.W. 327 (Tenn. 1911) ("insane").
WASHINGTON

State v. Davis, 108 P.2d 641 (Wash. 1940) ("insane").

General Statutory Procedures Requiring Transfer of Incompetent Prisoners to State Mental Hospital and Applicable Standard:

DELAWARE

"mentally ill"

INDIANA
Ind. Code Ann. § 11-10-4-3 (Burns 1981)

"mentally ill and in need of care and treatment in the department of mental health or a mental health facility"

NORTH CAROLINA

"by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner"

RHODE ISLAND
R.I. Gen. Laws §§ 40.1-5.3-6 to 40.1-5.3-7 (1984)

"insane"

SOUTH CAROLINA

"mentally ill or mentally retarded"

VIRGINIA

"insane or feebleminded"

States Which Have Recently Repealed Statutes, Leaving Case Law Which Supports the Common Law Rule:

COLORADO

Bulger v. People, 156 P. 800, 802 (Colo. 1916) ("insane").

KENTUCKY

Barrett v. Commonwealth, 259 S.W. 25, 27 (Ky. 1923) ("insane").

NEW JERSEY

In re Lang, 71 A. 47, 48 (N.J. 1908) (if prisoner is "capable
of understanding the nature and object of the proceedings going on against him, if he rightly comprehends his own condition in reference to such proceedings and can conduct his defense in a rational manner, he is . . . deemed to be sane, although on some other subjects his mind may be deranged or unsound") (quoting trial judge's jury instructions).

TEXAS

*Ex parte Morris*, 257 S.W. 894 (Tex. Crim. App. 1924) ("insane").

*Note:* Nine states, Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, West Virginia, and Wisconsin, have no death penalty. Two states, Idaho and New Hampshire, have a death penalty but no law relating to competency for execution. Two states, Oregon and South Dakota, were undetermined.