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COMMENTARY

PSYCHIATRY, INSANITY, AND THE DEATH PENALTY: A NOTE ON IMPLEMENTING SUPREME COURT DECISIONS*

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I. INTRODUCTION

Andrew Jackson may never have dared John Marshall to enforce his decision in *Worcester v. Georgia*,[1] but the legend that has grown up around that episode teaches a useful lesson about the fragile authority of the Supreme Court. The Court, like the Pope, has no divisions. It has, in Alexander Hamilton's words, "neither force nor will but merely judgment."[2] Thus, the impact of its rulings depends not only upon their fidelity to principle, but also upon their effective implementation in the face of public opposition and our general ignorance about precisely how the world works.

This is far from an academic question. Many of the Court's decisions have been intensely controversial.[3] In some instances, the

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1 31 U.S. (6 Pet.) 515 (1832). *See* G. GUNTHER, CONSTITUTIONAL LAW 25 (11th ed. 1985); 2 C. WARREN, THE SUPREME COURT IN AMERICAN HISTORY 219 (1926).

2 THE FEDERALIST No. 78, at 465 (A. Hamilton)(C. Rossiter ed. 1961)(emphasis omitted).

3 The most prominent contemporary illustration is the Court's abortion jurisprudence. *Compare, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) *and* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419-20 & n.1 (1982) *with, e.g., id.* at 453-59 (O'Connor, J., dissenting) *and* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

Energetic dispute also has surrounded its rulings in criminal procedure. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* was controversial when it was decided

reaction has included outright defiance.[4] On occasion, opponents have succeeded in overturning objectionable rulings by constitutional or statutory amendment.[5] These situations involve hostility to judicial orders. Sometimes, however, the problem results from inability rather than unwillingness to comply.[6] Although it is often assumed that difficulties of implementation arise primarily in com-

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and remains so today. *See, e.g.*, Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); Inbau, *"Playing God": 5 to 4*, 57 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 377 (1966). *See generally* L. BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983).

[4] Perhaps the most notable modern example of defiance was the reaction in much of the South to Brown v. Board of Educ., 347 U.S. 483 (1954). The Court addressed this phenomenon in several subsequent cases. *See, e.g.*, Green v. County School Bd., 391 U.S. 430, 435-39 (1968); Griffin v. County School Bd., 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958). *See generally* G. ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION 15-22, 210-19 (1969); S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM *BROWN* TO *ALEXANDER* 162-222 (1977). For discussion of the atmosphere in defiant communities, see, *e.g.*, J. SILVER, MISSISSIPPI: THE CLOSED SOCIETY (1964); Frankel, The Alabama Lawyer, *1954-1964: Has the Official Organ Atrophied?*, 64 COLUM. L. REV. 1243 (1964).

Another continuing controversy has involved officially mandated prayer in public schools, which at least in theory was outlawed by Engel v. Vitale, 370 U.S. 421 (1962), and School Dist. v. Schempp, 374 U.S. 203 (1963), but which has continued unabated in many jurisdictions nonetheless. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985). *See generally* K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISIONS 29-35, 41-45, 72-86 (1971); Beaney & Beiser, *Prayer and Politics: The Impact of* Engel *and* Schempp *on the Political Process*, 13 J. PUB. L. 475, 486-91 (1964); Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision*, 10 MIDWEST J. POL. SCI. 304, 307-08 (1966).

[5] Several constitutional amendments were adopted in response to unpopular Supreme Court decisions. For example, the eleventh amendment overruled Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); the sixteenth amendment overruled Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); and the twenty-sixth amendment overruled Oregon v. Mitchell, 400 U.S. 112 (1970).

The latest statutory change designed to vitiate a controversial Court ruling is the Civil Rights Restoration Act, Pub. L. No. 100-259, 56 U.S.L.W. 45 (1988), adopted as this Commentary went to press to overturn Grove City College v. Bell, 465 U.S. 555 (1984). Other recent examples include: the Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (codified at 49 U.S.C.A. app. § 1374(c) (West Supp. 1988)), enacted in response to United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986); the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)), enacted in response to General Elec. Co. v. Gilbert, 429 U.S. 125 (1976); and section 5(a) of the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241, 1247 (1976)(codified at 5 U.S.C. § 552(b)(3) (1982)), in which Congress rewrote Exemption 3 of the Freedom of Information Act in response to Administrator, FAA v. Robertson, 422 U.S. 255 (1975).

[6] For instance, during the Vietnam War, the Selective Service System failed to implement United States v. Seeger, 380 U.S. 163 (1965), and various other legal requirements in large measure due to its inability to direct the discretion of local draft boards. *See* L. BASKIR & W. STRAUSS, CHANCE AND CIRCUMSTANCE 70, 78-79 (1978); J. DAVIS, JR. & K. DOLBEARE, LITTLE GROUPS OF NEIGHBORS 80-87 (1968); Field, *Problems of Proof in Conscientious Objector Cases*, 120 U. PA. L. REV. 870, 892-904 (1972); Rabin, *A Strange Brand of Selectivity: Administrative Law Perspectives on the Processing of Registrants in the Selective Service System*, 17 UCLA L. REV. 1005, 1016-23 (1970).

plex institutional reform litigation,[7] the question inheres in many more traditional legal contexts.[8]

The recent decision in *Ford v. Wainwright*[9] exemplifies the ambiguous relationship between declaring and implementing the law. In *Ford*, the Supreme Court held that the eighth amendment forbids the execution of a capital defendant who becomes insane while on death row.[10] At first blush, *Ford* was an easy case. After all, the prohibition against putting an insane prisoner to death has venerable roots in Anglo-American law. Beginning in the seventeenth century, commentators such as Coke, Hale, and Blackstone discussed this prohibition as if it were a settled principle.[11] At the time of the *Ford* decision, every American state accepted that principle.[12] Accordingly, the formal ruling was deceptively narrow: it merely prohibited ex parte sanity determinations.[13]

On closer examination, however, the matter is not so simple. Psychiatrists almost certainly will be asked to assist in evaluating the sanity of death row inmates.[14] Psychiatric judgments are inherently imprecise.[15] Moreover, the sanity determination in a *Ford*-type claim involves the highest possible stakes: whether a prisoner lives

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7 *See, e.g.*, D. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

8 *See* Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

9 477 U.S. 399 (1986).

10 Some analysts have characterized the problem as one of inmate incompetence rather than insanity. They have done so in order to avoid any misunderstandings that could arise from the connotations of the word "insanity." *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE § 7-5.6 commentary (proposed draft 1987). The author refers to the concept as "insanity" because that is how the Supreme Court framed its discussion in *Ford*. Any reader so inclined should feel free to substitute "incompetence" and "incompetent" for "insanity" and "insane" wherever these terms appear.

11 For excerpts from common law treatises, see *Ford*, 477 U.S. at 406-08; Solesbee v. Balkcom, 339 U.S. 9, 17-19 (1950)(Frankfurter, J., dissenting).

12 *Ford*, 477 U.S. at 408 & n.2.

13 *Id.* at 413-15. The process at issue in *Ford* provided for gubernatorial determination of sanity. Under the applicable state law, the governor would appoint a panel of psychiatrists to prepare a report based upon a joint examination of the prisoner. The statute did not expressly provide for the submission of evidence or arguments on behalf of the inmate, and the governor followed a consistent policy of forbidding such evidence or arguments. The governor did not indicate whether he would consider the prisoner's post-examination submissions. *Id.* at 412-13.

14 The *Ford* Court did not consider the necessity of psychiatric participation in sanity determinations. Both the state and the prisoner in *Ford* relied upon the findings of psychiatrists. *Id.* at 402-04. Even if psychiatrists were not required to participate, other medical or mental health professionals almost surely would be involved. Many of the problems discussed in Part III of this Commentary with respect to psychiatrists also will arise for psychologists, nurses, social workers, and other experts. *See* Note, *Medical Ethics and Competency To Be Executed*, 96 YALE L.J. 167, 185 (1986).

15 Psychiatric evaluations have been described as calling for "basically subjective judgment," *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the

or dies. Thus, the qualitative nature of psychiatric judgments, together with the enormous and immediate consequences of the sanity determination, could combine to increase the risk of unreliable psychiatric opinions in every *Ford*-type case. The Supreme Court in *Ford* explicitly declined to define precisely the constitutionally required procedures for resolving sanity disputes.[16] Yet for that ruling to have more than rhetorical impact, resolution of death row sanity disputes will require considerable procedural formality.

The logic of the Court's recent due process rulings suggests that we should incur the burdens of that formality only if we accept the cogency of the rule against executing insane persons. The rule's ancient vintage notwithstanding, the justifications for exempting the insane from capital punishment remain problematic. Continued adherence to the rule, along with its elevation to constitutional status in *Ford* despite its analytical infirmities, implies a profound societal ambivalence about the death penalty. On the one hand, we are unwilling to abolish capital punishment. On the other, we hesitate to execute more than a handful of prisoners. This ambivalence in turn suggests that the death penalty has become more a symbol of opposition to crime than a meaningful criminal sanction.

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judgment), and as representing "at best a hazardous guess however conscientious," Solesbee v. Balkcom, 339 U.S. 9, 23 (1950)(Frankfurter, J., dissenting).

16 477 U.S. at 416-17. The Court also did not consider whether the same procedural requirements should apply to initial and successive insanity claims. The prospect of an inmate's repeatedly making false claims of insanity has troubled the Court for many years. *See id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part); Solesbee v. Balkcom, 339 U.S. 9, 12-13 (1950); Nobles v. Georgia, 168 U.S. 398, 405-06 (1897). Little or no empirical evidence exists that prisoners have repeatedly filed frivolous insanity claims. *See* Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 790-91 (1980). That situation could change, however, if more inmates seek sanity determinations in the wake of *Ford*.

The Court's concern in this area has two bases. First, death row inmates appear to have nothing to lose in advancing "entirely spurious claims of insanity." *Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting). Uneasiness over such claims reflects doubt over whether they can be exposed. Research on this problem is limited, although some methods for dealing with feigned mental and emotional disturbance have been suggested. *See* Resnick, *The Detection of Malingered Mental Illness*, 2 BEHAV. SCI. & L. 21 (1984). Second, seriatim claims present special problems in the *Ford* context. The disposition of a prior insanity claim logically cannot preclude a subsequent one because *Ford* requires that the prisoner be sane at "the very moment of execution." 477 U.S. at 429 (O'Connor, J., concurring in the result in part and dissenting in part). Of course, if that standard were taken literally, it could never be satisfied because, as a practical matter, the sanity determination must be made at some point prior to execution. Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 400 (1962).

For further discussion of unresolved procedural and substantive issues, see *infra* notes 67-77 and accompanying text.

II. INSANITY AND THE CRIMINAL LAW

The question of a defendant's mental condition may arise at any stage of the criminal process. In *Ford*, the issue appeared only after the prisoner had been tried, convicted, and placed on death row. In other contexts, a defendant may claim to have been insane at the time of the offense or to have become insane before trial. Just as the common law forbade the execution of an inmate who became insane while in prison, it also made special provision for insane defendants at these earlier stages. For example, insanity at the time of the offense traditionally has relieved the accused from legal responsibility.[17] This general rule excuses those persons whose antisocial conduct is insufficiently blameworthy to justify a finding of guilt.[18] Similarly, insanity at the time of trial requires a delay in the proceedings until the defendant regains mental competence.[19]

The principal controversy over insanity has concerned the appropriate definition of the concept.[20] The standard for insanity at the time of the offense has been formulated in various ways, including the classical *M'Naghten* rule, which excuses from criminal liability a defendant who, as a consequence of a mental disease or defect, did not know that his conduct was wrong;[21] the so-called "irresistible impulse" or "lack of control" test, which excuses a defendant who had a mental disease or defect which prevented him from controlling his behavior;[22] the "product" rule, which excuses a defendant whose conduct was the product of a mental disease or defect;[23] and the "substantial capacity" test, which essentially combines and up-

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17 This principle arose from the common law. The Constitution apparently does not require recognition of the insanity defense. *See* State v. Korell, 690 P.2d 992, 998-1002 (Mont. 1984). *Contra* Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931)(per curiam); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

18 *See generally* A. GOLDSTEIN, THE INSANITY DEFENSE 9-22, 220-26 (1967).

19 *See* Hazard & Louisell, *supra* note 16, at 381-82; Note, *supra* note 16, at 783. The requirement of competence to stand trial now rests upon constitutional due process guarantees, not simply the common law. *See infra* note 25 and accompanying text.

20 "Rivers of ink, mountains of printer's lead, forests of paper have been expended on this issue . . . ." Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 516 (1968).

The definitional question is not, however, the only controversial topic in this field. For example, the consensus over the continued recognition of the insanity defense has begun to dissolve in recent years. *See, e.g.*, N. MORRIS, MADNESS AND THE CRIMINAL LAW 29-87 (1982).

21 M'Naghten's Case, 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). *See generally* A. GOLDSTEIN, *supra* note 18, at 45-66.

22 *See, e.g.*, Davis v. United States, 165 U.S. 373, 378 (1897). *See generally* A. GOLDSTEIN, *supra* note 18, at 67-79.

23 *See, e.g.*, Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954), *overruled*, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)(en banc). *See generally* A. GOLDSTEIN, *supra* note 18, at 82-86.

dates the *M'Naghten* rule and the "lack of control" test.[24] The standard for competency to stand trial also has been variously phrased, but the alternative formulations focus upon the defendant's ability to understand the charges and proceedings against him and to consult rationally with his counsel.[25]

In short, there is no single legal definition of insanity. Different standards apply both at different stages of the criminal process and, from one jurisdiction to another, at the same stage. The same doctrinal untidiness exists in the *Ford*-type context. States previously had adopted varying standards of insanity for death row inmates.[26] Furthermore, the *Ford* Court left open the standard by which insanity would be determined.[27] In principle, however, implementing the rule against executing insane persons presents the same challenges regardless of the definition of insanity.[28]

III. PSYCHIATRISTS AND THE SANITY OF DEATH ROW INMATES

Sanity is a legal, rather than a medical, concept. Sanity decisions therefore involve normative questions, not scientific ones. Accordingly, those determinations are vested in judges, jurors, or other lay decisionmakers. Nevertheless, psychiatrists inevitably play a prominent role in sanity proceedings. They examine the person whose mental condition is at issue and report their findings to the decisionmaker.[29]

Psychiatric participation in capital cases poses special problems

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[24] *See, e.g.*, MODEL PENAL CODE § 4.01(1) (1985)(excusing from criminal responsibility a defendant who, at the time of the offense, "as a result of mental disease or defect . . . lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law"). *See generally* A. GOLDSTEIN, *supra* note 18, at 86-88.

[25] *See, e.g.*, Dusky v. United States, 362 U.S. 402, 402 (1960)(per curiam)(test is whether defendant "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 a factual understanding of the proceedings against him"); State *ex rel.* Davey v. Owen, 133 Ohio St. 96, 104, 12 N.E.2d 144, 148 (1937)(test is whether defendant "has sufficient mental capacity to recall the events of his life so that he can furnish to his counsel facts which ought to be stated and presented to his jury at his trial for the crime charged"). *See generally* H. UVILLER, THE PROCESS OF CRIMINAL JUSTICE: INVESTIGATION AND ADJUDICATION 780 (2d ed. 1979).

[26] *See* Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35, 60-61, 101-07 (1986).

[27] 477 U.S. at 418 (Powell, J., concurring in part and concurring in the judgment).

[28] For further discussion of the appropriate criterion of insanity in this context, see *infra* note 97.

[29] *See generally* A. GOLDSTEIN, *supra* note 18, at 97-105. The proper scope of psychiatric testimony in sanity proceedings has generated increasing debate. *Compare* Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984) *and* Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L.

due to the possibility that the defendant ultimately will be put to death. As members of the medical profession, psychiatrists are bound by the Hippocratic Oath to do no harm to their patients. For this reason, both the American Medical Association and the American Psychiatric Association have adopted policies precluding their members from "participat[ing] in a legally authorized execution."[30] These policies do not, however, bar psychiatrists from taking part in earlier stages of capital cases, such as evaluating a defendant's mental state at the time of the alleged offense or assessing an accused's competence to stand trial.[31] The proscription does not apply in these situations due to the attenuated connection between psychiatric involvement and actual execution.[32]

Cases like *Ford*, in which an inmate arguably has lost his sanity while awaiting execution, present the participation dilemma directly and unambiguously. The inmate in such cases already has been convicted and sentenced to death. A finding of sanity therefore could lead inexorably, and relatively quickly, to execution. Psychiatrists could become involved in *Ford*-type cases at three stages: (1) in evaluating a claim that a prisoner under sentence of death has become insane; (2) in treating a death row inmate who has been found to be insane; and (3) in certifying that a previously insane death row inmate has regained sanity.

The first stage, assessing the condition of a prisoner who claims to have become insane while awaiting execution, presents the weakest ethical conflict. Yet even here the case for psychiatric participation is far from clear-cut. A psychiatric evaluation at this stage could lead to a finding of insanity, which would at least temporarily prevent the state from taking the prisoner's life. On the other hand, a finding that the inmate was sane could be the final step leading directly to the inmate's execution. From this perspective, the psychiatrist's certification of sanity might be seen as an immediate cause of the prisoner's death.

Psychiatric participation in the other stages is more problematic. In the second stage, one might justify treating a death row in-

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REV. 971 (1982) *with* Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 VA. L. REV. 427 (1980).

30 Note, *supra* note 14, at 175 (quoting *Capital Punishment*, 1980 PROC. HOUSE DELEGATES AMA 85, 86; AM. PSYCHIATRIC A., THE PRINCIPLES OF MEDICAL ETHICS § 7(1)(1985)).

31 *See supra* notes 17-19 and accompanying text.

32 For example, even if a psychiatrist were to find that a defendant was sane at the time of the offense or competent at the time of trial, the defendant still could be acquitted. Similarly, if he were convicted, the defendant could receive a sentence less than death.

mate who has become insane on the basis that mental illness itself can cause great suffering. According to this view, psychiatrists have a medical duty to treat such illness, regardless of the legal implications of successful treatment. On the other hand, this approach holds out the grisly prospect that the state will restore the prisoner to health only so that it can kill him.[33] Once again, the treating psychiatrist could be viewed as an immediate cause of the inmate's death.

The third stage, determining whether a previously insane death row inmate has regained sanity, resembles the first, but the similarity is deceptive. As in the initial stage, a finding of insanity results in the postponement of execution, whereas a finding of sanity could lead directly to the inmate's death. At the same time, there is a significant difference between the first and third situations. Certifying a death row inmate as sane in the first situation simply continues the status quo because the inmate is presumed sane at that stage.[34] By contrast, certifying a death row inmate as sane in the third situation changes the status quo because the inmate already has been found insane in an earlier proceeding. At this stage, a finding of sanity could be "tantamount to imposing a new death sentence."[35] Thus, the psychiatrist might be viewed as more clearly implicated in the execution in the third situation than in the first.

Psychiatrists could resolve these issues in several ways.[36] Those

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33 This possibility has been characterized as "an arrangement in which psychiatrists clear the tortured minds of capital prisoners so that the state can fill their bodies with electricity." *The Supreme Court, 1985 Term*, 100 HARV. L. REV. 100, 107 (1986). One way to avoid that prospect would be to commute the sentence of any death row inmate found to have become insane while awaiting execution. Applebaum, *Competence to Be Executed: Another Conundrum for Mental Health Professionals*, 37 HOSP. & COMMUNITY PSYCHIATRY 682, 683 (1986); Radelet & Barnard, *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 49 (1986); Ward, *supra* note 26, at 91; Note, *supra* note 14, at 186. No such requirement exists under current law, however. *Ford*, 477 U.S. at 425 n.5 (Powell, J., concurring in part and concurring in the judgment). Only one state appears to have left open the possibility of commuting a death sentence when a prisoner becomes insane. Note, *supra* note 14, at 171 n.22 (citing MONT. CODE ANN. § 46-19-202 (1985), which authorizes a court to "suspend" the death sentence when "so much time has elapsed since the commitment of the defendant that it would be unjust" to carry out the execution).

34 The prisoner bears the burden of proving that he has become insane while awaiting execution. *See Ford*, 477 U.S. at 417; *id.* at 426 & n.6 (Powell, J., concurring in part and concurring in the judgment); *id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part). For further discussion of the extent of the burden of proof, see *infra* notes 69-71 and accompanying text.

35 Radelet & Barnard, *supra* note 33, at 49.

36 For more detailed discussion of alternative resolutions of these ethical issues, see Applebaum, *supra* note 33, at 682-83; Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 84-87, 90-92.

who adopt what might be characterized as the *scrupled* approach would refuse to evaluate or treat death row inmates at any stage.[37] They view any involvement in this process as inconsistent with, and threatening to, their medical role.[38]

Those following the *intermediate* approach take a more complex view. With respect to assessment, they would evaluate the extent of the inmate's mental impairment without offering a formal conclusion as to sanity.[39] Even this involvement would be conditioned upon the availability of a professionally adequate environment for the psychiatric examination and a subsequent adversarial proceeding which affords sufficient protection to the prisoner's interests.[40] With respect to treatment, followers of this approach would treat only inmates who give informed consent.[41] Some within this camp would further condition their provision of treatment upon the commutation of the death sentence to eliminate the possibility of execution if the prisoner were to regain his sanity.[42]

Finally, those following the *clinical* approach would participate fully in both assessment and treatment.[43] Two quite different groups of psychiatrists take this position. One group sees no special

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37 Some commentators characterize this approach as "principled." Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 85. Attaching that label to this approach could imply that advocates of other approaches to these issues are somehow "unprincipled." The term "scrupled" has the additional virtue of consistency with the Supreme Court's terminology in its discussion of the problem of prospective jurors who have reservations of various kinds about capital punishment. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 514 (1968).

38 Applebaum, *supra* note 33, at 683; Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 85. For a recent restatement of the arguments supporting the scrupled approach, see Ewing, *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives*, 5 BEHAV. SCI. & L. 175, 181-85 (1987).

39 Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 86-87. One commentator who adheres to many aspects of the intermediate approach has argued that psychiatrists face no ethical dilemma in simply evaluating an inmate's mental state because that type of involvement does not implicate the healing role of the psychiatrist. Note, *supra* note 14, at 177.

40 Applebaum, *supra* note 33, at 682-83; Radelet & Barnard, *supra* note 33, at 45-48.

41 Applebaum, *supra* note 33, at 683; Radelet & Barnard, *supra* note 33, at 49. A prisoner who has been found insane presumably would lack competence to give informed consent to treatment. Applebaum, *supra* note 33, at 683. Even if an insane prisoner could give informed consent, he also might be entitled to refuse treatment. *See* Ward, *supra* note 26, at 92-99.

42 The Human Rights Advocacy Committee at a Florida mental institution took this position in the case of a convicted murderer who was committed for treatment after being found incompetent for execution. Radelet & Barnard, *supra* note 33, at 49; Ward, *supra* note 26, at 91; Note, *supra* note 14, at 179-80. As previously stated, however, the law does not now require commutation upon a finding of insanity. *See supra* note 33.

43 For a recent discussion supporting the clinical approach, see Mossman, *Assessing and Restoring Competency to be Executed: Should Psychiatrists Participate?*, 5 BEHAV. SCI. & L. 397, 402-07 (1987).

ethical conflicts in *Ford*-type cases. Its members view the assessment of sanity in this setting as analogous to tasks that they routinely perform in other phases of the criminal process and see the treatment of mentally ill death row inmates as their professional duty; the possibility that the prisoner will be executed does not matter. The death penalty from this perspective is a legal, not a medical, issue.[44]

The other group follows this approach for more pragmatic reasons. Its members oppose, to a greater or lesser extent, the death penalty itself. They would participate, however, for two reasons. First, their involvement could lead to at least a temporary stay of execution. For those who abhor capital punishment, anything that keeps a prisoner alive is a positive development.[45] Second, if opponents of the death penalty refuse to participate, they will leave the entire field to those psychiatrists who have fewer reservations about capital punishment.[46] Supporters of this approach justify their concern with critical references to several psychiatrists who regularly testify for the prosecution in death penalty cases.[47] Allowing government-oriented psychiatrists to go unrebutted could lead to more executions, an eventuality which persons in this group would view with dismay.

This second pragmatic argument for anti-death penalty psychiatrists to participate in *Ford*-type cases recognizes—indeed, rests upon—the inevitably imprecise nature of psychiatric judgment. In essence, the argument runs, a psychiatrist's assessment of an individual's mental state is influenced to a degree by the psychiatrist's views on the underlying issue. A psychiatrist who opposes capital

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44 Applebaum, *supra* note 33, at 682, 683; Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 87, 90-91. Some persons in this group may have no particularly well-defined views on the death penalty. For example, the National Medical Association takes no position on capital punishment, but urges its members to assess and treat prisoners in order to fulfill their responsibilities as medical professionals. Applebaum, *supra* note 33, at 683; Ward, *supra* note 26, at 86. Others may, in fact, support the death penalty. For purposes of the discussion in the text accompanying this footnote, the distinction between those who are neutral about and those who are in favor of capital punishment has no special significance.

45 *See* Ward, *supra* note 26, at 86.

46 *See* Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 85.

47 *See* J. ROBITSCHER, THE POWERS OF PSYCHIATRY 198-207 (1980); Rappeport, *Ethics and Forensic Psychiatry*, in PSYCHIATRIC ETHICS 255, 269-70 (S. Bloch & P. Chodoff eds. 1981); Radelet & Barnard, *supra* note 33, at 47, 52 n.37. One particular psychiatrist, Dr. James Grigson, has come in for particularly harsh criticism. Dr. Grigson has testified for the prosecution in several dozen capital cases, in all but one of which the defendant has received a death sentence. Ewing, *"Dr. Death" and The Case for an Ethical Ban on Psychiatric and Psychological Predictions of Dangerousness in Capital Sentencing Proceedings*, 8 AM. J.L. & MED. 407, 410 & nn.9-10 (1983). One writer has suggested that Dr. Grigson works "at the brink of quackery." Dix, *The Death Penalty, "Dangerousness," Psychiatric Testimony, and Professional Ethics*, 5 AM. J. CRIM. L. 151, 172 (1977).

punishment is somewhat more likely to detect signs of insanity in a prisoner than is one who either favors the death penalty or has no strong feelings on the issue. Conversely, a psychiatrist who favors the death penalty is somewhat less likely to detect signs of insanity in a prisoner than is one who opposes the death penalty.[48]

Up to a point, this pragmatic argument captures an important truth. Psychiatry is "not . . . an exact science,"[49] but rather a field of "subtleties and nuances."[50] Its practitioners often deal with "elusive and deceptive symptoms."[51] Thus, it should come as no surprise that psychiatrists "disagree widely and frequently"[52] when called upon to contribute to legal proceedings. These disagreements arise more from the nature of the discipline, which has given rise to literally hundreds of competing methodologies and schools of thought, than from venality or bias.[53]

The Supreme Court could have responded to the inherently imprecise nature of psychiatry by forbidding the use of evidence provided by its practitioners as unreliable. It has not done so. Instead, and of special relevance to this discussion, the Court has specifically approved psychiatric participation in capital cases. In so doing, it has emphasized the need for adequate testing of psychiatrists' findings and opinions through an adversarial process.[54] Indeed, although the precise content of this requirement was a source of disagreement among the Justices,[55] the Court rested its decision in

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48 *See, e.g.*, Bolsen, *Strange Bedfellows: Death Penalty and Medicine*, 248 J. AM. MED. A. 518, 519 (1982); Radelet & Barnard, *supra* note 33, at 45; Ward, *supra* note 26, at 85.

49 Ake v. Oklahoma, 470 U.S. 68, 81 (1985).

50 Addington v. Texas, 441 U.S. 418, 430 (1979).

51 Solesbee v. Balkcom, 339 U.S. 9, 12 (1950).

52 Ake v. Oklahoma, 470 U.S. 68, 81 (1985). *But see* Rogers, Bloom & Manson, *Insanity Defenses: Contested or Conceded?*, 141 AM. J. PSYCHIATRY 885 (1984)(finding consensus among prosecution and defense psychiatrists in approximately 80% of cases in which the insanity defense succeeds).

53 *See, e.g.*, Resnick, *Perceptions of Psychiatric Testimony: A Historical Perspective on the Hysterical Invective*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 203, 209-10 (1986).

54 *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 77-87 (1985); Barefoot v. Estelle, 463 U.S. 880, 896-903 (1983).

In *Ake*, the Court held, precisely because of the lack of consensus within the discipline, that an indigent defendant in a capital trial is entitled to a court-appointed psychiatrist upon a showing that his sanity at the time of the alleged offense will be a significant issue. The court-appointed psychiatrist would enable the defendant to offer expert rebuttal to the prosecution's psychiatric evidence. 470 U.S. at 81-84.

The *Barefoot* decision allowed the prosecution to introduce psychiatric evidence on the defendant's future dangerousness. This holding rested upon the defendant's opportunity to cross-examine the state's experts and to provide his own contrasting expert testimony. 463 U.S. at 898-901.

55 Four Justices suggested that some form of cross-examination is essential, *Ford*, 477 U.S. at 415 although the plurality stopped short of requiring "a full trial on the issue of sanity," *id.* at 416. Three others, in two separate opinions, suggested that much less

Ford upon the complete exclusion of the prisoner from the sanity-determination process.[56]

Greater procedural formality has its costs, however. The Court has made clear in diverse contexts, including its recent death penalty jurisprudence, that those costs should weigh heavily in defining the scope of constitutional guarantees.[57] The pragmatic argument suggests that the costs of adversarial procedures in *Ford*-type cases could be quite substantial. In essence, it encourages psychiatrists who oppose or have reservations about the death penalty to participate in such cases to offset the views of their prosecution-oriented colleagues, some of whom engage in possibly dishonest practices to promote death sentences.[58] If this argument leads pragmatists to participate on behalf of prisoners, an appreciable number could shade their opinions to compensate for the questionable practices of various government psychiatrists. Thus, the argument implies that a disturbing proportion of all psychiatric opinions in *Ford*-type proceedings will be incorrect due to bias. Furthermore, much of that bias will be entirely unconscious.[59]

We do not, of course, know how many psychiatrists fit within each of the philosophical camps described above. It is clear, how-

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formal procedures would suffice. *Id.* at 425-27 (Powell, J., concurring in part and concurring in the judgment); *id.* at 429-30 (O'Connor, J., joined by White, J., concurring in the result in part and dissenting in part).

56 *Id.* at 413-15; *accord id.* at 424 (Powell, J., concurring in part and concurring in the judgment); *id.* at 429-30 (O'Connor, J., concurring in the result in part and dissenting in part).

57 The concern over the burdens of complex litigation may explain the Court's apparent retreat in recent years from the implications of its death penalty rulings in the 1970s. *E.g.*, McCleskey v. Kemp, 107 S. Ct. 1756 (1987); Wainwright v. Witt, 469 U.S. 412 (1985); California v. Ramos, 463 U.S. 992 (1983); Barclay v. Florida, 463 U.S. 939 (1983); Barefoot v. Estelle, 463 U.S. 880 (1983); Zant v. Stephens, 462 U.S. 862 (1983). *See* Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 307.

The emphasis upon costs also occupies a prominent place in modern procedural due process cases. *E.g.*, Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 321-34 (1985); Ingraham v. Wright, 430 U.S. 651, 680-82 (1977); Mathews v. Eldridge, 424 U.S. 319, 347-48 (1976). Costs are not the only consideration in procedural due process cases, of course. In *Eldridge*, the Court outlined a three-factor calculus for resolving such controversies: the private interest affected, the incremental gain in accuracy from more formal procedures, and the resulting additional burdens placed upon the government as a result of those procedures. *Id.* at 335. The individual interest in any death penalty case is as great as one could imagine: life itself. Nothing in the discussion that follows should be interpreted as denigrating that interest.

58 *See supra* notes 46-47 and accompanying text.

59 *Cf.* R. ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH (1966)(exploring impact of psychological researchers' working hypotheses upon their reported findings); R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM (1968)(analyzing effect of teachers' prior beliefs concerning students' intellectual aptitude upon those students' educational achievement).

ever, that the debate over the propriety of psychiatric assessment and treatment of inmates awaiting execution has intensified in recent months.[60] This debate apparently will not end soon. The American Psychiatric Association, after extended deliberation stimulated by the Supreme Court's ruling in *Ford*, has found itself unable to adopt an official position concerning the ethical acceptability of diagnosing and treating death row prisoners.[61]

We also cannot be sure how much subconscious shading of psychiatric opinions will occur. It bears repeating that most disagreements between psychiatrists will arise in good faith.[62] Nevertheless, there is reason to believe that the problem of shading will not be trivial. Various writers have noted that psychiatrists with strong personal beliefs on controversial issues sometimes allow those beliefs to affect their professional opinions. For example, psychiatrists opposed to the Vietnam War were more likely than others in their field to sympathize with and assist young men seeking to avoid military service.[63] Similarly, psychiatrists who favored more permissive abortion regulations in the period before *Roe v. Wade*[64] tended to find mental health indications for abortions in individual cases more often than did psychiatrists who favored restrictive abortion policies.[65]

One might dismiss the potential unreliability of psychiatric opinions in *Ford*-type cases on the theory that bias-related errors will be randomly distributed. Because the mistakes will balance out, the aggregate number of insanity claims upheld would be correct despite the errors in particular instances. Unfortunately, we cannot tell whether the assumption of random distribution will prove valid. In any event, regardless of the validity of this assumption, the argu-

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60 *Compare* Ewing, *supra* note 38, at 181-85 (advocating the scrupled approach) *with* Mossman, *supra* note 43, at 404-07 (advocating the clinical approach).

61 Roth, *APA Council Reports: The Council on Psychiatry and Law*, 144 AM. J. PSYCHIATRY 411, 412 (1987).

62 *See supra* text accompanying note 53.

63 *See, e.g.*, L. BASKIR & W. STRAUSS, *supra* note 6, at 45-46, 47-48. Psychiatrists were not unique among health professionals. Similar patterns have been documented for physicians and dentists. *Id.* at 42-47.

64 410 U.S. 113 (1973).

65 *See* Rosen, *Psychiatric Implications of Abortion: A Case Study in Social Hypocrisy*, 17 W. RES. L. REV. 435, 438-40, 444-46 (1965). *See also* D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 59-61, 141 (1970); G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 77-78, 81-82, 245-47 (1970); L. LADER, ABORTION 34-35 (1966). *Cf.* Bennett, *Abortion and Judicial Review: Of Burdens and Benefits, Hard Cases and Some Bad Law*, 75 Nw. U.L. REV. 978, 990-91 n.57, 1016 n.159 (1981)(discussing the claim that a proposed post-*Roe* distinction between elective and therapeutic abortions was illusory because sympathetic physicians would find the requisite medical necessity in many instances in which no genuine health justification for abortion existed).

ment overlooks the Supreme Court's repeated emphasis upon elevated procedural reliability and genuinely individualized factfinding in capital cases.[66] Thus, this matter cannot be ignored.

The law could respond to the problem of erroneous sanity determinations in particular *Ford*-type proceedings in three ways. First, the prisoner might be required to make a very significant threshold showing of insanity simply to obtain a hearing.[67] Of course, an extremely high threshold could result in the summary rejection of a substantial number of meritorious insanity claims. Such a rigorous standard might result in a skewed pattern of errors in which the number of valid claims that are mistakenly rejected will substantially exceed the number of invalid claims that are mistakenly accepted.[68] Yet a large excess of false negatives over false positives would frustrate *Ford*'s rule against executing inmates who have become insane while on death row.

Second, the prisoner could be called upon to prove insanity by more than the traditional "preponderance of the evidence" standard.[69] The highest plausible burden of proof would seem to be "clear and convincing evidence," the standard which federal law requires an accused to satisfy in order to establish an insanity defense at trial.[70] Again, however, the higher the standard, the greater the probability of mistaken denials of insanity claims. That result also

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66 *See, e.g.*, Mills v. Maryland, 56 U.S.L.W. 4503, 4508 (June 6, 1988); Spaziano v. Florida, 468 U.S. 447, 456 (1984); California v. Ramos, 463 U.S. 992, 998-99 (1983); Zant v. Stephens, 462 U.S. 862, 873-80 (1983); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976). *But see* Weisberg, *supra* note 57, at 320-21, 343-60 (suggesting that these decisions actually require far less rigorous procedures in capital cases than their rhetoric implies).

67 *See Ford*, 477 U.S. at 417; *id.* at 426 (Powell, J., concurring in part and concurring in the judgment).

68 It is somewhat misleading to talk about "valid" and "invalid" claims. No consensus has emerged concerning the proper definition of insanity in the criminal law, *see supra* Part II, and the *Ford* decision did not attempt to resolve this issue, *see* 477 U.S. at 422 n.3 (Powell, J., concurring in part and concurring in the judgment). The appropriate test depends to a considerable extent upon the rationale for the rule exempting the insane from execution. *See infra* note 97.

69 The inmate has the burden of proof when asserting a claim of insanity. *See supra* note 34.

70 18 U.S.C. § 17(a) (Supp. IV 1986). This statutory provision has been upheld against constitutional challenge. United States v. Freeman, 804 F.2d 1574, 1575-76 (11th Cir. 1986); United States v. Amos, 803 F.2d 419 (8th Cir. 1986).

Requiring the prisoner to show insanity "beyond a reasonable doubt" seems entirely inappropriate. That standard protects individuals by imposing the risk of erroneous decisions almost entirely upon the government. *See* Addington v. Texas, 441 U.S. 418, 428 (1979); Patterson v. New York, 432 U.S. 197, 208 (1977); *In re* Winship, 397 U.S. 358, 372 (1970)(Harlan, J., concurring). Placing so heavy a burden upon a prisoner would stand the rationale for the "reasonable doubt" standard on its head by imposing the risk of error almost entirely upon the individual.

would effectively undermine the apparent purpose of the *Ford* decision.[71]

Finally, the law could provide for careful inquiry into the bases for psychiatric opinions in order to ferret out bias or dishonesty. That necessarily implies the use of some form of relatively rigorous cross-examination, which in turn suggests a fairly formal hearing.[72] The prospect of mini-trials in *Ford*-type cases could pose a daunting challenge to the legal system. As Justice Frankfurter observed more than a generation ago, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."[73] Nearly two thousand inmates are now on death row in this country, and the number is steadily increasing.[74] Even if only a minority raised insanity claims, a substantial number of hearings would be required to determine the sanity issue and to resolve questions of possible psychiatric bias.[75]

The value of this additional burden on the legal system is not entirely self-evident. The sanity problem in a *Ford*-type matter differs significantly from the psychiatric questions at issue in the earlier phases of a capital case. A *Ford* claim necessarily arises after conviction and sentencing. These facts imply that the prisoner was sane at the time of the offense and competent during the trial. Under these

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71 The law could, of course, hold the inmate to the traditional "preponderance" standard or even to a more generous "substantial evidence" test. The latter would require only a sufficient showing to withstand a directed verdict. Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). It is exceedingly unlikely that any jurisdiction would adopt this standard, however. All of the opinions in *Ford* endorsed procedures designed to prevent the erroneous success of false claims rather than to facilitate the accurate recognition of valid ones.

72 Only a plurality of the *Ford* Court was willing to endorse such a requirement. *See supra* note 55.

73 Solesbee v. Balkcom, 339 U.S. 9, 14 (1950)(Frankfurter, J., dissenting). An impressionistic estimate suggests that approximately half of all death row inmates in Florida become insane at some point during their confinement. Sherrill, *In Florida, Insanity Is No Defense*, 239 THE NATION 537, 555-56 (1984)(quoting director of Florida Clearing House for Justice). For a detailed review of clinical and other studies of the stress of imprisonment on death row, see Ward, *supra* note 26, at 38-47. *See also* Note, *supra* note 14, at 172 nn.28-30.

74 *See* Bruck, *On Death Row In Pretoria Central*, THE NEW REPUBLIC, July 13 & 20, 1987, at 18, 18-19.

75 The absolute number of hearings in *Ford*-type cases might seem small as compared to the number of hearings on claims of incompetency to stand trial or insanity at the time of the offense. Nevertheless, the administrative burden of *Ford* hearings will not be insignificant for at least two reasons. First, the stakes in such situations—whether the prisoner lives or dies—are uniquely high. Second, death row inmates are concentrated in a small number of jurisdictions. *See* F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 135-37, 140 (1986); BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT, 1986, at 1 (1987) [hereinafter CAPITAL PUNISHMENT, 1986]. Those jurisdictions can expect to confront a relatively large number of *Ford*-type claims.

circumstances, society has established its right to sanction the prisoner.[76] During the earlier phases, by contrast, the accused stands in a much stronger position. He cannot be convicted if he was insane at the time of the offense and cannot be tried if he is not competent to stand trial.[77] Hence, the legal system and society as a whole should bear the real costs of resolving, in a relatively formal way, the psychiatric issues which arise in the earlier phases. Unless we understand the reasons for exempting the insane from execution, however, it is more difficult to justify the costs of resolving the psychiatric issues in *Ford*-type cases.

IV. THE RATIONALE FOR THE RULE AGAINST EXECUTING INSANE PERSONS

The justification for incurring the extra costs of ferreting out psychiatric bias depends upon why society should refuse to execute inmates who have become insane while on death row. Six different rationales have been proposed to explain the development and persistence of the rule against executing insane persons. None is entirely cogent.

A. EXCULPATION

An insane prisoner who receives a temporary reprieve might think of some argument that would exonerate him or persuade the authorities not to execute him.[78] This theory, however, proves too much. Given enough time, any death row inmate might think of such an argument.[79] Logically, therefore, this rationale does not justify staying the execution of only insane prisoners. Instead, it supports the outright abolition of capital punishment.

Even if there were some basis for special dispensation for the insane, the likelihood that such an inmate actually would propound a decisive argument seems "vanishingly small."[80] The typical death sentence receives extensive post-trial review. This review generally includes direct appeals to the state courts and often to the United States Supreme Court, as well as collateral attacks in both state and federal forums. These steps normally precede any *Ford*-type insanity claim, a fact which suggests the remoteness of the prospect

76 *See Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment); *id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part).

77 *See supra* notes 17-19 and accompanying text.

78 *See, e.g.*, 4 W. BLACKSTONE, COMMENTARIES *396; 1 M. HALE, PLEAS OF THE CROWN 34-35 (1736).

79 *See, e.g.*, Hazard & Louisell, *supra* note 16, at 383-84; Ward, *supra* note 26, at 49-50.

80 Applebaum, *supra* note 33, at 683.

that an insane prisoner will recall something that counsel, friends, and family had overlooked.[81] Moreover, one need not have litigated a death penalty case to appreciate the special hostility with which many courts regard last-minute attempts to forestall executions.[82] Such courts may reject almost summarily even a meritorious new argument advanced at the eleventh hour. Hence, the exculpation theory seems to be a questionable basis for sparing the insane inmate.

B. PROPORTIONALITY

Insanity itself is sufficient punishment, so executing an insane prisoner is an excessive sanction.[83] Unfortunately, existing law refutes this rationale. The insane prisoner gains only a temporary reprieve; the inmate can be executed upon recovery of his faculties.[84] Proportionality therefore cannot explain the rule.

C. DETERRENCE

The execution of an insane prisoner will not discourage other persons from committing capital crimes.[85] This theory, of course, assumes that the death penalty has some general deterrent value, a point of intense and longstanding controversy.[86] Let us grant that assumption for the moment, however. To maximize general deterrence, we should make no exception for the insane. By following this course, society would be telling all potential criminals that they will be executed if they commit a sufficiently heinous offense, no

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81 *See Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment). *See also* M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 434 (1952).

82 *See, e.g.*, Woodard v. Hutchins, 464 U.S. 377, 380 (1984)(Powell, J., concurring); Sullivan v. Wainwright, 464 U.S. 109, 112 (1983)(Burger, C.J., concurring); Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983).

83 *See, e.g.*, 4 W. BLACKSTONE, *supra* note 78, at *395.

84 *See supra* note 33. Of course, the prisoner would never be executed if he became permanently insane. In this situation, therefore, the proportionality theory retains its vitality. Reliable data on the relative incidence of permanent and temporary insanity on death row do not exist, although some anecdotal evidence suggests that many prisoners suffer intermittent episodes of insanity while awaiting execution. *See, e.g.*, Sherrill, *supra* note 73, at 555-56.

85 *See, e.g.*, E. COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 6 (1797); *Remarks on the Trial of Charles Bateman By Sir John Hawles, Solicitor-General in the Reign of King William the Third (1685)*, in 11 STATE TRIALS 474, 477 (T. Howell ed. 1811) [hereinafter *Hawles*].

86 For detailed summaries of the arguments on deterrence, see, *e.g.*, F. ZIMRING & G. HAWKINS, *supra* note 75, at 167-86; Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1196-224 (1981).

matter what happens to their mental state while on death row.[87] The rule against executing someone who becomes insane in prison leaves open the possibility that a lawfully imposed death sentence will not be carried out. That possibility encourages prospective perpetrators of capital offenses to consider the likelihood of escaping execution after being sentenced to death, just as they presumably assess the likelihood of avoiding apprehension and conviction. In short, exempting the insane from execution undermines whatever deterrent effect the death penalty affords.[88] Thus, this rationale also is inadequate.

D. HUMANENESS

Executing an insane person is inhumane.[89] This theory necessarily implies that it is somehow more humane to wait until the prisoner can understand his situation than simply to take his life without waiting for his sanity to return.[90] Many persons would find this a dubious proposition. If the death penalty is barbaric, it should not be imposed upon anyone. Justice Traynor characterized the idea of sparing only the insane from execution as "inverted humanitarianism" resting upon "a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses."[91] Hence, humaneness does not support the rule.

E. THEOLOGICAL

An insane prisoner should not be executed because he cannot

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87 *See* M. GUTTMACHER & H. WEIHOFEN, *supra* note 81, at 436; Radelet & Barnard, *supra* note 33, at 40.

88 The argument in the text might prove too much. If our only goal were to maximize deterrence, perhaps we should favor the summary execution of all suspected wrongdoers. Of course, the criminal law has other goals, including rehabilitation, incapacitation, and retribution. These goals can be at least partially satisfied through the imposition of sanctions less drastic than death. Moreover, the Constitution affords criminal defendants numerous rights which permit some guilty offenders to go free. Although respect for those rights undoubtedly also undermines deterrence, no serious commentator has advocated the repeal of the fourth, fifth, sixth, and eighth amendments.

In a more realistic vein, the possibility of commutation or clemency also may be said to undermine the deterrent effect of the death penalty by leaving open the prospect of gubernatorial action forestalling execution. Under current conditions, however, this prospect is more theoretical than real. No governor has acted to prevent a scheduled execution since the death penalty was reintroduced a decade ago. *See* F. ZIMRING & G. HAWKINS, *supra* note 75, at 126-28, 144-46.

89 *See, e.g.*, E. COKE, *supra* note 85, at 6.

90 *See* M. GUTTMACHER & H. WEIHOFEN, *supra* note 81, at 435.

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

prepare for death by making peace with the Almighty.[92] This approach has the virtue of acceptance within some religious traditions. On the other hand, not all religious groups believe that ultimate destiny depends upon one's mental or emotional state at the moment of death.[93] Thus, the theological approach is only partially persuasive at best.

F. RETRIBUTION

The effectiveness of punishment depends upon the moral equivalence between the sanction and the offense, an equivalence which is lacking when society executes an insane prisoner.[94] In such an instance, the prisoner cannot appreciate the relationship between his crime and his death. Accordingly, the inmate will not suffer in anticipation of his demise.[95] This argument has received more support from modern commentators than any other.[96] Yet the retribution theory presents problems of its own. This argument, like the exculpation theory, may prove more than its proponents intend. Any prisoner who lacks the capacity to comprehend the connection between his offense and his impending execution may well lack the capacity to comprehend the connection between his offense and any lesser punishment. The retribution theory thus calls into question the propriety of imposing any sanction at all upon insane inmates.

In short, none of these rationales is entirely persuasive; some cannot be cabined short of complete abolition of capital punishment.[97] Perhaps these theories had greater force in earlier times

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92 *See, e.g.*, *Hawles*, *supra* note 85, at 477; Musselwhite v. State, 215 Miss. 363, 371, 60 So. 2d 807, 811 (1952).

93 *See* Hazard & Louisell, *supra* note 16, at 387-88. One writer has suggested, without analysis, that the theological theory might run afoul of the establishment clause. Ward, *supra* note 26, at 51. None of the opinions in *Ford* alluded to any such problem, although two opinions, including that of the Court, implicitly approved the theological theory as a basis for a constitutional rule against executing the insane. *See* 477 U.S. at 407, 409; *id.* at 419 (Powell, J., concurring in part and concurring in the judgment). Even if the question were squarely presented, the Court might reject an establishment clause attack on the ground that the rule against executing the insane "is deeply embedded in the history and tradition of this country." Marsh v. Chambers, 463 U.S. 783, 786 (1983).

94 *See, e.g.*, Hazard & Louisell, *supra* note 16, at 386-87; Ward, *supra* note 26, at 54-55; Note, *supra* note 14, at 168 n.5.

95 *See Ford*, 477 U.S. at 421-23 (Powell, J., concurring in part and concurring in the judgment); Hazard & Louisell, *supra* note 16, at 386-87; Radelet & Barnard, *supra* note 33, at 39-40; Ward, *supra* note 26, at 54-56. *Cf.* H. UVILLER, *supra* note 25, at 780 (suggesting that similar reasoning underlies the requirement that a criminal defendant have the ability to understand the charges and proceedings against him in order to be competent to stand trial).

96 *See, e.g.*, Feltham, *The Common Law and the Execution of Insane Criminals*, 4 MELB. U.L. REV. 434, 468 (1964); Ward, *supra* note 26, at 56.

97 In addition to the difficulties with each of the theories discussed in the text, no

than they do today. For example, a theological rationale might have convinced those who lived in seventeenth-century England, when religious faith played a more central role in public affairs than it does in our comparatively secular age. They might also have found the deterrence theory less troublesome during a period in which substantially more executions took place each year in London and Middlesex alone than have occurred in the entire United States during the past two decades.[98]

However that may be, the uneasiness of the contemporary case for refusing to execute the insane suggests the difficulty of justifying the added costs of determining sanity and screening out possible psychiatric bias in *Ford*-type proceedings. Our continued adherence to the exemption implies that we must look elsewhere to understand its persistence.

V. THE PERSISTENCE OF THE RULE

The Supreme Court in recent years has shown a marked aversion to recognizing legal rights the vindication of which will impose substantial costs upon the judicial system.[99] The implementation of the rule against executing insane prisoners could impose such costs. If it is taken seriously, the resolution of sanity disputes could require very elaborate procedures. Despite the potential complexity of implementing the rule, the Court now has elevated it from common law to constitutional status.

One might dismiss the rule as a cynical device to obscure the state's absolute power over its citizens.[100] To be sure, the rule

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consensus exists concerning the definition of insanity. *See supra* notes 20-27 and accompanying text. The definition that applies, however, should bear some logical relationship to the rationale for the rule against executing insane prisoners. Thus, for example, if the exculpation theory were deemed to justify the rule, the standard of sanity should include the ability of the prisoner to propound an argument that would lead to exoneration of the crime or commutation of the sentence; if the retribution theory were viewed as the basis for the rule, the standard should require only that the inmate understand the connection between the offense and the ultimate punishment of death. *See, e.g.*, M. GUTTMACHER & H. WEIHOFEN, *supra* note 81, at 436; Hazard & Louisell, *supra* note 16, at 394-95; Ward, *supra* note 26, at 63-68; Comment, *Criminal Law—Constitutional Law—Execution of Insane Persons*, 23 S. CAL. L. REV. 246, 256 (1950).

98 Between 1607 and 1616, the average annual number of executions in these parts of England was 140. Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON & C. WINSLOW, ALBION'S FATAL TREE 17, 22 n.3 (1975). By contrast, only 68 persons were executed in the United States between 1977 and 1986, the latest year for which official statistics are available. CAPITAL PUNISHMENT, 1986, *supra* note 75, at 1. The last American execution before 1977 occurred in 1967. F. ZIMRING & G. HAWKINS, *supra* note 75, at 26, 30, 35.

99 *See, e.g.*, cases cited *supra* note 57.

100 *See The Supreme Court, 1985 Term*, *supra* note 33, at 106.

might yet be eviscerated through the imposition of stringent evidentiary burdens or the adoption of informal procedures which would make it extraordinarily difficult for a prisoner to prevail on an insanity claim.[101] Yet a curt dismissal overlooks a more plausible explanation for the rule's persistence: the rule has endured because it serves an important social function.

The functional analysis starts from an apparently curious fact. Although the Supreme Court has declined to invalidate the death penalty on constitutional grounds, only a tiny fraction of the hundreds of persons on death row have been executed.[102] This relative paucity of executions and the elaborate procedural requirements applicable in capital cases suggest a profound societal ambivalence on the subject. That ambivalence affects both the judges who must enforce laws which produce intense moral dilemmas and a public which seems to want some executions, but not too many.[103]

The evidence for this analysis admittedly is equivocal, but it is intriguing. The Supreme Court, despite its rejection of most constitutional challenges,[104] has shown no real enthusiasm for the death penalty. Several justices have expressed support for legislation to end executions even as they denied the propriety of judicial abolition of capital punishment.[105] The Court's recent retreat from the careful scrutiny of death sentences stems more from apparent frustration at the magnitude of the task than from renewed support of execution.[106]

Public opinion is similarly uncertain. At the broadest level, sur-

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101 *See supra* notes 67-71 and accompanying text.

102 *See* F. ZIMRING & G. HAWKINS, *supra* note 75, at 96; Weisberg, *supra* note 57, at 387 n.294.

103 *See* Weisberg, *supra* note 57, at 384-86.

104 One exception to this pattern was the decision that the death penalty for the rape of an adult woman, and presumably for the commission of other nonhomicidal crimes, violates the eighth amendment. Coker v. Georgia, 433 U.S. 584 (1977).

105 *See* Furman v. Georgia, 408 U.S. 238, 375 (1972)(Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting); *id.* at 405-06 (Blackmun, J., dissenting). Justice O'Connor, the only member of the Court to have had the opportunity to vote on such legislation, was one of the principal authors of the Arizona statute which reinstated the death penalty after the *Furman* decision. *See Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 128 (1981). Nevertheless, she once wrote a separate opinion concurring in the invalidation of a death sentence on a ground not expressly raised in the petition for certiorari. *See* Eddings v. Oklahoma, 455 U.S. 104, 117-19 & n.* (1982)(O'Connor, J., concurring). *See also* Enmund v. Florida, 458 U.S. 782, 827-31 (1982)(O'Connor, J., dissenting)(rejecting view that death is unconstitutionally disproportionate sanction for felony murder but supporting remand of case for new sentencing proceeding at which all relevant mitigating evidence would be properly considered).

106 *See* F. ZIMRING & G. HAWKINS, *supra* note 75, at 46; Weisberg, *supra* note 57, at 307, 387-88.

vey research reveals widespread support for capital punishment.[107] When the question moves from the abstract to the specific, however, the situation becomes more cloudy. Substantially smaller percentages favor mandatory death sentences for any particular crime than endorse capital punishment in principle.[108] Many persons also say that they would vote differently as jurors in capital cases than a logician might infer from their general views on the death penalty.[109] Moreover, the public has little interest in the details of capital punishment. The issue does not affect most people directly, and they lack basic knowledge on many elementary aspects of the subject.[110]

Perhaps ultimately the death penalty remains in force mostly as a symbol of opposition to crime and disorder. Many Americans seem more interested in simply having capital punishment on the statute books than in necessarily seeing it carried out in any particular case.[111] The rule against executing the insane operates to reduce the class of persons subject to execution. In that sense, it too has symbolic significance. From this perspective, the intellectual difficulties of justifying and implementing the rule matter less than the reaffirmation of a principle that diminishes our larger ambivalence.

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107 *See, e.g.*, R. BERGER, DEATH PENALTIES 7 n.23 (1982); F. CARRINGTON, NEITHER CRUEL NOR UNUSUAL 58-60 (1978); *Recent Survey Research Data on the Death Penalty*, in THE DEATH PENALTY IN AMERICA 85, 85-88 (H. Bedau 3d ed. 1982) [hereinafter *Recent Survey Research Data*]. For earlier public opinion data, see Erskine, *The Polls: Capital Punishment*, 34 PUB. OP. Q. 290 (1970).

108 *See, e.g.*, Ellsworth & Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 126-37 (1983); Vidmar & Ellsworth, *Research on Attitudes Toward Capital Punishment*, in THE DEATH PENALTY IN AMERICA 68, 71 (H. Bedau 3d ed. 1982). *See also Recent Survey Research Data*, *supra* note 107, at 89.

109 Vidmar & Ellsworth, *supra* note 108, at 83-84; *Recent Survey Research Data*, *supra* note 107, at 90.

110 *See* F. ZIMRING & G. HAWKINS, *supra* note 75, at 13; Ellsworth & Ross, *supra* note 108, at 139-45, 161; Sarat & Vidmar, *Public Opinion, the Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 184-87. These findings lend support to Justice Marshall's suggestion that the public "know[s] almost nothing about capital punishment." Furman v. Georgia, 408 U.S. 238, 362 (1972)(Marshall, J., concurring). One ought not exaggerate the significance of this point, however. The level of public knowledge on most issues is strikingly low. *See, e.g.*, W. NEUMAN, THE PARADOX OF MASS POLITICS 14-17 (1986); Vidmar & Ellsworth, *supra* note 108, at 81 & nn.43-45.

111 *See* F. ZIMRING & G. HAWKINS, *supra* note 75, at 10-15, 38-45; Ellsworth & Ross, *supra* note 108, at 161-65. *See also* THE DEATH PENALTY IN AMERICA 68 (H. Bedau 3d ed. 1982). At the same time, the public does seem to want some executions to occur. *See supra* note 103 and accompanying text. For example, the 1986 recall of three members of the Supreme Court of California was stimulated in part by their consistent votes against death sentences. *See* Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809, 847-50 (1986).