UIC Law Review

Volume 20 | Issue 3 Article 8

Spring 1987

Ford v. Wainwright: States Cannot Execute Insane - But How Is Insanity Determined, 20 J. Marshall L. Rev. 549 (1987)

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CASENOTES

*FORD v. WAINWRIGHT:** STATES CANNOT EXECUTE INSANE—BUT HOW IS INSANITY DETERMINED?

Forty-one states in the Union have a death penalty,[1] but none permit the execution of the insane.[2] Although these states agree that the insane prisoners should not be executed, these states do not agree on the procedure used to determine a prisoner's sanity.[3] The state's prohibition on the execution of the insane was based on common law rationales,[4] but it was disputed whether the eighth amend-

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* 106 S. Ct. 2595 (1986).

1. Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, West Virginia and Wisconsin have no death penalty. Brief for Petitioner at 8b, Ford v. Wainwright, 106 S. Ct. 2595 (1986) (No. 85-5542).

2. Twenty-six states have statutes ordering the execution suspended if the prisoner meets the legal test of incompetence. Ford v. Wainwright, 106 S. Ct. 2595, 2601 n.2 (1986). Four states have judicially adopted the common law prohibition on executing the insane. *Id.* Seven states have statutory procedures requiring the incompetent prisoners to be transferred to state mental hospitals. *Id.* Four states have no explicit insanity procedure, but seem to follow the common law rule. *Id.*

3. For example, the states vary as to who determines when the issue of insanity should be raised. In Alabama, it is the trial court that must raise the issue. ALA. CODE § 15-16-23 (1982). In Arizona, Arkansas and Nevada, the superintendent or director of the prison is charged with raising the possible insanity question. ARIZ. REV. STAT. ANN. § 12.4021 (1978); ARK. STAT. ANN. § 43.2622 (1977); NEV. REV. STAT. § 176.425 (1979). The warden or sheriff has the responsibility in California, Connecticut, Kansas, Mississippi, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, South Dakota, Utah and Wyoming. CAL. PENAL CODE § 3701 (Deering 1982); CONN.. GEN. STAT. ANN. § 54-101 (West 1983); KAN. STAT. ANN. § 22-4006 (Supp. 1981); MISS. CODE ANN. 99-19-57 (Supp. 1985); MO. REV. STAT. § 552.060 (Supp. 1985); NEB. REV. STAT. § 29.25 (1979); N.M. STAT. ANN. § 31-14-4 (1978); OHIO REV. CODE ANN. § 2949.28 (Anderson 1979); OKLA. STAT. ANN. tit. 22, § 1005 (West Supp. 1985); S.D. CODIFIED LAWS ANN. § 23A-27A-22 (1979); UTAH CODE ANN. § 77-19-3 (1982); WYO. STAT. § 7-13-901 (1982). Colorado, Florida, Georgia, Maryland, Massachusetts and New York place the Governor as the decision-maker. COLO. REV. STAT. § 16-11-401 (1978); FLA. STAT. § 922.07(1) (1985); GA. CODE ANN. § 27-2601 (1983); MD. CRIM. LAW CODE ANN art. 27, 75(L) (Supp. 1985); MASS. GEN. LAWS ANN. ch. 279 § 62 (West Supp. 1984); N.Y. CORRECT. LAW 655 (McKinney Supp. 1984). Illinois, Kentucky and Montana do not specify who must raise the issue. ILL. REV. STAT. ch. 38, para. 1005-2-3(1) (1985); KY. REV. STAT. ANN. § 431.240(2) (Michie/Bobbs-Merrill 1980); MONT. CODE ANN. § 46-19-201; (1983).

4. Common law has historically considered the execution of the insane cruel and unusual punishment. "If after he [idiot or lunatic] be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after

ment of the United States Constitution placed a substantive restriction on the execution of the insane.[5] Addressing this dispute for the first time,[6] the United States Supreme Court, in *Ford v. Wainwright*,[7] held that the eighth amendment prohibits the execution of the insane prisoner.[8] Based on this eighth amendment prohibition,

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judgment, he becomes of nonsane memory, execution shall be stayed. . . ." 4 W. BLACKTONE, COMMENTARIES, 24 (1769); [hereinafter BLACKSTONE]. "It has from the earliest period been a rule, that though a man be in the full possession of his senses when he commits a capital offense, if he becomes non compos. . .[after judgment], he shall not be ordered for execution." 2 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 761 (Garland Publishing, Inc. rev. ed. 1978) (1st ed. 1816). "And it seems agreed at this Day, That if one who has committed a capital Offense, becomes Non Compos before Conviction, he shall not be arraigned; and if after Conviction, that he shall not be executed." 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 2 (Garland Publishing, Inc. rev. ed. 1978) (1st ed. 1716-21).

There was a short time during the reign of Henry VIII, where a statute was enacted which held that a person who committed high treason and subsequently became mad, could still be tried and executed. BLACKSTONE, *supra* at 25. *See also* 33 Hen. 8 ch. 20; 1 and 2 Phil. & M., ch. 10.

See generally Feltman, *The Common Law and the Execution of Insane Criminals*, 4 MELB. U.L. REV. 434 (1964) (impact of common law on law of State of Victoria, Australia).

The Supreme Court has taken notice of the common law prohibition. Nobles v. Georgia, 168 U.S. 398, 406 (1877). Construing the common law, however, the Court held that when a claim of insanity was made after the defendant had been sentenced and convicted, the judge had the discretion to proceed as he deemed best. *Id.* at 407. This interpretation is contrary to the common law, however, which held that the stay of execution was mandatory upon a finding of insanity, regardless of the stage of the proceeding.

5. The eighth amendment, enacted in 1791, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

The Supreme Court ruled that the eighth amendment applies to the states through the fourteenth amendment. *See* Robinson v. California, 370 U.S. 660 (1962) (eighth and fourteenth amendments prohibit punishing a person merely for being narcotics addict); *Cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (no eighth amendment violation in executing prisoner after initial attempt failed). *See generally* J. NOWAK, R. ROTUNDA AND J. YOUNG, CONSTITUTIONAL LAW 452-61 [hereinafter CONSTITUTIONAL LAW] (discussing fundamental rights and the incorporation of Bill of Rights).

6. Prior to the application of the eighth amendment to the states, the Court was presented with the issue of whether execution of an insane convict violated the fourteenth amendment, because it was cruel and unusual punishment. Solesbee v. Balkcom, 339 U.S. 9 (1950). The Court refused to address this question, however, holding that the only relevant issue was the process for determining insanity. *Id.* at 11. The *Solesbee* Court held that it did not offend due process to leave the final decision on a prisoner's sanity with the Governor. *Id.* at 13.

7. 106 S. Ct. 2595 (1986).

8. *Ford*, 106 S. Ct. at 2602. The Court distinguished this case from *Solesbee* due to the application of the eighth amendment to the states since the time *Solesbee* was decided. *Id.* at 2600. *But see id.* at 2611 (O'Connor, J., concurring in part and dissenting in part). Justice O'Connor stated that the eighth amendment does not create a substantive right not to be executed while insane, but that the Florida law had created a protected liberty interest. *Id.* If a decision-maker is "required to base its decision on objective and defined criteria," the state has placed substantive limits on official discretion, thus creating a protected liberty interest. Olim v. Wakinekona, 461 U.S. 238, 249 (1983), quoting Connecticut Board of Pardons v. Dumschat, 452 U.S.

the Supreme Court next addressed the issue of whether the Florida procedure for determining sanity satisfied the due process requirement of providing a full and fair hearing.[9] The Court held that the Florida procedure did not provide a full and fair hearing[10] and remanded the case to the district court for an evidentiary hearing.[11] The Court did not clarify, however, what state procedures are necessary in order to avoid a federal evidentiary hearing.[12]

Alvin Bernand Ford was convicted of first degree murder and was sentenced to death on January 6, 1975.[13] At the time of trial and

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458, 466-67 (1981). *See also* Vitek v. Jones, 445 U.S. 480, 489 (1980) (due process protections necessary "to insure that the state-created right is not arbitrarily abrogated when prisoner has a liberty interest").

Justice Rehnquist also disagreed with the holding that the eighth amendment prohibits the execution of the insane. *Ford*, 106 S. Ct. at 2613 (Rehnquist, J., dissenting). Justice Rehnquist stated that the eighth amendment was not even at issue, since no state sanctions the execution of the insane. *Id.* at 2615. Justice Rehnquist also denied that the Florida statute created a protected liberty interest. *Id.*

9. *Ford*, 106 S. Ct. at 2602. The Florida statutory procedure states:

> (1) When the Governor is informed that a person under the sentence of death may be insane, he shall stay the execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed on him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him.
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> (2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall issue a warrant to the warden directing him to execute the sentence at the time designated in the warrant.
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> (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him, he shall have him committed to the state hospital for the insane.

FLA. STAT. § 922.07(1), (2), (3) (1985).

10. Although the requirements for a full and fair hearing vary, a full and fair hearing clearly requires the state court to reach and decide the issue of fact raised by the defendant. Townsend v. Sain, 372 U.S. 293, 313-14 (1962).

11. *Ford*, 106 S. Ct. at 2606.

12. *Id.* at 2605-06.

13. *Id.* at 2598. Ford was committing an armed robbery when a police officer arrived. Ford v. Strickland, 676 F.2d 434, 436-37 (11th Cir. 1982). Ford shot the police officer twice in the abdomen, left the scene, then returned, asked for the keys to the police car and shot the officer in the back of the head. *Id.* at 436-37. Upon the jury's recommendation, the trial judge sentenced Ford to death. *Id.*

The Florida statute defines first degree murder as "[t]he unlawful killing of a human being. . .when committed by a person engaged in the perpetration of, or the attempt to perpetrate . . . robbery. . . ." FLA. STAT. § 782.04(1)(a) (1986).

Although the trial judge in *Ford* followed the jury recommendation of the death penalty, he was not bound to. It does not violate the Constitution if a judge imposes the death penalty, even though the jury has recommended life imprisonment. Spaziano v. Florida, 468 U.S. 447, 465 (1984) (judge may impose death penalty after jury recommendation of life); Barclay v. Florida, 463 U.S. 939 (1983) (trial judge may impose death sentence over jury recommendation if there is "clear and convincing evi-

sentencing, Ford was mentally competent.[14] Early in 1982, however, Ford began to exhibit psychotic behavior.[15] He believed that there was a conspiracy against him and that the members of his family were hostages in the prison.[16] He was convinced that he owned the prison and that he could control the Governor of Florida through mind waves.[17] His speech became rambling and incoherent.[18]

Based on these changes, Ford's counsel invoked Florida's statutory procedure for determining competency.[19] As the Florida statute prescribes, the Governor of Florida appointed three psychiatrists who simultaneously interviewed Ford for approximately one-half hour.[20] Ford's attorneys were allowed to attend the interview, but

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dence" supporting death penalty). All that is constitutionally required is that the criminal sentence be proportionate to the crime. Solem v. Helm, 463 U.S. 277, 290 (1983). The Supreme Court has held that the imposition of the death penalty is proportionate to the crime of murder. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

14. *Ford*, 106 S. Ct. at 2598. For a discussion of competency to stand trial, see generally Comment, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967) [hereinafter *Incompetency*].

15. *Ford*, 106 S. Ct. at 2598. The psychotic behavior began gradually with strange ideas and warped perceptions, and then worsened. *Id.* Ford became obsessed with the Klu Klux Klan after reading an article about them. *Id.* Prior to this, Ford's counsel had obtained a psychiatrist to examine Ford. *Id.* The psychiatrists evaluated Ford for fourteen months. *Id.* at 2598-99. Ford then refused to see the psychiatrist, believing that he was a part of a conspiracy against him. *Id.*

16. *Id.*, at 2598. Ford believed that the Klu Klux Klan, along with the prison guards, were behind the conspiracy. *Id.* Ford even wrote a letter to the Attorney General of Florida, claiming that he had ended the "hostage crisis" and had fired certain prison officials. *Id.*

17. *Id.*, at 2599. The psychiatrist who examined Ford at this point concluded that there was no way Ford was faking his insanity and that Ford had no idea why he was being executed. *Id.* at 2598-99.

Although there are various explanations for the prohibition against executing the insane, one notion is that it offends human dignity to execute someone who does not understand why he is being executed. *Id.* at 2601-02. *See generally* H. BEDAU, THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT (1977) (at minimum, the prohibition is based on belief that it is murder to execute a person who does not understand why he is being executed); Comment, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980) [hereinafter *Eighth Amendment*] (discusses eighth amendment in relation to prisoners who ask to be executed).

18. *Ford*, 106 S. Ct. at 2599. In the midst of these rambling, incoherent sentences, Ford said that he knew there was a death penalty, but believed it would be illegal to execute him. *Id.*

Ford's attorney, argued to the Supreme Court that the test of competence should be whether the person has the capacity to understand the termination of his life. Denniston, *Debates on Death and Free Speech End Term*, AM. LAW., Sept. 1986, at 107.

19. *See supra* note 9 for the text of the Florida statute. The Florida statute does not restrict who may raise the insanity issue. FLA. STAT. § 922.07(1) (1985). *But see supra* note 3, discussing statutes that limit who may raise the insanity issue.

20. *Ford*, 106 S. Ct. at 2599. The psychiatrists were to diagnose Ford based on the single, thirty minute interview and each was to submit a written two-or three-page report to the Governor. *Id.*

Cf. J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY at 159-60 (1981) (pointing out deficiencies in clinical method of diagnosis).

were not allowed to cross-examine the psychiatrists or to present any evidence.[21] Based solely on the half-hour interview, the state-appointed psychiatrists concluded that, under the Florida statute, Ford was sane.[22] Relying on the psychiatrists' conclusion, the Governor signed Ford's death warrant.[23]

Ford's counsel then filed a petition for habeas corpus[24] in the United States District Court for the Southern District of Florida, seeking an evidentiary hearing[25] on Ford's sanity.[26] The petition was subsequently denied.[27] Ford's lawyers appealed, and the United States Court of Appeals for the Eleventh Circuit granted a certificate of probable cause[28] and stayed the execution.[29] The court of

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21. *Id.* at 2604. Following the submission of the reports by the psychiatrists, Ford's counsel attempted to submit other written materials disputing the conclusion of the Governor-appointed psychiatrists. Brief for Petitioner at 6, Ford v. Wainwright, 106 S. Ct. 2595 (1986) (No. 85-5542). The defense psychiatrists had examined Ford more extensively than the Governor-appointed psychiatrists. *Ford*, 106 S. Ct. at 2604.

22. *Ford*, 106 S. Ct. at 2599. The psychiatrists disagreed as to the proper diagnosis of Ford's condition. *Id.* One diagnosis was "psychosis with paranoia," one was that Ford had a "severe adaptational disorder," and one was that Ford was psychotic. *Id.* All agreed, however, that Ford understood the nature of the death penalty and understood why it was being imposed on him, as required by the execution statute. *Id. Cf.* Brief for Petitioner at 34, Ford v. Wainwright, 106 S. Ct. 2595 (1986) (No. 85-5542) (would require two additional factors in the Florida competency standard before allowing execution).

23. *Ford*, 106 S. Ct. at 2599. The Governor did not explain his decision or even make a statement. *Id.* He refused to tell Ford's counsel whether he would consider their submitted materials. *Id.* at 2604.

24. Habeas corpus is extended to all constitutional challenges and is used to determine whether a prisoner's liberty is restrained through due process procedures. BLACK'S LAW DICTIONARY 638 (5th ed. 1983). Habeas corpus may be used to allege facts that were not raised in the lower courts. Hawk v. Olson, 326 U.S. 271, 274 (1945). *See also* Frank v. Mangum, 237 U.S. 308 (1914) (in habeas corpus, courts may look into substance of matter, regardless of whether facts appear on record or not). *Cf.* Barefoot v. Estelle, 463 U.S. 880 (1983) (with second and successive federal habeas corpus petitions, state has legitimate interest in preventing use of writ as delaying tactic).

25. A federal court in habeas corpus is required to hold an evidentiary hearing unless the habeas corpus petitioner has received a full and fair hearing in the state courts. Townsend v. Sain, 372 U.S. 293 (1962). *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1969) (evidentiary hearing required prior to terminating welfare benefits). *But cf.* Matthews v. Eldridge, 424 U.S. 319 (1975) (no evidentiary hearing required prior to termination of disability benefits).

26. *Ford*, 106 S. Ct. at 2599. The trial court's conviction and sentence had been affirmed by the Supreme Court of Florida. Ford v. State, 374 So. 2d 496 (1979), *cert. denied*, 445 U.S. 972 (1980). In Brown v. Wainwright, Ford and 122 other death-row convicts unsuccessfully alleged that the Florida Supreme Court's procedure for review of capital punishment was improper. Brown v. Wainwright, 392 So.2d 1372 (1981), *cert. denied*, 454 U.S. 1000 (1981). A motion to vacate or set aside the judgement had been denied by the circuit court. The Florida Supreme Court affirmed this denial. Ford v. State, 407 So.2d 907 (1981).

27. *Ford*, 106 S. Ct. at 2599. The district court did not even grant a hearing before denying the petition. *Id.*

28. A certificate of probable cause is granted when the petitioner has made "a substantial showing of the denial of [a] federal right." Barefoot v. Estelle, 463 U.S.

appeals addressed the merits of Ford's petition and affirmed the district court's denial of Ford's habeas corpus petition.[30] Ford's counsel then petitioned the United States Supreme Court for certiorari.[31]

The United States Supreme Court granted Ford's petition for certiorari.[32] The Court addressed the issue of whether the eighth amendment prohibits the execution of the insane.[33] Based on com-

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880, 893 (1983). The probable cause standard is higher than good faith and requires more than the absence of frivolity. *Id.* When a certificate of probable cause is granted, the petitioner must have the opportunity to address the merits of his claim. *Id.* at 888.

See generally BLACK'S LAW DICTIONARY 1081 (5th ed. 1983) (probable cause is reasonable ground for belief in existence of facts warranting the proceedings complained of).

29. Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984). The Court held that Ford had not abused the writ of habeas corpus because the evidence Ford relied on was not available when he applied for his first writ of habeas corpus. *Id.* at 542. The Court held that Ford had raised "substantial grounds upon which relief may be granted." *Id.* at 543.

30. Ford v. Wainwright, 752 F.2d 526, 527 (11th Cir. 1985). The court relied on the fact that the Supreme Court had never recognized an eighth amendment prohibition against the execution of insane prisoners, as well as the fact that no federal appellate court has ever held that there is a prohibition. *Id.*

See generally Zenoff, *Can An Insane Person Be Executed?*, 16 PREVIEW 465 (June 27, 1986) (prior to *Ford* decision, author suggested Court might defer eighth amendment question until faced with case where execution of insane allowed); *Eighth Amendment*, *supra* note 17, at 766 (arguing in favor of eighth amendment prohibition).

31. Ford v. Wainwright, 106 S. Ct. 566 (1985). The Supreme Court Rule governing writs of certiorari states:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore.
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> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this [Supreme] Court. . . .

SUP. CT. R. 17.1(c) (1984).

It must be reasonably probable that four members of the Court would consider the issue sufficiently meritorious in order to grant certiorari; it must be significantly possible that the lower court's decision will be reversed; and there must be a likelihood that, if the decision is not stayed, irreparable harm will result. Barefoot v. Estelle, 463 U.S. 880, 895 (1983).

See generally CONSTITUTIONAL LAW, *supra* note 5, at 32-36 (discussing certiorari).

32. Ford v. Wainwright, 106 S. Ct. 566 (1985). *Cf.* Smith v. Baldi, 344 U.S. 561 (1952) (denial of certiorari in habeas corpus cases has no substantive significance); Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (denial of certiorari has no reflection on merits of case denied review).

33. Specifically, the Court addressed the eighth amendment's "cruel and unusual punishment" clause. *See supra* note 5 for the text of the eighth amendment.

The eighth amendment has been applied to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962). The excessive bail provision of the eighth amendment has been made applicable to the states by implication. Schlib v. Kuebel, 404 U.S. 357, 365 (1971). There are no cases, however, concerning the application of the "excessive fine" provision to the states. CONSTITUTIONAL LAW, *supra* note 5, at 456.

When a Bill of Rights provision is made applicable to the states, the provision applies to state and local acts in the same manner that it applies to federal action. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (fourteenth amendment guaran-

mon law precedent,[34] as well as the states' continued adherance to the common law,[35] the Court held that the eighth amendment bars the execution of the presently insane.[36]

Having found that the eighth amendment bars the execution of the insane, the Court then addressed the issue of whether the Florida competency procedure met minimum due process standards.[37] When a substantive right is involved,[38] any procedure affecting that right must provide a full and fair hearing[39] to the party whose right

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tees right to jury trial in criminal cases in state court, where sixth amendment would guarantee right in federal court); Malloy v. Hogan , 378 U.S. 1 (1964) (fourteenth amendment secures against state invasion same privilege that fifth amendment guarantees against federal infringement).

The Court decided to consider the issue of executing the insane because the interpretation of Due Process and of the eighth amendment had changed significantly since the Court had last addressed the issue. *Ford*, 106 S. Ct. at 2599-2600. *See supra* note 6, discussing the last time the Supreme Court addressed this issue.

34. *See supra* note 4 discussing the common law. *See also* Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (tracing history of cruel and unusual punishment); Hazard and Louisell, *Death, The State, And The Insane: Stay of Execution*, 9 UCLA L. REV. 381 (1962) [hereinafter Hazard and Louisell] (discusses various theories offered for common law prohibition).

35. *See supra* note 2 discussing states that follow the common law. *See also* Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979) [hereinafter *Insanity*] (shows common law influence on States).

36. *Ford*, 106 S. Ct. at 2601-02.

37. *Id.* at 2602.

38. Substantive rights include the specific guarantees in the Bill of Rights, as well as certain rights implicit in the specified rights. *See, e.g.*, Carey v. Population Services International, 431 U.S. 678 (1977) (right to privacy in connection with procreation extends to minors as well as adults); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy includes woman's right to chose to terminate pregnancy); Mayer v. Chicago, 404 U.S. 189 (1971) (cannot distinguish between felony and non-felony offenses in granting right to transcript); Boddie v. Connecticut, 401 U.S. 371 (1971) (cannot deny indigents right to divorce because of inability to pay court fees); Shapiro v. Thompson, 394 U.S. 618 (1969) (violates right to travel to deny welfare benefits to residents of less than one year); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (violates Equal Protection to condition right to vote on payment of fee or tax); Douglas v. California, 372 U.S. 353 (1963) (indigents have right to counsel on first appeal); Bates v. City of Little Rock, 361 U.S. 516 (1960) (compulsory disclosure of membership lists violates freedom of association); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreation prohibits state from requiring sterilization of habitual criminals); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (violation of liberty to force children to attend public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (violation of liberty when state forbids teaching foreign language).

39. The standards required in order to provide a full and fair hearing have never been explicitly defined. *But see* Armstrong v. Manzo, 380 U.S. 545 (1965) (hearing must be at a "*meaningful time and in a meaningful manner*") (emphasis added); Townsend v. Sain, 372 U.S. at 313 (no suggestion of full and fair hearing unless state court has actually reached and decided facts presented by defendant); Grannis v. Ordean, 234 U.S. 385 (1914) (opportunity to be heard is fundamental due process requirement).

A full hearing "[e]mbraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." BLACK'S LAW DICTIONARY 605 (5th ed. 1983). A fair hearing contemplates "the right to present evidence, to cross-examine, and to have finding supported by evidence." *Id.*

is being affected.[40] If the state court does not provide a full and fair hearing, the federal district court must provide a de novo evidentiary hearing on the issue.[41] The Court held that the Florida procedure did not provide a full and fair hearing.[42] The Supreme Court, therefore, reversed the court of appeals' decision and remanded the case to the Federal District Court for an evidentiary hearing.[43]

The Court began its analysis with the issue of whether the eighth amendment prohibits the execution of the insane.[44] The Court first considered the common law definition of cruel and unusual punishment.[45] The Court stated that, at minimum, the eighth amendment's cruel and unusual punishment clause adopted the forms of punishment considered cruel and unusual when the eighth amendment was enacted.[46] Because common law has historically considered the execution of the insane cruel and unusual punishment,[47] the Court concluded that the Framers of the Bill of Rights intended the eighth amendment to prohibit this type of punishment.[48]

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at 537.

40. Due process generally requires a consideration of three factors: (1) the private interest that will be affected; (2) the risk of erroneous deprivation of the private interest through current procedure, as well as the potential value of additional procedures; and (3) the governmental interest. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

For a discussion of proposed procedural due process guidelines, see generally Nowak, *Foreward: Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & CRIMINOLOGY 397 (1980).

41. If a state court has not provided the habeas corpus applicant with a full and fair hearing, either at the trial or in a related proceeding, the federal court must hold an evidentiary hearing. Townsend v. Sain, 372 US. 293, 312 (1962).

42. *Ford*, 106 S. Ct. at 2606.

43. *Id.*

44. *Id.* at 2600.

45. *Id. See also supra* note 4 and *infra* note 47, discussing the common law.

46. *Ford*, 106 S. Ct. at 2600.

47. When the eighth amendment was enacted in 1791, states uniformally followed the common law practice of requiring the death sentence for certain specific offenses (murder, treason, privacy, arson, rape, robbery, burglary, sodomy). Woodson v. North Carolina, 428 U.S. 280, 289 (1976). Common law, however, prohibited execution of the insane. *See supra* note 4. The Framers of the eighth amendment used the language of the English Bill of Rights, which is proof that the Framers intended to provide the same protections as the English, though they may have intended to go beyond the scope of the English Bill of Rights. Solem v. Helm, 463 U.S. 277, 286 (1983). *See also* Solesbee v. Balkcom, 339 U.S. 9 (1950) (Frankfurter, J., dissenting) (not a State in the Union permits execution of the insane); Commonwealth v. Ashe, 364 Pa. 93, 71 A.2d 107 (1950) (*common law principle* that no insane person can be executed is administered in Pennsylvania) (emphasis added).

48. *Ford*, 106 S. Ct. at 2601. The death penalty itself has survived constitutional challenges, also based on common law tradition. "Punishment of death does not invariably violate the Constitution." Gregg v. Georgia, 428 U.S. 153, 168 (1976). *Accord* Coker v. Georgia, 433 U.S. 584 (1977) (death not invariably cruel and unusual); Jurek v. Texas, 428 U.S. 262 (1976) (imposition of the death penalty not *per se* cruel and unusual). *Contra* Gardner v. Florida, 430 U.S. 349 (1977) (Marshall, J., dissenting) (death penalty unconstitutional in all cases); Gregg v. Georgia, 428 U.S. 153 (1976)

In addition to this historical perspective, the Court also assessed the evolution of society's notion of what is cruel and unusual punishment.[49] The Court recognized that the eighth amendment is flexible and may prohibit punishments that contemporary society considers cruel and unusual.[50] Because no state permits the execution of the insane, the Court concluded that the common law limitation remains valid.[51] Consequently, the Court held that the eighth amendment bars the execution of a insane prisoner.[52]

The Court next confronted the question of what minimum procedures were necessary to protect a condemned prisoner's rights.[53] When a prisoner's constitutional rights are involved, a federal evidentiary hearing is required unless the prisoner has received a full

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(Brennan, J., dissenting) (death penalty cruel and unusual in all circumstances).

The Constitution clearly shows that the Framers accepted capital punishment. Gregg v. Georgia, 428 U.S. at 177. The Framers made room for the death penalty, and capital punishment has been a part of the criminal justice system of a majority of states since the organization of the Union. Roberts v. Louisiana, 428 U.S. 325, 350-51 (1976).

49. *Ford*, 106 S. Ct. at 2602. "The eighth amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society." Gregg v. Georgia, 428 U.S. 153, 173 (1976). American society as a whole continues to regard the death penalty as appropriate and necessary. Gregg v. Georgia, 428 U.S. at 179.

For a discussion of the arguments for and against the death penalty, see generally BEDAU, *supra* note 16. *See also The Death Penalty in America* (H. Bedau ed. 1982) (collection of essays on capital punishment); R. BERGER, DEATH PENALTIES (1982) (disputing Supreme Court's interpretation of eighth amendment and the Framers' intent); J. GORECKI, CAPITAL PUNISHMENT (1983) (traces evolution of death penalty and predicts future developments).

50. *Ford*, 106 S. Ct. at 2600.

51. *Id.* at 2602. Although it is clear that there is and has always been a limitation on the execution of the insane, the reasons for the limitation vary. For example, it may violate human dignity; it may interfere with the condemned's ability to remember something that may assist in his defense; it may prevent the condemned from making peace with his God; it may not serve to deter other criminals; or the insanity may be sufficient punishment in itself. Brief for Petitioner at 15, Ford v. Wainwright, 106 S. Ct. 2595 (1986) (No. 85-5542).

Another interesting rationale for the prohibition is that the insane person is no longer the same person as the one convicted of the crime. Musselwhite v. State, 215 Mis. 363, 60 So. 2d 807 (1952).

52. *Ford*, 106 S. Ct. at 2602. The eighth amendment also prohibits punishments that are excessive in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 592 (1977). Punishment "must not involve the unnecessary or wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976). *See, e.g.*, Solem v. Helm, 463 U.S. 277 (1983) (life imprisonment with no parole for forging check cruel and unusual); Enmund v. Florida, 458 U.S. 782 (1981) (death penalty for robbery, where murder was committed but not by condemned, violates eighth amendment); Coker v. Georgia, 433 U.S. 584 (1977) (death sentence for rape excessive punishment in violation of eighth amendment); Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death sentence violates eighth amendment); Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference to prisoner's serious illness or injury by prison official would violate eighth amendment). *See generally* BEDAU, *supra* note 17, at 36-37 (defines cruel and unusual as unusually severe).

53. *Ford*, 106 S. Ct. at 2602.

and fair hearing in the state courts.[54] The Court held that the Florida sanity procedure did not meet the full and fair hearing requirement.[55]

The Court found the Florida procedure deficient for several reasons.[56] First, Ford's attorneys were not allowed to present their own evidence on the sanity questions.[57] Second, Ford's attorneys could not cross-examine the Governor-appointed psychiatrists.[58] Finally, the ultimate decision-maker, the Governor of Florida, was not a neutral party because he was, in essence, responsible for the prosecution of Ford.[59] In addition to these factors, a state court had never even heard Ford's insanity claim.[60] The Court therefore held that the Florida competency procedure did not provide an adequate full and fair hearing.[61] Consequently, the case was remanded to the federal district court for an evidentiary hearing on the question of Ford's sanity.[62] The Court, however, left it for the states to decide what minimum procedures are necessary to preclude rehearing in the federal courts.[63]

The Supreme Court was correct in holding that the eighth amendment prohibits the execution of the insane. The Court established as a constitutional right a privilege that the common law has always provided.[64] Historically, execution of the insane has never

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54. *See supra* notes 10, 39, and 41, discussing full and fair hearing.

55. *Ford*, 106 S. Ct. at 2605.

56. *Id.* at 2604-05.

57. *Id.* at 2604. *See supra* note 21 discussing the attempts of Ford's attorneys to present evidence. *Cf.* Matthews v. Eldridge, 424 U.S. 319 (1976) (fundamental requirement of due process is opportunity to be heard).

58. *Ford*, 106 S. Ct. at 2605. "[T]he subtleties and nuances of psychiatric diagnosis" are sufficient justification to require adversary hearings in determining competency. Vitek v. Jones, 445 U.S. 480, 495 (1980). *See generally* ZISKIN, *supra* note 20 (disputes validity of psychiatric testimony and conclusions).

59. *Ford*, 106 S. Ct. at 2605. The Court held that the Governor was not neutral because his subordinates had conducted Ford's prosecution. *Id. Contra id.* at 2613 (Rehnquist, J., dissenting) (historically, executive has determined whether condemned is insane); Solesbee v. Balkcom, 339 U.S. 9 (1950) (postponement of execution analogized to reprieve of sentence, which traditionally comes from the Governor and is not subject to review); Goode v. Wainwright, 448 So.2d 999, *cert. denied*, 466 U.S. 932 (1984) (under same Florida statute as *Ford* statute, held Governor has inherent right to grant stay of execution and *to make sanity determination*) (emphasis added).

60. *Ford*, 106 S. Ct. at 2602-03.

61. *Id.* at 2605.

62. *Id.* at 2606.

63. *Id.*

64. *See supra* note 4, discussing the common law. *See also*, Phyle v. Duffy, 334 U.S. 431 (1948) (California law prohibits execution of death row convict if convict declared insane); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939) (if found to be insane, petitioner's execution should be stayed); *In re* Smith, 25 N.M. 48 176 P.2d 819 (1918) (insane person cannot be tried, sentenced or executed according to common law). *Cf.* Ake v. Oklahoma, 105 S. Ct. 1087 (1985) (Burger, J., concurring) (additional protections required in capital punishment cases due to finality of death sen-

been permitted.[65] Although the reasons for the common law prohibition may no longer be clear, the fact that no state currently allows execution of the insane illustrates the continued validity of the prohibition.[66] Because the prohibition is so deeply rooted in the past and the present, the Court could not have held otherwise.

The Court was also correct in holding that the Florida procedure for determining sanity did not provide a full and fair hearing. The Florida procedure was clearly deficient because no court ever heard Ford's claim.[67] The Supreme Court could have ended its analysis at this point; however, the Court criticized the Florida procedure for further deficiencies.[68] In pointing out these deficiencies, the Court reached the correct conclusion, but failed to provide guidelines for states to follow in the future, when confronted with similar cases.[69] Based on the facts of the case before it, as well as the inconsistencies in the procedures of the other states, the Court should have provided minimum due process standards for the execution of the insane.[70]

Although all members of the Court agreed that the insane may not be executed, the members disagree upon the appropriate procedures for determining sanity.[71] The Supreme Court has not clearly

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tence); Barefoot v. Estelle, 463 U.S. 880 (1983) (Marshall, J., dissenting) (procedural safeguards most important when prisoner's life is at stake); Solesbee v. Balkcom, 339 U.S. 9 (1950) (Frankfurter, J., dissenting) (not uncommon for prisoner to go insane while awaiting execution); Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985) (Clark, J., dissenting) (executing the insane violates modern decency standards, as well as man's basic dignity).

65. *See supra* note 4, discussing the common law prohibition against executing the insane.

66. *See Ford*, 106 S. Ct. at 2601. *See also* Solesbee v. Balkcom, 339 U.S. 9 (1950) (Frankfurter, J., dissenting) (lists various explanations for the prohibitions); Hazard and Louisell, *supra* note 34 (theories for the prohibition); Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651 (1951) (examines various theories involved in prohibition); *Insanity*, *supra* note 36 (lists rationales for common law rule). *See generally Ford*, 106 S. Ct. at 2607-09 (examines common law reasons for prohibition and the current validity of prohibitions); BEADU *supra* note 17 (lists religious and moral arguments for and against death penalty).

67. *Ford*, 106 S. Ct. at 2602-03.

68. *Id.* at 2603-05.

69. The need for minimum guidelines is especially compelling because the *Ford* Court has created a new constitutional right in an area where states traditionally are granted broad discretion. *See* Solesbee v. Balkcom, 339 U.S. 9 (1950) (common law uniformly grants tribunal great discretion in determining whether evidence of insanity after sentencing should be heard); Phyle v. Duffy, 334 U.S. 431 (1948) (tribunal allowed reasonable discretion to determine whether to investigate insanity); Nobles v. Georgia, 168 U.S. 398 (1897) (common law did ot give right to insanity hearing after sentencing, instead left decision to judge); *In re* Smith, 25 N.M. 48, 176 P. 819 (1918) (if insanity issue raised after sentence imposed, judge has discretion to hear case or not). *But see* Solesbee v. Balkcom, 339 U.S. 9 (1950) (Frankfurter, J., dissenting) (law does not give discretion to decide whether to execute insane).

70. *See supra* note 3, discussing the inconsistencies in the various state procedures.

71. *See supra* note 8, discussing concurring and dissenting views. Although Jus-

defined the extent of a full and fair hearing.[72] The Court recognizes that a full and fair hearing includes the right to present evidence,[73] the right to cross-examine,[74] and the right to have a neutral decision-maker.[75] The Court, however, left several major questions unresolved.

The Court conceded that a high threshold showing of insanity may be required to trigger the eighth amendment full and fair hearing protections.[76] The Court did not answer, however, what level of

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tice O'Connor and Justice Rehnquist do not agree with the Court's reasoning in finding an eighth amendment prohibition, they agree that the insane should not be executed. *Ford*, 106 S. Ct. 2611, 2615 (O'Connor, J., concurring in the result in part and dissenting in part, Rehnquist, J., dissenting). Justice Powell advocates a procedure that does not rise to the level of a trial, in contrast to the full trial which he interprets Justice Marshall as requiring. *Id.* at 2611 (Powell, J., concurring). Justice O'Connor would allow the states discretion to decide whether to provide a hearing. *Id.* at 2612 (O'Connor, J., concurring in the result in part and dissenting in part). Justice Rehnquist would leave the Florida procedure intact. *Id.* at 2615 (Rehnquist, J., dissenting).

72. *See supra* notes 39 & 40, discussing fundamental elements of a full and fair hearing. *Cf.* Addington v. Texas, 441 U.S. 418 (1979) (due process does not mean that all precautions must be taken to prevent conviction of innocent person).

73. *Ford*, 106 S. Ct. at 2604. *Cf.* Vitek v. Jones, 445 U.S. 480 (1980) (transferring convict from prison to state hospital requires notice to prisoner and opportunity for prisoner to be heard and to present evidence); Greenholz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (procedure allowing prisoner opportunity to be heard prior to denying parole satisfies due process); Morrisey v. Brewer, 408 U.S. 471 (1972) (minimum requirements of due process in parole revocation cases include: written notice, disclosure of evidence against parole and opportunity to be heard in person and to present witnesses and documentary evidence); Goldberg v. Kelly, 397 U.S. 254 (1970) (prior to terminating welfare benefits, due process requires welfare recipient to receive adequate notice and opportunity to present oral arguments and evidence); Frank v. Mangum, 237 U.S. 309 (1914) (due process clause does not impose any procedure on states as long as person has notice, hearing and opportunity to present oral evidence before a tribunal).

74. *Ford*, 106 S. Ct. at 2605. *See also* Vitek v. Jones, 445 U.S. 480 (1980) (minimum due process procedure prior to transfer to mental hospital from prison requires opportunity to confront and cross-examine witnesses, absent good cause for denial of this right); Morrisey v. Brewer, 408 U.S. 471 (1972) (due process minimally requires, absent showing of good cause for denial, right to confront and cross-examine adverse witnesses before revoking parole); Goldberg v. Kelly, 397 U.S. 254 (1970) (due process requires welfare recipient to have the opportunity to cross-examine adverse witnesses). *But cf.* Williams v. New York, 337 U.S. 241 (1949) (no due process violation in denying defendant opportunity to confront or cross-examine witnesses during sentencing phase of trial).

75. *Ford*, 106 S. Ct. at 2605. *See also* Vitek v. Jones, 445 U.S. 480 (1980) (prior to transfer of prisoner to mental hospital, prisoner must have benefit of independent decision-maker); Parham v. J.R., 442 U.S. 584 (1979) (prior to institutionalizing child in mental health facility, a neutral factfinder, such as staff physician, must determine whether statutory requirements for admission are satisfied); Morrissey v. Brewer, 408 U.S. 471 (1972) (prior to parole revocation, due process requires a hearing before a neutral panel, like parole board).

76. *Ford*, 106 S. Ct. at 2606. This concession was made in order to eliminate the possibility of repeated or frivolous claims of insanity. *Id.* "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, on their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." Barefoot v. Estelle, 463 U.S. 880, 888 (1983) (citing Lambert v. Barrett, 159 U.S. 660, 662 (1895)).

insanity is required in order to pass the high threshold showing.[77] Further, the Court held that a State official, such as the Governor, is not a neutral decision-maker,[78] but never addressed the constitutionality of a state-appointed panel of psychiatrists.[79] Finally, the Court did not address the question of who may raise the initial insanity claim.[80] These unanswered questions will make it difficult for the states to modify their competency procedures in order to comply with due process.

In striking down the Florida procedure, the Court applied factors that it previously had held to be essential for a full and fair hearing.[81] These factors include the right to present evidence, the

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77. The Supreme Court has recognized the difficulties in determining sanity. "The subleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient." Addington v. Texas, 441 U.S. 418, 430 (1979). As background to those difficulties, it is helpful to examine the various tests used to determine competency to stand trial and sanity at the time of the offense. The M'Naghten test states that "at the time of committing the act, the party accused did not know the nature and quality of the act he was doing; or, if he did know it, he did not know he was doing what was wrong." H. HUCKABEE, LAWYERS, PSYCHIATRISTS AND CRIMINAL LAW at 5 (1980) (citing 8 Eng. Rep. 718, 722, (1843)). The irresistible impulse test adds a proviso to the M'Naghten test, "that the accused is insane if, even though able to distinguish right and wrong and know the act is wrong, his will is so completely destroyed that his actions are beyond his control." HUCKABEE at 5 (citing Davis v. United States, 165 U.S. 373, 378 (1897)).

In determining competency to stand trial, the focus is on current mental condition, rather than the mental condition at the time of the crime. HUCKABEE, at 137. Mental responsibility for the crime and competency to stand trial "are significantly different concepts." *Id. See also* the Federal competency test set forth in 18 U.S.C. § 4244 (1985).

78. *Ford*, 106 S. Ct. at 2605.

79. Psychiatrists are expert witnesses:

> "[A]n expert is generally described as one who is so qualified by study or experience that he can form a definite opinion of his own respecting a division of science,. . .concerning which persons having no particular training or special study are incapable of forming accurate opinions or of deducing special conclusions.

ZISKIN, *supra* note 20, at 1-2.

There are three sources of knowledge that an expert uses to form his opinions: his formal education and training, his experience and the state of knowledge of the specific discipline. ZISKIN, *supra* note 20, at 96.

The aim of psychiatrists and psychologists is to know and interpret human behavior in order to explain and predict behavior. ZISKIN, *supra* note 20, at 65-66.

80. The Court may not have addressed this question because the Florida statute does not restrict who may raise the initial insanity claim. *See* FLA. STAT. 922.07(1) (1985).

81. *See supra* notes 73, 74 and 75, listing the general full and fair hearing requirements. Since the Supreme Court has expanded the scope of substantive rights, *see supra* note 38, the Court has confronted the question of what process is necessary in order to protect these rights. For example, in the stage of a criminal proceeding between arraignment and impaneling of the jury, the accused has a procedural due process right to consult with his attorneys. Hawk v. Olson, 326 U.S. 271, 278 (1945).

When evidence raises doubt concerning the accused's competence, procedural due process requires that the court impanel a jury and grant a sanity hearing. Pate v. Robinson, 383 U.S. 375, 385 (1966). Similarly, when the accused presents evidence

right to cross-examine and the right to a neutral decision-maker.[82] Although these factors provide guidelines for determining general full and fair hearing requirements, the Court erred in not tailoring these full and fair hearing requirements to the specific interests involved in the possible execution of the insane.

First, the Court correctly recognized that a high threshold showing of insanity may be necessary to trigger the full and fair hearing requirements, in order to prevent frivolous claims of insanity.[83] The Court erred, however, in not defining high threshold. The impact of the Court's failure to define high threshold is great, because States must have a uniform standard to determine whether there is a constitutional right to a hearing.[84] Failure to implement uniform standards among the states will result in the disparate treatment of insane prisoners.[85] The guarantees inherent in the due process and equal protection clauses clearly require that similarly situated persons be treated equally.[86] The Court should have defined high threshold, thus eliminating this ambiguity.[87]

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that his sanity at the time of the crime may be an issue at trial, the accused has the right to a psychiatrist, even if he is indigent. Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

In a welfare termination proceeding, the welfare recipient must be allowed to have his attorney present at the hearing. Goldberg v. Kelly, 397 U.S. 254, 270-71 (1970). *But see* Meachum v. Fano, 427 U.S. 215 (1976) (state prisoner not entitled to due process hearing prior to transfer from medium to maximum security prison); Matthews v. Eldridge, 424 U.S. 319 (1976) (administrative procedures afford sufficient due process to terminate disability benefits); Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (due process does not require hearing prior to nonrenewal of nontenured teaching contract).

82. *See supra* notes 73, 74 and 75 discussing these rights.

83. *Ford*, 106 S. Ct. at 2606.

84. Once the Court established the minimum showing required to trigger the eighth amendment protections, states would be free to establish greater protections than required. *See* California v. Ramos, 463 U.S. 992 (1985) (states may provide greater protection than what is constitutionally required).

85. For example, states have different standards for determining whether an action for an execution should be stayed, due to incompetency. *See, e.g.*, COLO. REV. STAT. § 16-11-110 (1978) (prisoner is "incompetent to proceed"); ILL. REV. STAT. ch. 38 para. 1005-2-3 (1985) (prisoner "unable to understand the nature and purpose of sentence"); MONT. CODE ANN. § 46-19-201 (1983) (prisoner "lacks mental fitness"); WYO. STAT. § 7-13-901 (1982) (prisoner "insane").

86. The Supreme Court has held that when a constitutional right is involved, a basic level of fair treatment must be guaranteed. United States v. Chavez, 627 F. 2d 953, 958 (9th Cir. 1980), *cert. denied*, 450 U.S. 924 (1981).

This need for fair treatment is especially compelling when a person's life is in the balance. *See* Barefoot v. Estelle, 463 U.S. 880 (1983) (Supreme Court has always recognized need for procedural protections when human life is involved).

87. The need for a definition of high threshold is especially great because of the disagreement among psychiatrists as to what constitutes insanity. *See supra* notes 77 and 79, discussing psychiatric analysis.

See also Ake v. Oklahoma, 470 U.S. 68, 81 (1985) (psychiatry not an exact science and there is frequent disagreement on definition of mental illness); Addington v. Texas, 441 U.S. 418 (1979) (due to uncertainness of psychiatric diagnosis, it is unlikely state could prove individual to be mentally ill, beyond reasonable doubt). *See generally* ZISKIN, *supra* note 20, at 251-52:

Second, the Court erred in not addressing the constitutionality of the state-appointed panel of psychiatrists. It is logical that if the governor, or other state official, is not a neutral party, neither are his appointees, the psychiatrists.[88] In order to eliminate any claims of bias the Court should have held that a neutral party must appoint the panel of psychiatrists.[89] The Court, however, was silent on this issue. Consequently, when reviewing similar provisions in competency procedures states may interpret the Court's silence as approval and, as a result, this same bias will continue to exist.[90]

Finally, the Court erred in not addressing the issue of who may raise the initial insanity claim. The majority of states permit only the warden or prison official to raise the initial claim of insanity.[91] The prisoner has no right to raise this claim on his own behalf.[92]

With regard to reliability of diagnosis, the most common research findings indicate that, on the average, one cannot expect to find agreement in more than about 60% of cases between two psychiatrists. When a third psychiatrist is introduced, the agreement among the three psychiatrists drops to 45% of the cases.

Cf. Comment, *Execution of Insane Persons* 23 S. CAL. L. REV. 246 (1950) [hereinafter *Execution*] (advocates legislatively defined insanity test).

88. The prisoner could claim that the Governor has appointed psychiatrists who are likely to declare him competent. This would be a valid claim, considering the uncertainty surrounding psychiatric opinion. "[M]ost of the subject matter of psychiatry and clinical psychology is at the theoretical rather than at the established level." ZISKIN, *supra* note 20, at 96. *See generally* Weihofen, *supra* note 66, at 654 (no guarantee court appointed experts more qualified than party's expert, or that court appointed experts have more opportunity to diagnose).

89. *See* MASS. GEN. LAWS ANN. ch. 279 § 62 (West Supp. 1984) (commissioner of mental health appoints two psychiatrists); NEV. REV. STAT. § 176.425 (1979) (judge is to appoint two doctors, one a psychiatrist).

Another possibility is to allow the prisoner to have a psychiatrist that he has selected on the panel.

Cf. Barefoot v. Estelle, 463 U.S. 880 (1983) (Blackmun, J., dissenting) (juries cannot distinguish valid expert opinion since experts cannot agree among themselves on correct diagnosis); Addington v. Texas, 441 U.S. 418 (1979) (criminal defendant's interest so great, standard of proof is designed to eliminate error).

90. *See generally* CONN. GEN. STAT. ANN. § 54-101 (West 1983) (Court or judge has discretion to appoint three physicians); MISS. CODE ANN. § 99-19-57 (Supp. 1985) (sheriff has six physicians examine prisoner); N.Y. CORRECT LAW § 655 (McKinney Supp. 1984) (governor appoints commission of three to examine prisoner); S.C. CODIFIED LAWS ANN. § 23A-27A-22 (1979) (governor appoints commission of three to five physicians).

91. *See supra* note 3, discussing various state statutes. *Cf. Eighth Amendment, supra* note 17 (would allow next friend of prisoner to raise insanity claim); *Insanity, supra* note 35 (argues prisoner should be guaranteed one hearing on possible insanity, without warden raising issue); *Incompetency, supra* note 14 (when issue is competency to stand trial, counsel can decide whether to raise issue for defendent). *But cf. Execution, supra* note 87 (would uphold warden's discretion to refuse prisoner's sanity hearing).

92. At the minimum, the prisoner or the person acting on his behalf, should have the right to raise the question initially at least one time, as suggested in *Insanity, supra* note 35. Furthermore, even though a prisoner is entitled to raise the claim, he still must demonstrate a high threshold in order to qualify for a hearing. *See supra* note 76 and accompanying text.

States may continue to deny prisoners this right because the Court's failure to address the issue implies approval of existing procedures.[93] The right to raise the claim is especially important to the condemned prisoner.[94] The Court should have held that the prisoner must have the right to raise the initial insanity claim, because a constitutional right is now involved.[95]

The *Ford.* Court has finally settled a controversy that has existed since the inception of the eighth amendment: that it is cruel and unusual punishment to execute an insane person.[96] States have traditionally prohibited the execution of the insane, therefore the precedential value of this decision will be minimal.[97] Recognition of the eighth amendment restriction, however, will have a great impact on state procedures for determining sanity. The existence of this constitutional right now requires states to provide a condemned prisoner with a full and fair hearing on the issue of his sanity.[98] The *Ford* Court held that the Florida statute did not provide a full and fair hearing, but failed to delineate the minimum full and fair hearing requirements in terms of the new eighth amendment restriction.[99] The Court justified the vagueness by stating that the extent of this new constitutional restriction should be left to the discretion of the states.[100] In granting states such broad discretion, however, the Court has merely created more confusion, which will only result

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The private interest of the prisoner (prohibiting execution if insane), along with the risk of "erroneous deprivation of such interest through the procedures used," outweighs the government's interest in reducing administrative burdens. *See supra* note 40 (three factors required by due process). *See also* Addington v. Texas, 441 U.S. 418 (1979) (criminal cases apply heavy standard, therefore risk of error would be minimized).

93. States may wish to retain provisions limiting who may raise the insanity claim, in order to prevent repeated or frivolous claims of insanity. *See Execution, supra* note 87 (warden's complete discretion necessary to eliminate postponement of execution through frivolous insanity claims).

94. Without this right, insane prisoners may be executed because the warden did not raise the issue. *See* Barefoot v. Estelle, 463 U.S. 880 (1983) (Marshall, J., dissenting) (procedural safeguards especially needed when life is at stake); Woodson v. North Carolina, 428 U.S. 280 (1976) (death penalty is ultimate penalty because it cannot be reversed).

95. The fact that the prisoner has received a full and fair hearing in the trial and sentencing stage does not decrease the value of this right. *See* Olim v. Wakinekona, 461 U.S. 238 (1983) (following incarceration, inmate retains constitutionally protected rights); Meachum v. Fano, 427 U.S. 215 (1976) (convicted prisoner retains constitutional rights).

96. *Ford*, 106 S. Ct. at 2606.

97. *See supra* note 2, for a list of states prohibiting the execution of the insane.

98. *See generally* 28 U.S.C. § 2254(d) (1977) (outlines factors requiring de novo federal evidentiary hearing).

99. *Ford*, 106 S. Ct. at 2604-06.

100. *Id.* at 2606.

in further litigation, as the extent of the new constitutional restriction is defined.

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