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CAPITAL PUNISHMENT AND THE INCOMPETENT: PROCEDURES FOR DETERMINING COMPETENCY TO BE EXECUTED AFTER *FORD V. WAINWRIGHT*

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I. INTRODUCTION

Alvin Ford was convicted of murder and sentenced to death in Florida in 1974. Eight years later, he began to exhibit symptoms of mental illness. Florida law forbade the execution of an incompetent prisoner,[1] and Ford's attorneys sought a determination of Ford's competency under the procedure provided by statute. Following that procedure, the Governor of Florida appointed a panel of three psychiatrists who interviewed Ford jointly for thirty minutes.

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1. FLA. STAT. § 922.07 (1983) (amended 1985).

Each psychiatrist filed a two- or three-page report with the Governor, who decided on the basis of those reports that Ford "underst[ood] the nature of the death penalty and the reasons why it was imposed on him" and therefore was competent to be executed.[2] Consistent with Florida's policy excluding all advocacy on behalf of the condemned in competency determinations, Ford's attorneys were prevented from participating in the examination.[3]

In *Ford v. Wainwright*,[4] the Supreme Court held that the eighth amendment bars the execution of a condemned prisoner who has become "insane"[5] after being sentenced to death and that Florida's procedures for determining competency to be executed were constitutionally deficient. Before *Ford*, virtually every state barred execution of the presently incompetent as a matter of statutory or common law.[6] Thus, the decision itself will result in the postponement of few, if any, executions. As Justice Rehnquist pointed out in dissent,[7] the "real battle" in *Ford* was not over whether an incompetent prisoner may be executed, but over what procedures should be used in determining competency to be executed.

Ford, however, proved to be only a preliminary skirmish in that battle, as a divided Court provided little concrete guidance to states attempting to formulate procedures for determining competency to be executed.[8] Seven Justices agreed that a prisoner must have some opportunity to be heard on the question of competency, but they disagreed sharply on the precise scope of the procedures required. Justice Marshall, writing for a plurality of four, took the most expansive view.[9] Justice Powell, who concurred in the result, wrote that a "full-scale 'sanity trial'" is not warranted and called for less elaborate procedures.[10] Justice O'Connor, joined by Justice White, found that the demands of due process are "minimal in this context."[11]

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2. Ford v. Wainwright, 477 U.S. 399, 403-04 (1986) (plurality opinion).

3. *Id.* at 412-13 (plurality opinion) (citing Goode v. Wainwright, 448 So. 2d 999, 1001 (Fla. 1984)).

4. 477 U.S. at 399.

5. Although the Justices in *Ford* and many state statutes use the term "insane," there is substantial debate over the precise meaning of that term. *See infra* note 14. This article uses the term "incompetent."

6. *See* 477 U.S. at 408 n.2 (plurality opinion); Ward, *Competency For Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35, 101 app. (1986); Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979).

7. *Ford*, 477 U.S. at 431-35 (Rehnquist, J., dissenting).

8. *See* Martin v. Dugger, 686 F. Supp. 1523, 1557 (S.D. Fla. 1988) (calling *Ford* "a precedential quagmire").

9. *Ford*, 477 U.S. at 413-18.

10. *Id.* at 425 (Powell, J., concurring in part and concurring in the judgment).

11. *Id.* at 429 (O'Connor, J., concurring in the result in part and dissenting in part).

Disagreement over the requirements of the eighth amendment and due process will hinder the ability of states to determine precisely the demands of *Ford*.[12] That task is further complicated by the role of mental health professionals in competency determinations. The values and methods of the legal system differ in many respects from those of the medical profession.[13] When mental health professionals become involved in competency determinations, states must take these differences into account.[14]

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12. In response to *Ford*, the Governor of Florida asked the Florida Supreme Court to consider promulgating a rule of criminal procedure regarding competency to be executed. *In re* Emergency Amendment to Florida Rules of Criminal Procedure (Rule 3.811, competency to be executed), 497 So. 2d 643 (Fla. 1986). In response, the court adopted an interim rule which provided that determinations of competency to be executed made under the statutory scheme ruled invalid in *Ford* could be reviewed by a court on motion by the prisoner. *Id.* The rule directed the trial judge to review the experts' reports and any written submissions from the parties. *Id.* No evidentiary hearing was required, but the court could, in its discretion, allow the parties to present oral argument or live witnesses. *Id.* In 1987, the court adopted FLA. R. CRIM. P. 3.811 and 3.812, which prescribed the same procedures as were contained in the interim rule. *In re* Amendments to the Florida Rules of Criminal Procedure, 518 So. 2d 256 (Fla. 1987); FLA. R. CRIM. P. 3.811-.812. The current rules contain amplifying provisions regarding petition and hearing procedures and the standard and burden of proof. FLA. R. CRIM. P. 3.811(d), 3.812.

13. An early example of the voluminous literature on the tension between law and psychiatry is found in E. MANN, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 3 (1893):

> To a physician skilled in psychiatry, nothing appears more absurd, and nothing could possibly be more in conflict with the laws which govern mental disease, than the [M'Naghten test], which lays down, that if a man knew the consequences of his conduct, and the difference between right and wrong, he must be held legally responsible for crime; yet it happens very often that the insane are well-informed upon these points, and that sane men are not.

14. *Ford* also raises a question distinct from, but related to, the question of the procedures to be employed in determining competency. While a majority of the Justices in that case agreed that the eighth amendment bars execution of an "insane" prisoner, only Justice Powell specifically addressed the definition of "insanity" in this context. *Ford*, 477 U.S. at 418 (Powell, J., concurring in part and concurring in the judgment). The development of procedural standards must be accompanied by the refinement of this substantive standard, because procedural protections will be of no avail if the definition of "sanity" employed fails to protect the interests that *Ford* demands be protected.

The statutory scheme invalidated in *Ford* labeled a prisoner "insane" if he lacked the "mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him." FLA. STAT. § 922.07 (1985) (amended 1985). Professors Radelet and Barnard, in evaluating the Florida competency statute, suggest that the phrase "nature of the penalty" presents problems because society has reached no agreement on what the phrase, in the fuller sense, means. Radelet & Barnard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37, 42 (1986). They argue that the statute asks psychiatrists to treat the nature of the death penalty as "fixed" and unrelated to moral or

This article examines the legal requirements of *Ford* and considers the unique problems posed by the role of mental health professionals in competency determinations. Part II examines the two primary sources of procedural protection for condemned prisoners, the due process clause and the eighth amendment. Part III asserts that the most effective way of meeting the requirements of *Ford* while also protecting the interests of the states is to incorporate competency determinations in a comprehensive system of mental health care for death row inmates. Such a system would provide routine, periodic

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political considerations, "which it is not." *Id.*; *see also* M. Radelet & G. Barnard, Ethics and Psychiatric Determination of Competency to be Executed 5 (Nov. 20, 1984) (unpublished manuscript). The phrase cannot encompass the societal justifications for imposing the death penalty because there is no societal consensus on what those justifications are.

The word "understand" also poses problems. As a lower limit, the prisoner should possess mental ability greater than mere cognitive understanding of his or her fate. If what is meant by "understand" is mere cognitive understanding, that is, a bare mental understanding of the fact of execution and that it will result in death, then almost all mentally ill prisoners will be found competent. A superficial factual understanding rarely is impossible for a mentally ill person. *Cf.* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 191 (3d ed. 1980) [hereinafter DSM-III] (paranoid schizophrenics may exhibit no functional impairment and often can interact with others). What is more usual is an impairment of the individual's affective understanding, or emotional response to intellectual understanding. An individual lacking affective understanding of his impending execution could accurately describe what an execution means, but would exhibit no emotional reaction to the knowledge that he faces execution.

In addition to these difficulties with the statutory standard itself, individual mental health professionals may have difficulty interpreting the standard. The state psychiatrists who interviewed Alvin Ford illustrate this problem. One of them, Dr. Mhatre, found that Ford exhibited an "ability to carry on day-to-day activities, and relate to his fellow inmates and guards, and appear[ed] to understand what [was] happening around him." Petition for Writ of Certiorari at 39, Ford v. Wainwright, 477 U.S. 399 (1986) (No. 85-5542). As Ford's counsel indicated, this finding fails to support the doctor's conclusion that Ford understood that he might be executed. *Id.* at 39 n.29. A deluded person such as Ford, who believed that he would not be executed because he had won a "landmark case" outlawing capital punishment, see *Ford*, 477 U.S. at 403 (plurality opinion), often can operate reasonably normally on a daily basis. *See* DSM III, *supra*, at 191 ("impairment in functioning may be minimal if the delusional material is not acted upon, since gross disorganization of behavior is relatively rare"). Mhatre's conclusion indicates that he understood the standard to be "does the prisoner understand anything?" rather than "does the prisoner have the mental capacity to understand the nature of the death penalty and the reasons why it was imposed on him?" The standard apparently employed by Dr. Mhatre is closer to an "obvious frenzy or imbecility" standard, which was the prevailing test for insanity at the time the prohibition against executing the insane developed, before the formulation of different tests of insanity for different purposes. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 MELB. U.L. REV. 434, 467 (1964).

Any system of competency determinations will face these and related difficulties. A discussion of these difficulties is, however, beyond the scope of this article.

mental health examinations for condemned prisoners. These examinations would be relatively cursory, but would identify the small number of cases in which a competency determination requires more elaborate procedures. Part IV of this article describes the procedures to be used in those cases.

II. PROCEDURAL RIGHTS OF THE PRISONER

A. *Due Process*

Ford is the first Supreme Court decision in nearly thirty years to examine the procedures for determining competency to be executed.[15] Prior decisions held that because an incompetent prisoner's interest in freedom from execution was a privilege granted by the state rather than a right, the procedures established by states to determine competency were not required to meet the demands of due process.[16] The Supreme Court, however, has since abandoned the right/privilege distinction as determinative of due process requirements[17] and has replaced it with a more flexible test that provides due process protection whenever government action threatens a substantial[18] interest in life,[19] liberty,[20] or property.[21] Because condemned prisoners have both life and liberty interests in avoiding execution while incompetent, procedures to determine competency to be executed must meet due process demands.[22]

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15. *See* Caritativo v. California, 357 U.S. 549 (1958); Solesbee v. Balkcom, 339 U.S. 9 (1950); Nobles v. Georgia, 168 U.S. 398 (1897).

16. *See Caritativo*, 357 U.S. at 550; *Solesbee*, 339 U.S. at 11-14; *Nobles*, 168 U.S. at 405-09; *see also* Phyle v. Duffy, 34 Cal. 2d 144, 156-59, 208 P.2d 668, 675-77 (1949) (Traynor, J., concurring) (the interest is "not a constitutional right, but a privilege that the state has conferred as an act of mercy or special dispensation . . . . When there is merely a question of the regulation of a privilege, the validity of final administrative decisions under the due process clause does not require that notice of hearing be given.").

17. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (due process protection accorded to interests "within the contemplation of the '[life,] liberty or property' language" of the due process clause); *see also* Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (citing cases undermining the right/privilege distinction).

18. *De minimis* interests may not be protected. *See* Ingraham v. Wright, 430 U.S. 651, 674 (1977); Goss v. Lopez, 419 U.S. 565, 576 (1975).

19. *See, e.g.*, Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion).

20. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974).

21. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969).

22. *See* Martin v. Dugger, 686 F. Supp. 1523, 1562 (S.D. Fla. 1986) (finding that exercise of Florida procedure for determining competency to be executed failed to meet due process requirement of notice).

As Justice Powell noted in *Ford*, the question in a competency determination is "not *whether*, but *when*" the prisoner may be executed.[23] However, a condemned prisoner does not forfeit all protected interest in life once the death sentence has been validly imposed. In his plurality opinion, Justice Marshall wrote that although the reasons for the eighth amendment prohibition on executing the incompetent are obscure,[24] the rule stems partly from the belief that it is wrong to execute a prisoner who has not had an opportunity to "come to grips with his own conscience or deity,"[25] and from recognition of the possibility that, had the prisoner been sane, "he might have alleged something in stay of judgment or execution."[26] Justice Powell found the second of these rationales of little contemporary merit given the extensive opportunities for review of convictions and sentences available to modern capital prisoners,[27] but found the first valid.[28] Therefore, an incompetent condemned prisoner retains at least a residual life interest.

The prisoner also has a liberty interest[29] in avoiding execution while incompetent.[30] State laws that prohibit the execution of an incom-

23. *Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment).

24. *See id.* at 407 (plurality opinion) ("the reasons for the rule are less sure and less uniform than the rule itself").

25. *Id.* at 409 (plurality opinion).

26. *Id.* at 406-07 (plurality opinion) (quoting 4 W. BLACKSTONE, COMMENTARIES* 24-25 (1769)); *see also* 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (Philadelphia 1847) ("if after judgment he becomes of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution").

27. *Ford*, 477 U.S. at 420 (Powell, J., concurring in part and concurring in the judgment) (noting opportunities for direct appeal, state and federal collateral review, and the requirement of effective assistance of counsel at trial and on appeal).

28. *Id.* at 421 (Powell, J., concurring in part and concurring in the judgment).

29. The fact that an individual is imprisoned, and will remain in prison whether or not the government takes action against him, does not abrogate his liberty interest where a legitimate expectation regarding the conditions of confinement has been created. *See* Vitek v. Jones, 445 U.S. 480, 488-89 (1980) ("Once a State has granted prisoners a liberty interest, we held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'") (quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1974)).

It has been argued that, because the prisoner forfeits his liberty through conviction and sentencing, and because that liberty is forfeited whether the prisoner is in custody, on death row, or in a mental hospital, the interest is not one in liberty. *See* Note, *supra* note 6, at 546 n.80 (citing Meachum v. Fano, 427 U.S. 215, 223-29 (1976)). In *Meachum*, the Court held that the transfer of a prisoner between prisons did not implicate a liberty interest. 427 U.S. 215, 216 (1976). But the *Vitek* Court specifically distinguished *Meachum* on the ground that discretion to make the transfer contested in *Meachum* was lodged in prison authorities, and the prisoner did not possess "any right or justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events." *Vitek*, 445 U.S. at 489.

30. Justice O'Connor seemed to have assumed as much in *Ford*. *See Ford*, 477 U.S. at 427 (O'Connor, J., concurring in the result in part and dissenting in part).

petent prisoner create such a right. "[W]here a statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause."[31] Statutes in more than half of the states imposing the death penalty create such a liberty interest.[32]

Moreover, the common law roots of the prohibition against executing the incompetent create a constitutionally protected liberty interest independent of state law. In *Ingraham v. Wright*,[33] the Supreme Court held that the liberty preserved from deprivation without due process includes the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[34] Justice Marshall found the prohibition against executing the incompetent to be an "ancestral legacy" with "impressive historical credentials."[35] He traced its roots at least to the seventeenth century,[36] long before the adoption of the due process clause, which "was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown."[37] The common law right to be free from execution while incompetent therefore creates an "historic libert[y]"[38] interest protected by due process.[39]

Once a protected interest is identified, modern due process analysis asks whether a state's procedures for protecting that interest are "fundamentally fair."[40] Due process is flexible, and procedural rules

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31. *Id.* at 428 (O'Connor, J., concurring in the result in part and dissenting in part) (quoting Hewitt v. Helms, 459 U.S. 460, 471-72 (1983) and citing Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 10 (1979)) ("entitlement created where under state law 'there is [a] set of facts which, if shown, mandate a decision favorable to the individual'").

32. *See Ford*, 477 U.S. at 408 n.2 (plurality opinion).

33. 430 U.S. 651 (1977).

34. *Id.* at 673 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

35. *Ford*, 477 U.S. at 406-08 (plurality opinion).

36. *Id.* (plurality opinion).

37. *Ingraham*, 430 U.S. at 672-73.

38. *Id.* at 673.

39. Grounding the liberty interest in historical precedent has implications with respect to the level of due process required. In *Ingraham*, the Court held that when a liberty interest is rooted in history, it is "subject to historical limitations." *Id.* at 675. Justice Rehnquist argued in *Ford* that the executive traditionally passed on the competency of a prisoner to be executed, and that it therefore was error for the Court to find the placement of the decision within Florida's executive branch a violation of due process. *Ford*, 477 U.S. at 431 (Rehnquist, J., dissenting).

40. *See* Lassiter v. Department of Social Servs., 452 U.S. 18, 24 (1981).

required in one context may not be required in others.[41] To determine the necessary level of procedural due process protection, courts employ a three-part balancing test that considers: the private interest at stake; the government's interests, including the effect of additional procedures on the government function in question and the financial and administrative burdens such procedures would impose; and the likely effect of additional procedures on reducing the risk of erroneous decisions.[42]

Determining the level of procedures required to determine competency to be executed involves balancing the prisoner's right to avoid execution while incompetent against the states' interest in avoiding additional cost and delay.[43] The determination also demands an analysis of the risk of error in current procedures and the likelihood that more elaborate procedures will increase the accuracy of competency determinations.

1. The Public and Private Interests

The Supreme Court has recognized the states' interest in the informality, flexibility, and economy[44] of their proceedings as a legitimate

41. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (due process "is flexible and calls for such procedural protections as the particular situation demands"); Bell v. Burson, 402 U.S. 535, 540 (1971) ("[a] procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case").

42. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Little v. Streater, 452 U.S. 1 (1981); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 17-18 (1978); Dixon v. Love, 431 U.S. 105, 112-13 (1977); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); Goldberg v. Kelly, 397 U.S. 254, 266 (1970); *see also* Addington v. Texas, 441 U.S. 418 (1979) (using the three-part test to determine the burden of proof in civil commitment proceedings); Barry v. Barchi, 443 U.S. 55 (1979) (balancing governmental and private interests involved in suspension of a horse trainer's license).

43. Because present competency can, in theory, never be determined unless execution and the determination of competency are simultaneous, "the potential for false claims and deliberate delay in this context is obviously enormous." *Ford*, 477 U.S. at 429 (O'Connor, J., concurring in the result in part and dissenting in part); *see also id.* at 435 (Rehnquist, J., dissenting) ("a prisoner found sane two days before execution might claim to have lost his sanity the next day"); Caritativo v. California, 357 U.S. 549, 551 (1958) (Harlan, J., concurring) (warning of "interminable delaying maneuvers"); Nobles v. Georgia, 168 U.S. 398, 405-06 (1897) (prisoners' "fecundity in making suggestion after suggestion of insanity" could delay execution indefinitely); Hazard & Louisell, *Death, the State and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 399-400 (1962) (possibility of "interminable delay" is the "real objection to broadening the procedural remedies available to a prisoner claiming the insanity exemption"); Note, *supra* note 6, at 562-63 ("[t]he fear is that the prisoner will attempt to postpone his execution interminably by feigning insanity after every adverse hearing"). Empirical evidence, though, suggests that the fear of an avalanche of incompetency claims filed as a delaying tactic may be exaggerated. *See infra* note 49 and accompanying text.

44. Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973).

interest to be recognized in determining the extent of procedures demanded by the due process clause.[45] The strength of this interest, however, diminishes when weighed against a strong individual interest like that in one's life because, when "weighing the government's pocketbook against the actual survival of the [individual], . . . surely [the] balance must always tip in favor of the individual."[46]

The prisoner's interest in avoiding execution is surely lessened by the fact that he has been convicted and sentenced to death. But while the competency proceeding may accordingly demand fewer procedural safeguards than capital sentencing, the incompetent prisoner's life and liberty interests are sufficiently compelling to outweigh the state's interest in efficiency and flexibility, at least with respect to some procedural safeguards. Furthermore, the state's interest in executing condemned prisoners necessarily is tempered by its interest in the accuracy of competency determinations,[47] and inadequate procedures resulting in inaccurate competency determinations will reduce the integrity of the state's criminal justice system.[48]

The state's interest in avoiding delays caused by false claims of incompetency, on the other hand, appears to weigh in favor of streamlined competency procedures. Empirical evidence suggests, however, that the fear of an avalanche of false claims is exaggerated.[49] Further-

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45. *Id.*

46. Goldberg v. Kelly, 397 U.S. 254, 278 (1970) (Black, J., dissenting).

47. *Cf.* Ake v. Oklahoma, 470 U.S. 68, 79 (1985) (holding in the context of whether to provide psychiatric assistance to indigent defendants, "[t]he state's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases").

48. In *Solesbee v. Balkcom*, Justice Frankfurter wrote that

> [t]he risk of an undue delay is hardly comparable to the grim risk of the barbarous execution of an insane man because of a hurried, one-sided, untested determination of the question of insanity, the answers to which are as yet so wrapped in confusion and conflict and so dependent on elucidation by more than one-sided partisanship.

339 U.S. 9, 25 (1950) (Frankfurter, J., dissenting).

If, as the Court found in *Ford*, the execution of an incompetent prisoner "simply offends humanity," a state's refusal, in the name of economy and efficiency, to provide adequate procedures for determining competency is likely to lead to diminished respect for the state's criminal justice system. *See Ford*, 477 U.S. at 409 (plurality opinion).

49. In his brief to the Supreme Court, Alvin Ford noted that then-Florida Governor Graham had signed 122 death warrants, and claims of incompetency were raised in only four cases. Brief for Petitioner, at 46 n.42, Ford v. Wainwright, 477 U.S. 399 (1985) (No. 85-5542). He also noted that in the period during which his case had "high visibility," between the date of the stay of his execution and the filing of the brief, incompetency was claimed in only 2 of the 42 cases in which Graham signed death warrants. *Id.* Ford also noted that, while fears of frivolous claims and undue delay in insanity cases have been raised for centuries, courts have always been found capable of discerning the difference between "'pretenses and realities.'" *Id.* (quoting J. Hawles, *Remarks on the Trial of Mr. Charles Bateman*, in 11 STATE TRIALS 474, 478 (1816)); *see also* 1 M. HALE, *supra* note 26, at 35.

more, as discussed below,[50] states can minimize delays caused by repeated claims.

2. Reducing the Risk of Erroneous Decisions

When governmental action hinges on the psychiatric assessment of an individual, it is difficult to say whether elaborate adversarial procedures or more streamlined nonadversarial procedures are more accurate. Supreme Court decisions addressing the due process protections necessary in such cases have been, in the words of one commentator, "wildly erratic."[51] The Court has failed to state clearly whether adversarial procedures promote or hinder accurate decisions based on psychiatric assessment.

Thus, a threshold question is whether determinations of competency to be executed should be adversarial at all. Due process does not always require an adversarial hearing.[52] In an execution competency hearing, however, the combination of the nature of the assessment and the gravity of the determination mandates the adversarial model.

Adversarial debate is "essential to the truth-seeking function"[53] when the determination turns on what Justice Frankfurter called "the ascertainment of what is called a fact, but which in the present state of the mental sciences is at best a hazardous guess however conscientious."[54] Although the accuracy of psychiatric diagnosis undoubtedly has improved in recent decades, there still "often is no single, accurate psychiatric conclusion on legal insanity in a given case."[55]

The indeterminate nature of psychiatric judgments has led the Supreme Court to hold that adversary procedures may be necessary to produce accurate decisions.[56] Because psychiatrists differ widely on

50. *See infra* notes 93-94 and accompanying text.

51. J. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 111 (1985).

52. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 608 n.16 (1979).

53. Gardner v. Florida, 430 U.S. 349, 360 (1977).

54. Solesbee v. Balkcom, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting).

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

56. *See, e.g., id.* at 81 ("Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party . . . . [By] laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them."); Vitek v. Jones, 445 U.S. 480, 495 (1980) ("[i]t is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings") (quoting *Addington*, 441 U.S. at 430).

such issues as the definitions of mental illnesses and on the diagnosis and labelling of patients,[57] adversary proceedings may be necessary to expose the bases of differing opinions. If only one mental health examiner is involved, that examiner likely will become the "de facto decisionmaker," as laypersons tend to defer to the examiner's expertise.[58] Confusion between legal and medical standards of competency also may skew the judgment of examiners,[59] and adversary procedures like cross-examination may be necessary to ensure that examining psychiatrists do not overstep their bounds by giving legal, and not psychiatric, conclusions.[60]

The vagaries of psychiatric analysis have led our judicial system to place primary fact finding responsibility on issues of sanity or competency in the hands of lay fact finders.[61] But without some form of adversarial hearing at which both sides may present and challenge evidence, these lay fact finders will be unable to make accurate determinations.

If some form of adversarial procedure is necessary, then what is the optimum level of "adversariness?" Justice Powell wrote in *Ford* that ordinary adversarial procedures including live testimony, cross-examination, and oral argument by counsel may impede the development of "sound, consistent judgments" in "a discipline fraught with 'subtleties and nuances.'"[62] Even Justice Marshall, whose opinion in *Ford* called for more elaborate procedures than those contemplated by Justice Powell, refrained from suggesting that only a full trial on

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57. *See Ake*, 470 U.S. at 81; Addington v. Texas, 441 U.S. 418, 429-30 (1979); Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Falibility [sic] of the Doctrine of Immaculate Perception*, 6 CAP. U.L. REV. 11, 15-16 (1976); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 726 (1974) (One study showed that "psychiatrists were predisposed to observe different personality traits in the same individual. Moreover, the various traits and symptoms observed were not valued equally by the different psychiatrists.").

58. *See* AMERICAN BAR ASS'N CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Std. 7-5.7 comment (1987) [hereinafter ABA STANDARDS].

59. *See* Comment, *An End to Incompetency to Stand Trial*, 13 SANTA CLARA LAW. 560, 560-61 (1973). One commentator has argued that psychiatric reports are "weakest precisely at the point of drawing legal conclusions from clinical data." Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 52 (1977).

60. *See* McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U.L. REV. 46, 58-59 (1969) ("Clearly the esoteric legal implications of the clinical data which the psychiatrist provides . . . are for the court to apply and are outside the province of the psychiatrist.").

61. Ake v. Oklahoma, 470 U.S. 68, 84 (1985).

62. *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment) (quoting Addington v. Texas, 441 U.S. 418, 430 (1979)).

the issue of sanity would be sufficient.[63] To comply with due process, states must consider at each step of the proceeding how much increased "adversariness" increases accuracy.

B. *The Eighth Amendment*

The eighth amendment gives capital defendants a source of procedural protection that is both independent of and more comprehensive than the due process clause.[64] The greater protection of the eighth amendment stems from the qualitative difference between capital and other punishments, which has led the Supreme Court to recognize a corresponding difference in the need for reliability in its imposition.[65]

In *Ford*, Justice Marshall wrote that the heightened standard of reliability mandated by the eighth amendment applies in all capital proceedings, including competency determinations.[66] But Justice Powell, who provided the crucial fifth vote for the proposition that the eighth amendment forbids execution of the incompetent, explicitly found that the eighth amendment imposes no special procedural requirements on competency determinations.[67] Justice Powell wrote that the decisions demanding greater assurances of reliability in capital cases have dealt only with procedures for imposing the death sentence,[68] and are therefore not determinative of the procedures required for determining competency to be executed, which come into play only after the death sentence has been validly imposed.[69] Even so, the

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63. *Id.* at 416-17 (plurality opinion); *see also id.* at 415 (plurality opinion) (calling for "[c]ross-examination of . . . psychiatrists, or perhaps a less formal equivalent").

64. *See, e.g.*, Beck v. Alabama, 447 U.S. 625, 637 (1980) (failure to give jury instruction as to lesser included offense may not violate due process but "cannot be tolerated" in capital sentencing); Lockett v. Ohio, 438 U.S. 586, 594 (1978) (plurality opinion) ("what had been approved under the Due Process Clause of the Fourteenth Amendment in *McGautha* became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in *Furman*"); Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1143-44 (1980).

65. *See* Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Spaziano v. Florida, 468 U.S. 447, 456 (1984); Barclay v. Florida, 463 U.S. 939, 958 (1983) (Stevens, J., concurring); Eddings v. Oklahoma, 455 U.S. 104 (1982); *Lockett*, 438 U.S. at 605; Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

66. *Ford*, 477 U.S. at 411-12 (plurality opinion).

67. *Id.* at 425 (Powell, J., concurring in part and concurring in the judgment).

68. *Id.*; *see* Turner v. Murray, 476 U.S. 28, 35 (1986); Barclay v. Florida, 463 U.S. 939, 950 (1983); Roberts (H) v. Louisiana, 431 U.S. 242, 252 (1977); Woodson v. North Carolina, 428 U.S. 280, 303 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 252, 259 (1976); Gregg v. Georgia, 428 U.S. 153, 189 (1976).

69. *See Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment) ("the only question raised is not *whether*, but *when* [the] execution may take place").

rationales underlying the reliability requirements of the eighth amendment plainly apply — if less forcefully — in competency determinations as well.

The reliability requirements of the eighth amendment stem from the death penalty's irrevocability.[70] When, as at the sentencing stage, "life itself hangs in the balance,"[71] and correcting error is impossible,[72] the need for an extraordinary standard of reliability is obvious. But a challenge to competency to be executed does not challenge the validity of the death sentence itself; a successful challenge will defer the prisoner's death, not set aside his sentence.[73] When the prisoner's life no longer hangs in the balance, the need for greater assurances of reliability is less pressing, but still substantial for at least two reasons.

First, the eighth amendment's heightened requirements grow from the concern that persons facing capital punishment receive "the degree of respect due the uniqueness of the individual,"[74] a concern magnified by "the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence."[75] To say that a valid death sentence mitigates the need for reliability undermines both the right announced in *Ford* and the values of human dignity underlying the eighth amendment. These values do not end at sentencing. Furthermore, the severity and finality of the death penalty make accurate decisionmaking vitally important to both the condemned and the community.[76]

Second, a determination that a once-incompetent prisoner has regained competency and may be executed effectively *reimposes* the death penalty.[77] Because *Ford* prohibits the execution of an incompe-

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70. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("[t]he nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence"); Furman v Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) ("death must inevitably be inflicted upon innocent men, [and] . . . death has been the lot of men whose convictions may have been . . . unconstitutionally inflicted . . . yet the finality of death precludes relief").

71. *Lockett*, 438 U.S. at 620 (Marshall, J., concurring).

72. *See id.* at 605.

73. As Justice Powell put it, "[T]he only question raised is not *whether*, but *when*, [the prisoner's] execution may take place." *Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment).

74. *Lockett*, 438 U.S. at 605; *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (capital sentencing scheme must treat defendants as "uniquely individual human beings").

75. *Lockett*, 438 U.S. at 605.

76. *Cf.* Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion) (stressing importance to defendant and community that any decision imposing the death sentence "be, and appear to be, based on reason rather than caprice or emotion").

77. Note, *supra* note 6, at 551.

tent prisoner, life does hang in the balance during competency determinations, and such determinations therefore must meet the reliability demands of the eighth amendment. Those demands are particularly important when "the ultimate decision will turn on the finding of a single fact, not on a range of equitable considerations" as at the sentencing stage.[78]

The heightened assurances of reliability mandated by eighth amendment jurisprudence take many forms. For example, the Supreme Court has found that a statute preventing a capital jury from being instructed on a lesser included offense creates an unacceptable risk of error because the jury, forced to choose between conviction for a capital offense and acquittal, may resolve its doubts in favor of conviction.[79] Similarly, the Court in *Gardner v. Florida*[80] found it error for a sentencing judge to rely on a presentencing report, parts of which were not made available to the defendant or his counsel, in sentencing the defendant to death. The Court held that debate between adversaries is often essential to the truth-seeking function, and found it necessary to give defendant's counsel "an opportunity to comment on facts which may influence the sentencing decision in capital cases."[81]

Vague competency standards,[82] which could induce the decisionmaker to resolve doubts in favor of competency, could be found to conflict with these precedents, as could limitations on the prisoner's ability to present evidence[83] or challenge the state's evidence.[84] Failure to provide an adequate psychiatric examination of the prisoner[85] or

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78. *See Ford*, 477 U.S. at 411-12 (plurality opinion); *see also* Ward, *supra* note 6, at 82 (reliability requirements of the eighth amendment may apply because "'a finding of competence . . . requires more certainty, clarity, and comprehensiveness than a finding of incompetence'") (quoting M. Radelet & G. Barnard, *supra* note 14, at 21) (unpublished manuscript).

79. Beck v. Alabama, 447 U.S. 625, 632 (1980).

80. 430 U.S. 349 (1977).

81. *Id.* at 360.

82. For example, the following state statutes forbid the execution of an "insane" prisoner: ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN. §§ 13-4021 to -4024 (1978); ARK. CODE ANN. § 16-86-111 (1987); CAL. PENAL CODE §§ 3700-3704.5 (West 1982); CONN. GEN. STAT. ANN. § 54-101 (West 1985); GA. CODE ANN. §§ 17-10-61 (1988); KAN. STAT. ANN. § 22-4006 (1981); MD. ANN. CODE art. 27, § 75A(b) (1987); MASS. ANN. LAWS ch. 279, § 62 (Law. Co-op Supp. 1988); MISS. CODE ANN. § 99-19-57 (Supp. 1988); NEB. REV. STAT. § 29.2537 (1985); NEV. REV. STAT. §§ 176.425-.455 (Michie 1986); N.M. STAT. ANN. §§ 31-14-4 to -7 (1984); N.Y. CORRECT. LAW §§ 655-57 (McKinney Supp. 1987); OHIO REV. CODE ANN. §§ 2949.28-.30 (Anderson 1987); OKLA. STAT. ANN. tit. 22, §§ 1005-1008 (West 1983); WYO. STAT. §§ 7-13-901 to -02 (1987).

83. *See infra* notes 192-208 and accompanying text.

84. *See infra* notes 209-26 and accompanying text.

85. *See infra* notes 156-83 and accompanying text.

refusal to allow the prisoner to develop and present the testimony of the prisoner's own psychiatric experts[86] also may render competency determinations insufficiently reliable under the eighth amendment.

III. Structuring Competency Determinations

Opponents of the right announced in *Ford* have argued that the decision will create unique opportunities for delay.[87] This problem has two faces. First, false competency claims could enable competent prisoners to postpone their executions. Second, the inevitable delay between a determination of competency and execution itself could allow prisoners to delay their executions indefinitely by bringing repeated claims.[88] The latter problem requires that "[s]ome unreviewable discretion must ultimately be permitted the executing officer,"[89] but procedures can be designed that accommodate both the state's interest in avoiding unnecessary delay and the competent prisoner's interest in avoiding execution without surrendering the decision to the executioner.

As a preliminary matter, though, the risk of delay should not be overstated. History suggests that *Ford* will not unleash a flood of false claims. Even before *Ford*, a Florida statutory provision prohibited the execution of the insane, but claims of insanity were rare.[90] Between the stay of Ford's execution and his appeal to the Supreme Court, when public awareness of his claim was high, fewer than five percent of Florida's death row inmates claimed insanity.[91] Moreover, mental health professionals can detect malingering with a high degree of certainty.[92]

A variety of procedural devices also can expose repeated false claims. In *Ford*, Justices Marshall and Powell agreed that states might require a high threshold showing of incompetency before initiating

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86. *See infra* notes 184-91 and accompanying text.

87. *See Ford*, 477 U.S. at 435 (Rehnquist, J., dissenting) (it "offers an invitation to those who have nothing to lose"); Hazard & Louisell, *supra* note 43, at 399 ("It is . . . difficult to know what procedure would satisfy Mr. Justice Frankfurter, [who dissented in *Solesbee*] and yet also avoid interminable delay. This . . . is the real objection to broadening the procedural remedies available to a prisoner claiming the insanity exemption.").

88. *See* Hazard & Louisell, *supra* note 43, at 400.

89. Comment, *Execution of Insane Persons*, 23 S. CAL. L. REV. 246, 252 (1950).

90. *See supra* note 49.

91. *Id.*

92. *See* Brief of Amicus American Psychiatric Association at 11, Ford v. Wainwright, 477 U.S. 399 (1986) (No. 85-5542) [hereinafter APA Amicus Brief] (citing Resnick, *Detection of Malingered Mental Illness*, 2 BEHAVIORAL SCIENCE AND THE LAW 21 (1984)).

competency proceedings.[93] Commentators have suggested that repeated claims be analyzed under a more expedited system.[94] These methods of coping with false repeated claims of incompetency should be incorporated into a more comprehensive system of mental health care for death row prisoners. Under such a system, death row prisoners would receive periodic mental health examinations. If an examination were to show that a condemned prisoner met a heightened threshold standard of incompetency, then that prisoner would be afforded a more elaborate adversary hearing on the issue of competency. Such a system would expedite determinations of competency to be executed while minimizing the incremental costs of complying with *Ford* and protecting the interests of condemned prisoners.

In *Estelle v. Gamble*, the Supreme Court held that deliberate indifference to serious medical needs of prisoners violates the eighth amendment.[95] Subsequent decisions have held that mental illness may constitute such a "serious medical need,"[96] and that prisoners should receive mental health examinations under *Gamble*. By using these *Gamble* examinations as part of the process mandated by *Ford*, states can minimize the incremental cost of complying with the latter.

One may argue, however, that *Gamble* does not require such examinations because they are by definition routine and not triggered by a "serious medical need."[97] Decisions requiring prisons to provide mental health care generally have involved situations in which a prisoner's mental illness and its resulting danger are apparent.[98] Routine physical

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

Some states currently permit only "reasonable" claims to proceed. *See, e.g.*, ARK. STAT. ANN. §§ 16-86-102, 111 (1987); GA. CODE ANN. § 17-10-66 (1988); MO. ANN. STAT. § 522.060 (Vernon 1987); MONT. CODE ANN. § 46-19-201 (1987); NEV. REV. STAT. ANN. § 176.425 (Michie 1986); N.M. STAT. ANN. § 31-14-4 (1984); OKLA. STAT. ANN. tit. 22, § 1005 (West 1969); UTAH CODE ANN. § 77-19-13 (Supp. 1988).

94. *See, e.g.*, Note, *supra* note 6, at 563.

95. 429 U.S. 97, 103-04 (1976).

96. Rogers v. Evans, 792 F.2d 1052, 1058 (11th Cir. 1986); Partridge v. Two Unknown Police Officers, 751 F.2d 1448, 1452 (5th Cir. 1985); Wellman v. Faulkner, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977).

97. *See, e.g.*, Laaman v. Helgemoe, 437 F. Supp. 269, 311 (D.N.H. 1977) ("[A] 'serious' medical need is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.").

98. *See Rogers*, 792 F.2d at 1058; *Partridge*, 751 F.2d at 1452; *Wellman*, 715 F.2d at 272; *Bowring*, 551 F.2d at 47; Winnedge v. Gibbs, 550 F.2d 926, 927 (4th Cir. 1977).

examinations, however, have been required both by courts[99] and by statute.[100] Additionally, the American Bar Association's Standards for Criminal Justice call for periodic physical and mental examinations of inmates.[101] Given the serious medical needs attending both mental and physical illness, states should provide both mental and physical examinations.

Periodic examinations of prisoners' mental health may be especially important on death row. Because the symptoms of mental illness often are manifested in violence toward others,[102] such illness may go undetected by lay persons who are likely to channel prisoners exhibiting such symptoms into ordinary disciplinary procedures, and not into medical treatment.[103] Moreover, conditions on death row may contribute to mental illness,[104] making mental health examinations of condemned prisoners particularly important.

Periodic mental health examinations may also be required to ensure the access to medical care required by *Gamble*. Federal courts have held that the right of prisoners to medical care includes the right to "reasonable access to medical personnel qualified to diagnose and treat [their] illnesses or disturbances."[105] Mentally ill prisoners are not likely to be able to alert medical personnel to their ailments. In such situations, periodic screening examinations are necessary.

Prisoners claiming incompetency who do not meet the threshold required to initiate heightened procedures could attack the results of these preliminary examinations.[106] This possibility does not pose a threat of increased delay, however, because death row prisoners may raise the competency issue at anytime, even without an initial deter-

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99. *See* O'Bryan v. Saginaw County, 437 F. Supp. 582, 598 (E.D. Mich. 1977); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 677 (S.D. Tex. 1975); Miller v. Carson, 401 F. Supp. 835, 878 (D. Fla. 1975), *aff'd in part*, 563 F.2d 741 (5th Cir. 1977).

100. *See, e.g.*, ARK. STAT. ANN. § 16-85-101 (1987); MASS. ANN. LAWS ch. 127, § 16 (Law. Co-op 1981); PA. STAT. ANN. tit. 61, § 1 (Purdon Supp. 1988).

101. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE, Std. 23-5.3 (1986 Supp.).

102. *See* DeWolfe & DeWolfe, *Impact of Prison Conditions on the Mental Health of Inmates*, 1979 S. ILL. L.J. 497.

103. *See* J. GOBERT & N. COHEN, RIGHTS OF PRISONERS 339 (1981).

104. *See* Furman v. Georgia, 408 U.S. 238, 288-89 & n.36 (1972); Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 801 (1980).

105. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 763 (3d Cir. 1979); *see also* Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982) (finding eighth amendment violation "if prisoners are unable to make their medical problems known to the medical staff").

106. *See* Note, Ford v. Wainwright: *Warning — Sanity on Death Row May Be Hazardous to Your Health*, 47 LA. L. REV. 1351, 1355 (1987).

mination of sanity. Furthermore, prison officials meeting such challenges after periodic examinations could better counter these claims with current factual data from preliminary examinations.

IV. PROCEDURES FOR HARDER CASES

Periodic mental health examinations of death row prisoners would identify the relatively small percentage of cases meeting the threshold necessary to initiate more detailed procedures. Proceedings beyond this initial phase should be more elaborate. Because periodic initial examinations will screen out unwarranted claims, the problems of delay will be less pressing, and the due process balance will call for relatively stringent procedures. Detailed procedures also will help to ensure accurate and efficient determinations of competency. A rigorous analysis at this stage will enable prison officials to address repeated claims in an expedited manner because it would provide a clinical background against which later claims would be evaluated. Furthermore, rigorous analysis would allow examiners to assess the likelihood that a prisoner once determined competent might deteriorate.[107] The remainder of this article considers the procedures to be used in the detailed examination called for at this stage.

A. *Who Must Hold the Hearing?*

The Supreme Court held in *Ford* that the determination of competency to be executed may not be left wholly to a state's executive branch.[108] Because only four states placed the power to determine competency in the executive branch before *Ford*,[109] a more pertinent question is whether the determination of competency must be made by a court or jury, or whether it may be made by mental health professionals.[110] Prior to *Ford*, twenty-four states placed the decision

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107. *See* APA Amicus Brief, *supra* note 92, at 18 n.16.

108. *Ford*, 477 U.S. at 416 (plurality opinion) ("The commander of the State's corps of prosecutors cannot be said to have the neutrality that is necessary for reliability in the factfinding proceeding."). In addition to bias as the head of the prosecuting branch of government, governors and other political officials are subject to political pressures that may make it inappropriate for them to make competency determinations. *See* ABA STANDARDS, *supra* note 58, Std. 7-5.7 n.17.

109. *See* FLA. STAT. § 922.07 (1983) (amended 1985); GA. CODE ANN. § 17-10-61 (1982) (amended 1988); MD. ANN. CODE art. 27, § 75 (c) (1976) (amended 1987); MASS. ANN. LAWS ch. 279, § 62 (Law. Co-op. Supp. 1984).

110. The composition of the body holding the hearing will affect collateral attacks. In federal habeas corpus proceedings, "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." Townsend v. Sain, 372 U.S. 293, 312-13 (1963). The fact finding of a state *court* is presumed to be correct, 28 U.S.C.

with a judge or jury[111] while nine states empowered mental health professionals to make the determination.[112] Justice Powell suggested in *Ford* that "an independent panel of psychiatric experts" might examine a prisoner and determine his competency.[113] Placing the decision in the hands of such a tribunal likely would increase efficiency and lower costs, but mental health professionals may not be sufficiently "impartial" to assure the prisoner a fair hearing. Moreover, the decision to be made will be more reliable in an eighth amendment sense if it is made by a judge or jury.

The right to an impartial decisionmaker is a fundamental requirement of due process,[114] but substantial debate exists over what constitutes partiality.[115] Due process does not always require a judicial decision, nor does it always require that a decisionmaker be divorced utterly from the government agent whose actions are questioned. For

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§ 2254(d) (1982), but hearings before a nonjudicial body may not be entitled to the presumption of correctness. *See* Note, *Execution of the Insane Criminal:* Ford v. Wainwright, 41 SW. L.J. 745, 751-52 (1987).

111. Twenty states continue to do so by statute. *See* ALA. CODE § 15-16-23 (1982); ARIZ. REV. STAT. ANN. § 13-4021 (1978); CAL. PENAL CODE § 3701 (West 1982); COLO. REV. STAT. § 16-8-110 (1986); IDAHO CODE § 18-210 (Supp. 1987); ILL. ANN. STAT. ch. 38 ¶ 1005-2-3 (Smith-Hurd 1982); KY. REV. STAT. ANN. § 431.240(2) (Baldwin 1988); LA. CODE CRIM. PROC. ANN. art. 641 (West 1981); MISS. CODE ANN. § 99-19-57 (Supp. 1985); MO. ANN. STAT. § 552.060 (Vernon 1987); MONT. CODE ANN. § 46-14-221, 46-19-201 (1987); NEV. REV. STAT. ANN. § 176.425 (Michie 1986); N.M. STAT. ANN. § 31-14-4 (1984); N.C. GEN. STAT. § 15-A-1001 (1983); OHIO REV. CODE ANN. § 2949.28 (Anderson 1987); OKLA. STAT. ANN. tit. 22, § 1004 (West 1983); R.I. GEN. LAWS § 40.1-5.3-6 (1984); S.C. CODE ANN. § 44-23-210 (Law. Co-op. 1985); UTAH CODE ANN. § 77-15-1 (1982); WYO. STAT. § 7-13-901 (1987).

Four states continue to do so as a matter of common law. *See* Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (1955); Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911); *Ex parte* Morris, 96 Tex. Crim. 256, 257 S.W. 894 (Crim. App. 1924); State v. Davis, 108 P.2d 641 (Wash. 1940).

112. *See* ARK. STAT. ANN. § 43-2622 (1977) (current version at ARK. STAT. ANN. § 16-86-111 (1987)); CONN. GEN. STAT. ANN. § 54-101 (West 1985); DEL. CODE ANN. tit. 11, § 406 (1979); IND. CODE ANN. § 11-10-4-2 (Burns 1981); KAN. STAT. ANN. § 22-4006 (1981); NEB. REV. STAT. § 29.2537 (1985); N.Y. CORRECT. LAW § 655 (McKinney 1984); S.D. CODIFIED LAWS ANN. § 23A-27A-24 (1979); VA. CODE ANN. § 19.2-177 (1983) (repealed 1988).

113. *Ford*, 477 U.S. at 423 & n.4 (Powell, J., concurring in part and concurring in the judgment).

114. Wolff v. McDonnell, 418 U.S. 539, 592 (1974) (Marshall, J., concurring in part and dissenting in part); Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part); Morrissey v. Brewer, 408 U.S. 417, 485-86 (1972); Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

115. *See* Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1279 (1975) ("Although an unbiased tribunal is a necessary element in every case where a hearing is required, sharp disagreement can arise over how much in the way of prior participation constitutes bias.").

example, in *Morrissey v. Brewer*,[116] the Supreme Court held that a parole officer, who worked for the agency that sought to reincarcerate a parolee, could make a determination of reasonable cause to revoke parole as long as the officer was not the individual who originally recommended revocation.[117] In *Wolff v. McDonnell*,[118] the Court approved a system for revoking good time credits in a Nebraska prison where correctional officers comprised the committee that conducted the required hearings.[119]

Situations in which the Court has approved the use of a nonjudicial decisionmaker and allowed an overlap between the decisionmaker and the challenged government actor, however, differ fundamentally from the determination of competency to be executed. Issues such as cause for revocation of parole or good time credits generally turn on questions of historical fact that demand little or no subjective judgment. In such cases, discretion can be cabined enough to ensure that personal bias does not enter into the decision,[120] and a judicial decisionmaker may not be necessary in the first instance. The issue of a condemned prisoner's competency, on the other hand, "calls for a basically subjective judgment,"[121] and, because a psychiatrist's own attitudes, biases, personality, and value system[122] may influence psychiatric diagnosis, it may be impossible to limit the discretion of mental examiners sufficiently to ensure a decision free of personal bias.[123]

The determination of competency requires two steps: a determination of the facts regarding the prisoner's mental state and the application of the relevant legal standard of competency to those facts. Psy-

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116. 408 U.S. 471 (1972).

117. 408 U.S. at 485-86.

118. 418 U.S. 539, 570-71 (1974).

119. *See also* Vitek v. Jones, 445 U.S. 480, 496 (1980) (approving scheme that allowed prison or hospital administrators to make determination of competency that could lead to transfer from one to the other).

120. *See Wolff*, 418 U.S. at 571.

121. *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment) (citing Addington v. Texas, 441 U.S. 418, 429-30 (1979)).

122. *See* Ennis & Litwack, *supra* note 57, at 726; *see also* Gardner, *The Myth of the Impartial Psychiatric Expert — Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 LAW & PSYCHOLOGY. REV. 99, 107 (1976) ("[T]he bulk of mental abnormalities concerns behavioral maladjustments to the demands of life . . . . Assessments of the 'healthiness' of behavioral and mental conditions are always related to prevalent social values . . . . A diagnosis of mental illness requires a social and moral evaluation of the patient's conduct in comparison with social behavior perceived as appropriate by the psychiatrist.").

123. *See* Morrissey v. Brewer, 408 U.S. 471, 485-86 (1972).

chiatric "facts" may be harder to discern than historical facts and may not be "facts" at all in the sense of objective realities.[124] Furthermore, psychiatrists are likely to disagree on the meaning of those facts.[125] Application of the legal standard of competency to the facts provides another opportunity for the injection of personal bias. One forensic psychiatrist has reported that without "meaningful guidelines" as to the meaning of legal standards, doctors testifying in insanity defense cases tended to become "immoderate" in their views and to disregard applicable legal standards.[126] The problem is exacerbated by the very real possibility that the pool of mental health professionals available to make competency determinations may be skewed in favor of execution, as many of those who oppose capital punishment refuse to participate in death penalty procedures.[127] In addition, psychiatrists appointed to such a panel may assume they "work for the state" and be unaware of their independence or impartiality.[128]

Some have argued that the issue of competency is "essentially medical in nature," and that the use of a judge or jury as decisionmaker is unlikely to lead to more accurate results.[129] Those who would apply this view to determinations of competency to be executed,[130] however, ignore the weight of precedent, which suggests that the indeterminate nature of psychiatric assessment justifies taking the ultimate decision from psychiatrists.[131] More important, such arguments also fail to rec-

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124. *See* Ennis & Litwack, *supra* note 57, at 726 ("Raines and Rohrer . . . found that psychiatrists were predisposed to observe different personality traits in the same individual") (citing Raines & Rohrer, *The Operational Matrix of Psychiatric Practice, I: Consistency and Variability in Interview Impressions of Different Psychiatrists*, 111 AM. J. PSYCHIAT. 721, 733 (1955)).

125. *See* Ake v. Oklahoma, 470 U.S. 68, 84 (1985); Addington v. Texas, 441 U.S. 418, 429-30 (1979); Albers, Pasewark & Meyer, *supra* note 57, at 15-16; Gardner, *supra* note 122, at 109-10; Pugh, *The Insanity Defense in Operation: A Practicing Psychiatrist Views* Durham *and* Brawner, 1973 WASH. U.L.Q. 87, 94-95 & n.10.

126. Pugh, *supra* note 125, at 94-95; *see also* Pizzi, *supra* note 59, at 52 ("psychiatric reports are weakest precisely at the point of drawing legal conclusions from clinical data").

127. *See* Ward, *supra* note 6, at 79-80; *cf.* Gardner, *supra* note 122, at 108-09.

128. *See infra* note 153.

129. *See* Vitek v. Jones, 445 U.S. 480, 499 (1980) (Powell, J., concurring in part); Parham v. J.R., 442 U.S. 584, 609 (1979); Note, *supra* note 6, at 559.

130. *See, e.g., Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment).

131. *See supra* notes 56-61 and accompanying text; *see also* Ake v. Oklahoma, 470 U.S. 68, 84 (1985) (relevance of psychiatric testimony to question of future dangerousness required granting defendant right to psychiatrist's assistance); *Vitek*, 445 U.S. at 495 (experts must interpret facts to evaluate psychiatric condition); Addington v. Texas, 441 U.S. 418, 429-30 (1979) (same).

ognize that judgment of a prisoner's competency for execution is a legal and moral, as well as medical, decision, properly in the province of a judge or jury.

The eighth amendment prohibition on execution of the incompetent stems at least in part from the notion that to execute an incompetent prisoner "simply offends humanity" and undermines "the community's quest for 'retribution.'"[132] To accommodate these factors, standards of incompetency are necessarily broad and require decisionmakers to make value judgments. For example, when we ask whether a prisoner "understands the purposes of the death penalty," we mean, "does he have *sufficient* understanding to warrant imposition of a death sentence?" That inquiry requires both clinical and moral assessments. Such assessments are more likely to be reliable, as a reflection of community values, if made by a judge or properly instructed jury.[133]

B. *Right to Counsel*

Alvin Ford initially was found competent to be executed through a procedure that precluded, by order of the Governor, any advocacy by his attorneys.[134] The Supreme Court criticized this procedure in *Ford*, but did not state explicitly whether a condemned prisoner is entitled to representation by counsel in competency proceedings.[135] The introduction of counsel into any proceeding tends to increase costs and formality while decreasing flexibility.[136] The increased accuracy brought about by the presence of counsel may, to some extent, be offset because "the role of counsel is not to make sure the truth is ascertained but to advance his client's cause."[137] Due process,[138] how-

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132. *Ford*, 477 U.S. at 407-08 (plurality opinion); *see also id.* at 421-23 (Powell, J., concurring in part and concurring in the judgment) (execution of incompetent prisoner is "uniquely cruel" and undermines retributive force of the death penalty).

133. *Cf.* Gardner, *supra* note 122, at 110-12 (jury, as the "collective conscience," is best qualified to make the legal, moral, and social decision involved in determining whether a defendant is not guilty by reason of insanity).

134. *Ford*, 477 U.S. at 412 (plurality opinion).

135. *Id.* at 413-14 (plurality opinion). The Court evidently did at least contemplate the assistance of counsel, holding that "any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity . . . is necessarily inadequate." *Id.* at 414 (plurality opinion).

136. *See* Wolff v. McDonnell, 418 U.S. 539, 569 (1974); Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973); Friendly, *supra* note 115, at 1287.

137. Friendly, *supra* note 115, at 1287.

138. The sixth amendment right to counsel creates no right to counsel in competency determinations, as it extends only to criminal prosecutions. U.S. CONST. amend. VI. The scope of the right to counsel in these determinations therefore will depend on the balance of factors required under the due process clause.

ever, requires that condemned prisoners be represented by counsel in competency determinations.[139]

The Supreme Court has held that counsel may not be required when the presence of counsel would alter significantly the nature of a proceeding or lessen its utility. In *Gagnon v. Scarpelli*,[140] the Court found that counsel is not required in parole revocation hearings because counsel is unlikely to make a "constructive contribution." The Court found that the issues in such hearings normally would not require "investigation or exposition" by counsel, and that counsel would impede the rehabilitative, predictive, and discretionary nature of a revocation hearing.[141] Similarly, in *Wolff v. McDonnell*,[142] the Court held that counsel was not required in hearings to revoke prison good time credits because the hearings were "predictive and discretionary," and required a delicate weighing of the effects of a decision on prison order. The Court found the likely utility of counsel to be low in such a case.[143]

The determination of competency to be executed differs, however, from proceedings like those involved in *Gagnon* and *Wolff*. Competency to be executed does not turn on a range of predictive, rehabilitative, or discretionary factors, but solely on the determination of the prisoner's competency. Furthermore, competency determinations involve a basically subjective judgment made in "a discipline fraught with 'subtleties and nuances.'"[144] Without the aid of counsel to investigate those judgments and expose their bases and errors, a prisoner, particularly an incompetent prisoner, would be helpless. Decisions made in such a context would be less reliable.

The "fundamental requisite" of due process is the opportunity to be heard.[145] The opportunity to be heard must "be tailored to the

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If the burden of proof of incompetency is placed on the prisoner, the necessity for counsel is even more pressing. A better apportionment of the burden of proof might be to borrow from the competency to stand trial method, which ordinarily places the burden of proof on the government once the presumption of competency has been overcome by the defense's introduction of evidence raising a doubt as to competency. *See* A. MATTHEWS, JR., MENTAL DISABILITY AND THE CRIMINAL LAW 74 (1970).

139. *See* ABA STANDARDS, *supra* note 58, Standard 7-5.7(a).

140. 411 U.S. 778, 787 (1973).

141. *Id.* at 787-88. The Court found counsel was not necessary in that case, but that in some cases, cost for counsel must be borne by the state. *Id.*

142. 418 U.S. 539, 569-70 (1974) (quoting *Gagnon*, 411 U.S. at 787).

143. *Id.*

144. *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment) (quoting Addington v. Texas, 441 U.S. 418, 430 (1979)).

145. Grannis v. Ordean, 234 U.S. 385, 394 (1914). Seven members of the *Ford* Court held that Florida's procedures for determining competency to be executed failed in this respect. *See*

capacities and circumstances of those who are to be heard,"[146] and the unique circumstances of the incompetent prisoner make the opportunity to be heard meaningless without representation by counsel.[147]

In *In re Gault*,[148] the Supreme Court wrote that the peculiar circumstances of juveniles entitle them to counsel in delinquency proceedings: "The most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot."[149] Incompetent prisoners cannot influence or understand the legal or medical technicalities of proceedings to determine competency to be executed. They, like the juveniles in *Gault*, need the aid of counsel "to cope with problems of law, to make skilled inquiry into the facts, [and] to insist upon regularity of the proceedings."[150] The risk of error likely will be high in the absence of counsel.[151]

Justice Powell has suggested that representation by mental health professionals may be appropriate in hearings designed to determine issues of mental condition.[152] The fact that it is, in part, an inability to understand, present, or question *medical* evidence that leads to the conclusion that incompetent prisoners need assistance naturally leads to the possibility that they be represented by mental health professionals, and not attorneys. But such representation would be inadequate for several reasons.

First, while mental health professionals are skilled in the interpretation of medical evidence, they lack skill in presenting it effectively to a lay decisionmaker. Second, mental health professionals are inexpert in guaranteeing the procedural regularity of competency determinations. Finally, mental health professionals may misunderstand the nature of their representation; mental health professionals appointed

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Ford, 477 U.S. at 413 (plurality opinion); *id.* at 423-24 (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).

146. Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

147. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 500 (1980) (Powell, J., concurring in part) (mentally ill or incompetent prisoner has great need for legal assistance because he is "likely to be unable to understand or exercise his rights").

148. 387 U.S. 1 (1967).

149. *Id.* at 38 n.65 (quoting THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 86-87 (1967)).

150. *Id.* at 36.

151. ABA STANDARDS, *supra* note 58, Standard 7-5.7 comment.

152. *See* Vitek v. Jones, 445 U.S. 480, 500 (1980) (Powell, J., concurring).

by the state to represent indigent defendants in other contexts often believe that their duty is to the prosecutor, not the defendant.[153]

In addition to the psychiatrist's confusion, the prisoner may be uncooperative in an interview in which the psychiatrist is seen as enemy rather than ally. An independent expert is unlikely to be seen by the prisoner as objective; in fact, the prisoner is likely to perceive the court-appointed expert as "a covert agent of prosecution,"[154] which, ironically, is how the expert may view himself.[155]

C. *Examination of the Prisoner*

Current state procedures for determining competency vary widely concerning the extent of mental health evaluations and the identity of the examiners,[156] but most statutes require or permit mental health professionals or other medical experts to examine the prisoner.[157] The

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153. Matthews notes:

> Prosecutors are usually in a better position to know not only which local psychiatrists are qualified and experienced, but which psychiatrists share the prosecutor's point of view; their experience typically is more continuous than that of defense counsel . . . . When defense counsel is not knowledgeable about the psychiatrists, the prosecutor's influence may be greater than it ought to be. For example, in one county we studied the practice was to appoint psychiatrists from a list which had been prepared some years earlier by the prosecutor's office. When we talked with them, these doctors were still confused as to whether they were being appointed by the court or by the prosecution; a number of them told us they thought they were being employed by the prosecution, although they were in fact being appointed by the court — as 'impartial experts.'

A. MATTHEWS, JR., *supra* note 138, at 81 n.16.

154. Pollack, *Psychiatric Consultation for the Court*, 1 BULL. AM. ACAD. PSYCHIATRY & LAW 267, 276 (1973).

155. *See supra* note 153.

156. *See, e.g.*, CAL. PENAL CODE § 3700.5 (West 1982) ("three alienists, all of whom must be from the medical staffs of the Department of Corrections"); CONN. GEN. STAT. ANN. § 54-101 (West 1985) ("three reputable physicians"); DEL. CODE ANN. tit. 11, § 406 (1987) (two "practicing physicians"); FLA. STAT. § 922.07 (1987) ("three psychiatrists"); GA. CODE § 17-10-66(c) (1988) ("an expert"); IND. CODE ANN. § 11-10-4-3 (Burns 1988) ("psychiatrist"); MD. ANN. CODE art. 27 § 75A(c) (Michie 1987) ("one psychiatrist"); MASS. ANN. LAWS ch. 279, § 62 (Law. Co-op 1988) ("two psychiatrists"); MO. ANN. STAT. § 522.060 (Vernon 1987) ("physician"); MONT. CODE ANN. § 46-14-202 (1987) ("at least one qualified psychiatrist"); NEV. REV. STAT. ANN. § 176.425 (Michie 1986) ("two physicians, at least one of whom shall be a psychiatrist"); N.C. GEN. STAT. § 15A-1002(b) (1983) ("one or more impartial medical experts"); S.C. CODE ANN. § 44-23-220 (Law. Co-op. 1985) ("two examiners designated by the Department of Mental Health or the Mental Retardation Department or both"); UTAH CODE ANN. § 77-15-5 (Supp. 1988) ("two or more alienists").

157. When a prisoner's competency to be executed is suspect, 17 states require an examination by mental examiners or the prisoner's commitment to a mental health facility. *See* ARK. STAT. ANN. §§ 16-86-102, -111 (1987); CAL. PENAL CODE § 3700.5 (West 1982); FLA. STAT.

Supreme Court wrote in *Ake v. Oklahoma* that psychiatric experts are necessary in proceedings to determine sanity because "[u]nlike lay witnesses, who can merely describe symptoms they believe might be relevant . . . psychiatrists can identify the 'elusive and often deceptive' symptoms of insanity."[158] As Justice Powell pointed out in *Ford*, the determination of competency to be executed "depends substantially on expert analysis in a discipline fraught with 'subtleties and nuances.'"[159] State schemes for determining competency to be executed that do not provide for expert examination of the prisoner by mental health professionals lack sufficient accuracy or reliability to survive constitutional scrutiny.[160]

This section explores the issues facing states in providing for the examination of incompetent condemned prisoners. First, it discusses ways to structure examinations in order to yield meaningful assessments. It then considers the problem of fostering a constructive dialogue between the legal and mental health professions in this context. Finally, it argues that providing prisoners with access to their own mental health professionals would improve the quality of examinations and result in more accurate determinations of competency.

1. Providing Meaningful Assessments

Even states that provide psychiatric examination of the prisoner may provide incomplete, inaccurate, or unreliable examinations. Examinations are typically brief, conducted in prisons or courtrooms with a group of psychiatrists and, often, others present.[161] No state sets substantive standards regulating the conduct of psychiatric examina-

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§ 922.07 (West 1987); GA. CODE ANN. § 17-10-68(c) (1988); IDAHO CODE § 18-211 (1987); ILL. ANN. STAT. ch. 38 ¶ 1005-2-3 (Smith-Hurd 1982); IND. CODE ANN. § 11-10-4-2 (Burns 1988); KAN. STAT. ANN. § 22-4006 (1981); MASS. ANN. LAWS ch. 279 § 62 (Law. Co-op. 1988); MO. ANN. STAT. § 552.060 (Vernon 1987); MONT. CODE ANN. §§ 46-14-202, 46-19-201 (1987); NEB. REV. STAT. § 29-2537 (1985); NEV. REV. STAT. ANN. § 176.425 (Michie 1986); N.M. STAT. ANN. § 31-14-4-7 (1984); S.C. CODE ANN. § 44-23-220 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-27A-22 (1984); VA. CODE ANN. § 19.2-177.1 (Supp. 1988). Eight states allow such examinations, but do not require them. *See* COLO. REV. STAT. §§ 16-8-110 to -111 (1978); DEL. CODE ANN. tit. 11, § 406 (1987); GA. CODE ANN. § 17 10-66 (1982); LA. CODE CRIM. PROC. ANN. art. 641 (West 1978); N.Y. CORRECT. LAW § 654 (McKinney 1984); N.C. GEN. STAT. § 15A-1001 (1983); R.I. GEN. LAWS § 40.1-5.3-6 (1984); UTAH CODE ANN. §§ 77-15-3 to -5 (1982 & Supp. 1988).

158. Ake v. Oklahoma, 470 U.S. 68, 80 (1985).

159. *Ford*, 477 U.S. at 426 (Powell, J., concurring in part and concurring in the judgment) (quoting Addington v. Texas, 441 U.S. 418, 430 (1979)).

160. *See* ABA STANDARDS, *supra* note 58, Standard 7-5.7(d).

161. *Ford*, 477 U.S. at 403-04 (plurality opinion); APA Amicus Brief, *supra* note 92, at 10.

tions in competency determination proceedings.[162] Standards should be set to provide for a meaningful psychiatric assessment of prisoners.

As a base requirement, a single examiner should conduct the examinations. Group interviews lead to inaccuracies because the comments of one examiner may prejudice others.[163] They also can impair the development of the relationship between patient and examiner necessary for an accurate evaluation. If more than one examiner is used, each should examine the prisoner separately.

The presence of third parties, such as correctional officials or attorneys, similarly undermines the effectiveness of the interview.[164] In addition, conducting the examination in an oppressive atmosphere, such as a courtroom or a prison, lessens "the spontaneous and candid exchange with the subject that forms the principal basis for the evaluation."[165] Finally, most states make no provision for physical examination, psychological testing, or standardizing diagnostic techniques,[166] which may be essential to an accurate competency determination.[167] Under *Ford*, states must adopt these or equivalent methods of increasing the reliability of examinations administered to death row prisoners.[168]

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162. *See* Ward, *supra* note 6, at 81; *see also Ford*, 477 U.S. at 415 n.3 (plurality opinion) ("this Court does not purport to set substantive guidelines for the development of expert psychiatric opinion").

163. *See* APA Amicus Brief, *supra* note 92, at 10-11.

164. *See* Estelle v. Smith, 451 U.S. 454, 470 n.14 (1981) (quoting Smith v. Estelle, 602 F.2d 694, 708 (5th Cir. 1979)) ("an attorney present during the psychiatric interview . . . might seriously disrupt the examination").

165. Brief of Amici American Psychological Association and Florida Psychological Association at 24-25, Ford v. Wainwright, 477 U.S. 399 (1986) (No. 85-5542) [hereinafter APA & FPA Amici Brief]; *see also* Hays v. Murphy, 663 F.2d 1004, 1011 n.12 (10th Cir. 1981) (atmosphere on death row is not conducive to an accurate determination of competency to waive post-conviction review).

166. "95% of the diagnostic disagreements among psychiatrists were accounted for by (1) differing and unreliable interviewing techniques (information variance) which elicit incomplete or inaccurate information, and (2) unreliable diagnostic standards (criterion variance) which contribute to inconsistent classification of psychiatric patients." Rogers & Cavanaugh, Jr., *Application of the SADS Diagnostic Interview to Forensic Psychiatry*, 9 J. PSYCHIATRY & LAW 329, 330 (1981). Rogers and Cavanaugh endorse the Schedule of Affective Disorders and Schizophrenia (R. SPITZER & J. ENDICOTT, SCHEDULE OF AFFECTIVE DISORDERS AND SCHIZOPHRENIA (1978)) for increasing the reliability of expert opinion. *Id.* at 329-30.

167. *See* AMERICAN PSYCHIATRIC ASS'N, THE ROLE OF PSYCHIATRY IN THE SENTENCING PROCESS 17-19 (1984); APA Amicus Brief, *supra* note 92, at 26-28 & n.33 (listing evaluative tests).

168. *See Ford*, 477 U.S. at 415 n.3 (plurality opinion) (condemning competency determination that afforded no opportunity for testing).

A single, brief interview cannot form the basis for an accurate assessment of competency to be executed. Essential evaluative techniques cannot be employed in a hurried examination,[169] and a single examination may be insufficient to elicit adequate material for an evaluation because manifestations of mental illness may not surface in a single interview.[170] Moreover, a more complete examination ultimately will save time. Sufficiently extensive evaluations provide material for accurately predicting whether the prisoner's mental state will deteriorate — material that is unlikely to surface in a single, cursory interview.[171] The availability of this prediction will limit the ability of prisoners deemed competent to claim that they have become incompetent in the interval between the competency determination and their scheduled execution.

Finally, condemned prisoners may develop defense mechanisms to cope with the stress of living under a sentence of death, and symptoms of mental illness "may not always manifest themselves in obviously aberrational behavior."[172] A condemned prisoner's competency therefore cannot be determined accurately by a mental health professional who fails to develop a somewhat intimate and trusting relationship with the prisoner.[173] Such a relationship cannot be developed in a single interview.[174]

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169. *See* APA Amicus Brief, *supra* note 92, at 10; S. HALLECK, LAW IN THE PRACTICE OF PSYCHIATRY: A HANDBOOK FOR CLINICIANS 201 (1980) ("[m]ost patients . . . should be interviewed for several hours").

170. *See* L. BELLAK & L. LOEB, THE SCHIZOPHRENIC SYNDROME 337-38 (1969) (manifestations of schizophrenia "are present one day and not the next. They are revealed to one examiner and not to another . . . . A complete account of a patient's symptomatology, therefore, demands that he be observed over an extended period of time."); J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTING 13 (3d ed. 1981) ("[b]ecause psychological states are complex . . . a single and relatively brief examination is . . . inadequate"); Ziskin, *Giving Expert Testimony: Pitfalls and Hazards for the Psychologist in Court*, in THE ROLE OF THE FORENSIC PSYCHOLOGIST 101 (G. Cooke ed. 1980).

171. APA Amicus Brief, *supra* note 92, at 18 n.16. The APA took the position in *Ford* that,

> A proceeding conducted in accordance with reasonable due process protections is far more likely to permit the factfinder to make an accurate determination of the likelihood that a person might deteriorate materially in the immediate future . . . . The information generated in such a proceeding, moreover, should often provide a sufficient clinical background to allow subsequent assessments of competence to be addressed reliably through less formal procedures.

Id.

172. APA & FPA Amici Brief, *supra* note 165, at 15.

173. *Id.* at 15-16, 24-25.

174. *See Ford*, 477 U.S. at 415 n.3 (plurality opinion) (finding a single interview unlikely to yield reliable results).

2. Providing a Meaningful Dialogue

Another obstacle to an effective determination of competency is the inability of psychiatrists, lawyers, and judges to distinguish between the medical and legal aspects of determining competency. The ultimate determination of competency is legal; the medical aspect consists of psychiatric investigation into the prisoner's mental state to gather data for the legal decisionmaker. Psychiatrists who fail to grasp this distinction tend to present their findings in a manner that merges the pertinent medical and legal questions. As Professor Pollack comments:

> The purpose of the psychiatric legal report is to furnish data for legal disposition which will be effected by attorney, judge, or jury . . . . In his explanation of the reasoning which led to his conclusions, the psychiatrist must adopt the logical reasoning approach followed by the legal system . . . . [D]escription of psychopathological phenomena and elaboration of psychodynamics have no significance and are unnecessary unless they can be logically related to the legal issue. The psychiatrist's reasoning in establishing and demonstrating this relationship is crucial.[175]

Until psychiatrists are given greater guidance regarding the need for presenting reasoning rather than just conclusions — medical, rather than legal opinion — the two will continue to be confused.

Much of the responsibility for unreliable forensic examinations belongs with the legal system, which consistently fails to define clearly what sort of evaluation is requested.[176] Professor Matthews, reporting

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175. Pollack, *supra* note 154, at 277-78. Citing Pollack, Ford's counsel argued that Dr. Mhatre, one of the state psychiatrists who examined Ford and found him to be competent, did not disclose the reasoning that led him to his conclusion. As counsel put it, Mhatre "did not attempt to explain the apparent contradiction between finding Mr. Ford psychotic — the central feature of which was his delusions, and in particular, his belief that he could not be executed — with his finding of competency under the criteria of the Florida statute." Petition for Certiorari at 39, Ford v. Wainwright, 477 U.S. 399 (1986) (No. 85-5542).

176. Such an explanation should be both detailed and routine, but too frequently is neither.

> Judges, by and large, do not give systematic or sustained attention to the form of the psychiatric examination. Some judges are not sophisticated enough about psychiatric procedures to realize the relative advantages of different types of psychiatric examination, or, in some cases, to realize that there are different types of psychiatric examination . . . . Nonetheless there are a variety of factors that in differing combinations add up to importantly different forms of psychiatric examination: whether the examination is outpatient or inpatient, at a jail, at the office of a psychiatrist, at a court clinic, at a psychiatric hospital or the psychiatric wing of a general hospital, at a short-term institution with a strong therapeutic orientation, or at a long-term treatment institution with a strong custodial orientation;

on a study of competency to stand trial procedures, noted that although one might expect the court ordering an examination of the defendant's competency to instruct the examiner cautiously on the reasons for the examination and the most useful form for reporting results, actual practice varied considerably from this expectation.[177] One might also predict that the participating doctors would "gather the clinical data relevant to the accused's ability to be tried and supporting conclusions along with the clinical data and the reasoning used to reach them,"[178] but this prediction also contrasted with actual practice.[179]

These findings underscore the need to explain thoroughly the purposes for conducting the competency inquiry. Just as judges and lawyers struggle to understand psychiatric testimony, psychiatrists may find legal concepts of competency confusing. When participating doctors misunderstand the purpose of an examination, the examination's utility is questionable. Mental health professionals possess no special skills for interpreting legal rules.[180] Therefore, legal decisionmakers must be able to communicate with participating mental health professionals.

Most state statutes governing competency determinations not only fail to delineate the legal standard, but also lack a precise articulation of the role of the expert. Without an understanding of their role as experts advising on the issue of competency, mental health professionals may still fall prey to the temptation to present their conclusions as the final step in the determination. Both sides of the legal-psychiatric fence must understand the goal of psychiatric expertise in competency determinations. That goal is to obtain a picture of the prisoner's mental processes, how these processes are or may be impaired,

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> whether the doctor works in private practice, in a court clinic, or at a state hospital; the competence, experience, and predisposition of the examiner. How these factors are combined has important effects on the reliability and appropriateness of the examination.

A. MATTHEWS, JR., *supra* note 138, at 81.

177. *Id.* at 78. Matthews quotes a typical example of a court order to determine the competency of a defendant: "[I]t is . . . ordered and adjudged that the defendant, John Doe, be examined by Dr. A and Dr. B, two disinterested, qualified experts, to determine said defendant's mental condition at this time and to testify at a hearing as to his mental condition . . . ." *Id.* at 80.

178. *Id.* at 78.

179. *Id.*

180. *See* APA Amicus Brief, *supra* note 92, at 6 ("We take no position on the underlying questions of whether there should be a right not to be executed while incompetent and, if so, what the standard of competence should be for this purpose: resolution of those matters turns on considerations as to which the Association possesses no special expertise." (footnote omitted)).

whether the impairment affects the prisoner's perceptions and beliefs, and if so, to what extent. From this picture, the legal decisionmaker can best determine if the prisoner meets the constitutionally required standard of competency.

Finally, purely "mechanical" changes can improve communication between mental health professionals and the legal system. Forensic reports should be presented in a form that is both standardized and useful to legal decisionmakers. The organizational style of many expert reports and of much testimony suggests that mental health professionals often assume that a format useful in medical contexts is also useful in legal ones.[181] Not only is this assumption incorrect, but it adds to the already considerable confusion and poor communication between the two disciplines.[182] Guidance should be provided on presentation of clinical observations, diagnoses, and other data relevant to the legal question. The lack of such guidance leads to inaccurate assessments of the material by legal decisionmakers and inefficient use of expert opinions.

3. Prisoner Access to Mental Health Professionals

Finally, condemned prisoners should be afforded access to their own mental health professionals.[183] Such access would improve the

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181. Pollack, *supra* note 154, at 277. Pollack observes that many psychiatric reports fail to express the reasoning relating the medical assessment to the legal question. *Id.* at 278. He observes:

> For example, one report presents a clinical diagnosis of psychosis which is corroborated by a picture of psychopathology, a supporting life history, and conclusion that the "patient is not competent to stand trial." Another provides a psychiatric diagnosis of schizophrenic reaction, paranoid type, describes this condition and concludes that the "accused party at the time of commission of the act did not understand the nature and quality of his offense."

Not only do these reports fail to set out the reasoning leading to their conclusions, but they also demonstrate a misunderstanding of the psychiatrist's role by answering the disputed legal question as if the psychiatrist were the sole decisionmaker.

182. *Id.* at 277. The tension between law and psychiatry, discussed in note 13, *supra*, stems primarily from the differences in goals of the two fields. Medicine is directed toward healing, not punishment and social control. Medical values frequently conflict with legal ends, and psychiatrists may be reluctant to subordinate the values of their profession to the necessarily overriding (in the forensic setting) legal ones. Using the tools of their profession instrumentally for the purposes of the legal regime, whose goals may be inimical to medical goals, naturally causes psychiatrists some degree of discomfort.

183. Justice Powell suggested that the prisoner must have access to his own mental health professional: "[A] constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the state's own psychiatric examination." *Ford*, 477 U.S. at 427 (Powell, J., concurring in part and concurring in the judgment).

quality of the examination by facilitating the development of a sufficiently intimate and trusting relationship. State examiners are unlikely to have either the time or the incentive to develop this necessary relationship. Access to private mental health professionals would also affect the hearing itself by furnishing the prisoner with meaningful assistance in the process and reducing the risk of erroneous determinations.

A mental health expert would aid the prisoner and the prisoner's attorneys by developing evidence and by reviewing and responding to evidence presented by the state.[184] In deciding in *Ake v. Oklahoma*[185] that the state must provide a psychiatrist for indigent defendants raising the insanity defense, the Supreme Court held that psychiatric assistance may be "crucial" to such defendants:

> Without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the [insanity] defense, . . . to present testimony, and to assist in preparing the cross-examination of a state's psychiatric witnesses, the risk of inaccurate resolution of sanity issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.[186]

Providing incompetent prisoners access to their own mental health professionals also will lead to more accurate determinations. In *Ake*, the Court noted that, because "psychiatrists disagree widely and frequently" in their diagnoses and "because there is often no single, accurate psychiatric conclusion" in a given case, primary fact finding responsibility on issues of mental condition traditionally has been lodged in laymen.[187] Studies have shown that psychiatric assessment

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Florida Rule of Criminal Procedure 3.811, adopted with Rule 3.812 in response to *Ford*, appears to contemplate the participation of experts, and particularly of experts representing the prisoner. *See In re* Amendments to the Florida Rules of Criminal Procedure, 518 So. 2d 256 (Fla. 1987); FLA. R. CRIM. P. 3.811(d)(4). It does not, however, appear to call for live participation by the prisoner's experts. *See* FLA. R. CRIM. P. 3.811(d). Rule 3.811 requires a trial judge reviewing the Governor's determination of competency to review the experts' reports and any evidentiary material or written submissions from the parties, including experts representing the prisoner. *Id.* 3.811(d)(4), (e).

184. *See* APA & FPA Amici Brief, *supra* note 165, at 14.

185. 470 U.S. 68 (1985).

186. *Id.* at 82; *see also* Reilly v. Barry, 250 N.Y. 456, 461, 166 N.E. 165, 167 (1929) ("Upon the trial of certain issues, such as insanity or forgery, experts are often necessary both for prosecution and for defense . . . . [A] defendant may be at an unfair disadvantage, if he is unable because of poverty to parry by his own witnesses the thrusts of those against him.").

187. *Ake*, 470 U.S. at 81.

is often colored by clinicians' own personalities, value systems, and attitudes.[188] In such circumstances, lay fact finders cannot accurately determine competency without a full airing of both parties' evidence.[189] Despite their ultimate responsibility for fact finding on issues of mental condition, lay judges and juries often tend to defer to the expert judgments of psychiatrists. Mental health professionals may thus become "de facto decisionmaker[s],"[190] and fundamental fairness requires that the incompetent prisoner have some input. This is particularly true when the opinion of the prisoner's expert is likely to be based on a more extensive evaluation of the prisoner than are the opinions of the state's experts.[191]

D. *Opportunity to Present Evidence*

Seven Justices agreed in *Ford* that a crucial deficiency in Florida's procedure for determining competency to be executed was its failure to afford the condemned prisoner any input into the determination.[192] At the time of *Ford*, only three states made explicit the right of a condemned prisoner claiming incompetency to present evidence.[193]

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188. *See* Ennis & Litwack, *supra* note 57, at 726-27; Pugh, *supra* note 125, at 94-95.

189. *See Ford*, 477 U.S. at 414 (plurality opinion); *see also* Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. PA. L. REV. 1061, 1071-76 (1962) (recommending the prisoner be furnished his or her own expert to ensure presentation of differing evaluations); Note, *An Indigent Criminal Defendant's Constitutional Right to a Psychiatric Expert*, 1984 U. ILL. L. REV. 481, 500-04 (state must provide an impartial psychiatrist, but need not provide the prisoner his or her own choice of experts, to comport with due process).

190. *See* ABA STANDARDS, *supra* note 58, Standard 7-5.7 comment.

191. *See supra* note 183 and accompanying text; *see also Ford*, 477 U.S. at 414 (plurality opinion) (an erroneous competency determination is more likely when the prisoner is not allowed to present results of more extensive evaluations than those conducted by the state).

192. *See Ford*, 477 U.S. at 413-14 (plurality opinion); *id.* at 427 (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).

193. *See* NEV. REV. STAT. § 176.435 (Michie 1986); N.C. GEN. STAT. §§ 15A-1001 to -1002 (1983); UTAH CODE ANN. § 77-15-9 (Supp. 1988). Florida Rule of Criminal Procedure 3.811 now requires a trial judge reviewing the Governor's determination of competency to review the experts' reports and any evidentiary material or written submissions from the parties, including experts representing the prisoner. FLA. R. CRIM. P. 3.811(d)(4), (e). It does not mandate an evidentiary hearing, but allows the judge to hold one in his discretion. *Id.* 3.811(e).

Florida Rule of Criminal Procedure 3.812 governs hearing procedures. The hearing is not to be a review of the Governor's determination of the prisoner's competency, but is a hearing *de novo*. *Id.* 3.812(a). The judge may require the prisoner's presence at the hearing, appoint no more than three disinterested experts to examine the prisoner and report to the court, or enter any other order appropriate to resolve justly the issues raised. *Id.* 3.812(c). The court may admit any evidence it deems relevant and will not be strictly bound by the rules of evidence. *Id.* 3.812(e). To grant the prisoner's motion for a stay, the judge must find the prisoner insane

Ford makes clear that other states will be required to follow suit, but the Justices who agreed on this point in *Ford* did not delineate the scope of the opportunity that must be given the prisoner. Justice O'Connor wrote that, at a minimum, the prisoner's written submissions must be considered,[194] but Justices Marshall and Powell were less explicit, holding only that the prisoner may not be precluded from presenting material relevant to the determination[195] and that the hearing body must receive evidence and argument from the prisoner's counsel.[196]

States seeking to minimize the cost of proceedings[197] and to avoid delay are likely to read Justice O'Connor's minimum — that the fact finder consider written submissions — as a maximum.[198] In *Mathews v. Eldridge*,[199] the Supreme Court held that written submissions may suffice in a hearing to determine a medical issue. States may seize on that language as a means of limiting the scope of the prisoner's right to present evidence.

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by clear and convincing evidence. *Id.* 3.812(f). While the rules provide guidelines for procedures by which courts can determine a prisoner's competency, trial judges remain vulnerable to reversal for failure to provide sufficient due process in the procedures they utilize. *See* Martin v. State, 515 So. 2d 189 (Fla. 1987).

194. *Ford*, 477 U.S. at 430 (O'Connor, J., concurring in the result in part and dissenting in part).

195. *Id.* at 414 (plurality opinion).

196. *Id.* at 427 (Powell, J., concurring in part and concurring in the judgment). Justice O'Connor specifically stated that she "would not invariably require oral advocacy." *Id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part).

197. *See* Friendly, *supra* note 115, at 1281 n.79 (use of written submissions yields "great savings in time and money"). Florida Rule of Criminal Procedure 3.811(d)(4), (e) requires a judge reviewing the Governor's determination of competency to be executed to review the experts' reports and any evidentiary material or written submissions from the parties. It is within the trial judge's discretion to hold an evidentiary hearing and to hear oral argument or live witnesses. *Id.* 3.811(3), 3.812(a), (c), (e); *see supra* note 193.

198. The State of Mississippi appears to have taken this position to the extreme. In Johnson v. State, 508 So. 2d 1126 (Miss. 1987), the Mississippi Supreme Court rejected a condemned prisoner's claim that he was incompetent after reviewing affidavits submitted on behalf of the prisoner. *Id.* at 1127. Although the court did not even consider opposing affidavits submitted by the state, it found that the prisoner had failed to make out a *prima facie* case of present insanity. *Id.* The prisoner's habeas petition was rejected, Johnson v. Cabana, 661 F. Supp. 356 (S.D. Miss. 1987), and his application for a stay of execution was denied. Johnson v. Cabana, 107 S. Ct. 2207 (1987). As Justice Brennan pointed out in dissenting from the denial of the stay: "If unchallenged affidavits by licensed professionals, concluding that a condemned man 'is unable to relate any punishment through execution to his own conduct,' are insufficient to raise a *prima facie* case that he is incompetent under *Ford*, then it is hard to imagine what would." *Id.* at 2208 (Brennan, J., dissenting).

199. 424 U.S. 319, 345 (1976).

In *Mathews*, the Court reacted to its earlier holding in *Goldberg v. Kelly*[200] that written submissions were insufficient in welfare entitlement hearings and that claimants in such hearings should be granted an opportunity to present their cases orally. *Mathews* dealt with the procedures required in hearings to determine eligibility for disability benefits.[201] The *Mathews* Court held that written submissions that might be insufficient in a multi-factored determination of welfare entitlement were sufficient when the decision turned on "'routine, standard, and unbiased medical reports' [and where] the 'specter of questionable credibility and veracity is not present.'"[202]

The *Mathews* Court noted that the conclusions of the physicians whose written submissions would be accepted in disability entitlement proceedings were verifiable by reference to x-rays and the results of clinical and laboratory tests.[203] The Court therefore found that oral presentation of the evidence was not necessary to check credibility and veracity. Psychiatric evidence is not, however, amenable to this kind of objective verification, nor is it based on routine, standard, and unbiased reports. Psychiatrists examining the same individual may observe different personality traits.[204] Psychiatrists often disagree in their assessment of the meaning of an individual's behavior.[205] Furthermore, psychiatric diagnosis may be guided by a psychiatrist's own attitudes, personality, and value system.[206]

In *Ake*, the Supreme Court approved the practice of placing the ultimate factual determination of mental condition in the hands of a lay fact finder on the explicit assumption that the fact finder would be presented with the views of both the prosecutor's and the defendant's psychiatrists and would therefore be competent to "uncover, recognize,

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200. 397 U.S. 254 (1970).

201. The case involved the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act, 42 U.S.C. § 423 (1982). *Mathews*, 424 U.S. at 323.

202. *Id.* at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404, 407 (1971)); *see also* Friendly, *supra* note 115, at 1281 n.79 (use of written submissions "often permits relatively complicated ideas, theories, or facts to be transmitted in a form best suited to complete understanding in situations where the value of observing demeanor is minimal").

203. *Mathews*, 424 U.S. at 345.

204. *See* Ennis & Litwack, *supra* note 57, at 726 (psychiatrists may be "predisposed to observe different personality traits in the same individual").

205. *See* A. WATSON, PSYCHIATRY FOR LAWYERS 294 (1978) ("The judgment of which label to apply to a given patient is indeed a difficult one. There very often will be considerable disagreement between psychiatrists in the choice of labels . . . ."); *see also* Albers, Pasewark & Meyer, *supra* note 57, at 15-16 (describing studies highlighting unreliability of psychiatric diagnoses).

206. *See supra* note 188 and accompanying text.

and take due account of . . . shortcomings" in psychiatric testimony.[207] Although written submissions could provide the fact finder with the views of both sides' psychiatrists in competency determinations, written submissions would not effectively uncover shortcomings in those views. Oral testimony and cross-examination would uncover faults in examination procedures as well as any personal biases. Written submissions may be a valuable time and money-saving device when "the value of observing demeanor is minimal,"[208] but they are insufficient when the determination to be made turns on psychiatric assessment.

E. *Opportunity to Challenge State Evidence*

Ford leaves little doubt that some opportunity to challenge the state's evidence is necessary in determinations of competency to be executed,[209] but leaves open the scope of the necessary opportunity. In particular, it fails to answer whether the prisoner is entitled to cross-examine the state's witnesses.

Cross-examination has been called "beyond any doubt the greatest legal engine ever invented for the discovery of truth,"[210] but in noncriminal proceedings its "main effect" is often delay.[211] Even Justice Marshall, whom Justice Powell faulted in *Ford* for advocating a "full-scale 'sanity trial,'"[212] took apparent note of the dilemma posed by cross-examination when he wrote that cross-examination "or perhaps a less formal equivalent" would be required in determinations of competency to be executed.[213]

The constitutional right of confrontation is limited to criminal prosecutions,[214] but the Supreme Court has extended the right to cross-examine adverse witnesses to "all types of cases where administrative and regulatory actions [are] under scrutiny."[215] This extension reached

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207. *Ake*, 470 U.S. at 84 (quoting Barefoot v. Estelle, 463 U.S. 880, 899 (1983)).

208. Friendly, *supra* note 115, at 1281 n.79.

209. *See Ford*, 477 U.S. at 415 (plurality opinion) ("Without some questioning of the experts concerning their technical conclusions, a fact finder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent."); *id.* at 427 (Powell, J., concurring in part and concurring in the judgment) (hearing body should "receive evidence and argument from the prisoner's counsel").

210. 5 J. WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974).

211. Friendly, *supra* note 115, at 1285.

212. *Ford*, 477 U.S. at 425 (Powell, J., concurring in part and concurring in the judgment).

213. *Id.* at 415 (plurality opinion); *see also id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part) (would not inevitably require cross-examination).

214. U.S. CONST. amend. VI.

215. Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

its zenith in *Greene v. McElroy*[216] and *Goldberg v. Kelly*,[217] in which the Supreme Court held that cross-examination is required whenever governmental action may injure an individual or where "important decisions turn on questions of fact."[218] In subsequent cases, though, the Court has recognized that institutional considerations may make cross-examination undesirable, and has approved hearings without cross-examination when it could endanger informants[219] and create disruption inside a prison.[220]

Allowing an allegedly incompetent prisoner to cross-examine the state's witnesses in competency determinations creates no similar danger, and the attendant threat of delay and increased expense is outweighed by the greater accuracy and reliability that cross-examination would bring to competency determinations. Permitting cross-examination would force all witnesses to report fairly and accurately, and to precisely articulate their findings.[221] Psychiatrists often disagree in their assessments,[222] in part because their own personalities, value systems, or attitudes may affect their assessment of an individual.[223] Cross-examination will expose these influences and illuminate for the fact finder the bases of differing psychiatric opinions.[224] Cross-examination may also be necessary to ensure that psychiatric testimony is limited to psychiatric and not legal conclusions.[225] Finally, cross-exami-

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216. *Greene*, 360 U.S. at 474.

217. 397 U.S. 254, 269 (1970) ("[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

218. *Id.*

219. Morrissey v. Brewer, 408 U.S. 471, 487 (1972).

220. Vitek v. Jones, 445 U.S. 480, 496 (1980); Wolff v. McDonnell, 418 U.S. 539, 567 (1974).

221. *See* Brief for Amicus Curiae Mental Health Ass'n of Fla., at 23, Ford V. Wainwright, 477 U.S. 399 (1986) (No. 85-5542) (citing *Wolff*, 418 U.S. at 565, *Goldberg*, 397 U.S. at 271).

222. *See supra* note 57.

223. *See supra* note 188 and accompanying text.

224. *See Ford*, 477 U.S. at 415 (plurality opinion) ("[w]ithout some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent"); *see also* Ennis & Litwack, *supra* note 57, at 743-46 (psychiatric judgments must be subject to cross-examination to ensure reliability).

225. The legal issue in a competency determination requires an assessment of the prisoner's mental condition and the application to that assessment of the legal standard of competence. For example, the Florida statute prohibiting execution of the incompetent makes deferral of execution contingent upon the prisoner's ability to "understand[ ] the nature and effect of the death penalty and why it is to be imposed upon him." FLA. STAT. § 922.07(1) (1987). As the American Psychiatric Association pointed out in its Amicus Brief to the Supreme Court in *Ford*,

nation is necessary to uncover any bias regarding capital punishment. Capital punishment tends to arouse strong personal feelings, creating a risk that psychiatric assessments may be colored by opinions regarding the death penalty.[226]

V. CONCLUSION

Because most states forbade execution of the incompetent before *Ford*, the decision's impact is largely limited to the question of the procedures necessary to determine competency to be executed. *Ford*, however, provides little guidance to states seeking to formulate procedures that meet its requirements.

This article has suggested that the most effective way to develop adequate protections is to balance the interests of prisoners against those of the state, and to incorporate determinations of competency to be executed into a comprehensive system of mental health care for death row inmates. Such a system should be built on periodic mental health examinations of these prisoners. *Estelle v. Gamble* requires such examinations in some instances, and using them to meet the requirements of *Ford* would minimize their incremental cost. These relatively cursory examinations would identify a small number of cases that would warrant more elaborate procedures. Because those more elaborate procedures would be required in only a small number of cases, the state's interest in minimizing costs and avoiding delays could be accommodated with the prisoner's interests.

> whether or not a psychiatrist is willing to render an opinion in the precise terms of the legal standard, he nevertheless must perform the additional analytic step of relating a medical diagnosis to the prisoner's ability to understand the matters in question. In the absence of cross-examination, it is difficult for the factfinder to determine what it is about a person's mental condition that affects his ability to understand, how and to what extent that ability is impaired, and whether the impairment is temporary, transitory, or permanent.

APA Amicus Brief, *supra* note 92, at 16-17 (footnote omitted).

226. APA Amicus Brief, *supra* note 92, at 17.