LOOPHOLE TO EXECUTION—*FORD V. WAINWRIGHT*

“If it were true that at common law a suggestion of insanity after sentence, created on the part of a convict an absolute right to a trial of this issue... it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial.”*

INTRODUCTION

Constitutional inquiry into the imposition of the death penalty “must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eight Amendment.”

In *Ford v. Wainwright,* the United States Supreme Court specifically interpreted the eighth amendment's uncertain language and concluded that the execution of an insane prisoner was cruel and unusual punishment prohibited by the Constitution. Although the Court had addressed the issue of eighth amendment interpretation in prior cases, it had never decided whether the Constitution specifically forbids the execution of the insane.

The purpose of this Note is threefold. First, this Note examines the history of the death penalty. Second, it addresses the issue of executing an insane prisoner. Finally, this Note reviews the possible implications of the decision in *Ford.* The *Ford* decision, although important, merely follows the trend of struggle surrounding the death penalty that has faced the Court for the last twenty years. The continuation of this struggle in *Ford* is likely to have a substantial impact.

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* Nobles v. Georgia, 168 U.S. 398, 405-06 (1897).
2. 106 S. Ct. 2595 (1986).
3. *Id.* at 2598. U.S. CONST. amend. VIII provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” See also W. LA FAVE & A. SCOTT, CRIMINAL LAW 177 n.71 (2d ed. 1986) (citing S. RUBIN, THE LAW OF CRIMINAL CORRECTION 423 (2d ed. 1978)) (stating that “[n]ineteen states proscribe cruel ‘or’ unusual punishment; 22 prohibit cruel ‘and’ unusual punishment; and 6 prohibit only ‘cruel’ punishment.”).
5. This Note does not necessarily express the author’s position on the death penalty. Rather, it discusses the death penalty as it is applied to the condemned prisoner who claims insanity after sentencing.
6. *See infra* notes 70-129 and accompanying text.
7. *See infra* notes 130-73 and accompanying text.
8. *See infra* notes 174-245 and accompanying text.
on criminal jurisprudence and may also provide a "loophole" for condemned prisoners who have nothing more to lose.\textsuperscript{9}

FACTS AND HOLDING

On July 21, 1974, Alvin Bernard Ford murdered a Fort Lauderdale police officer in the course of an attempted robbery.\textsuperscript{10} He was convicted of first degree murder and, pursuant to jury recommendations, the trial court imposed a sentence of death.\textsuperscript{11} Throughout the legal proceedings, Ford's counsel never suggested that Ford was, or had been, mentally incompetent at any time during the offense, at trial, or at sentencing.\textsuperscript{12} Ford had completely exhausted all legal remedies, and each of his direct and collateral appeals had been fully litigated, leaving him with no further avenues of relief.\textsuperscript{13}

Although the question of Ford's sanity was never at issue during trial or at sentencing, in 1982 Ford began to manifest numerous behavioral changes.\textsuperscript{14} Part of Ford's behavioral changes were due to his confused perceptions that continually increased in severity.\textsuperscript{15} Initially, Ford developed an obsession focused on the Klu Klux Klan after he had read about a rally the group had conducted.\textsuperscript{16} Ford also believed he was involved in an intricate conspiracy where "prison guards had been killing people and putting the bodies in the concrete enclosures used for beds."\textsuperscript{17} Further, Ford began to call himself "Pope John Paul III" and believed that he had just appointed nine new justices to the Florida Supreme Court.\textsuperscript{18}

As Ford's delusions worsened, Ford's counsel requested that psychiatric examinations be performed.\textsuperscript{19} Dr. Jamal Amin, a psychiatrist, evaluated Ford and concluded that he was suffering from paranoid schizophrenia.\textsuperscript{20} Following Ford's refusal to see Dr. Amin, Dr. Amin was unable to have any direct contact with Ford after June of 1983, because Ford believed that Dr. Amin was part of the conspiracy. Ford v. Wainwright, 106 S. Ct. at 2595.

\textsuperscript{9} See infra notes 242-52 and accompanying text.
\textsuperscript{10} Ford v. Strickland, 676 F.2d 434, 436 (11th Cir. 1982). Ford and three others were in the process of robbing a Red Lobster Restaurant in Fort Lauderdale, Florida. As Ford was confronted by Officer Dimitri Walter Ilyankoff, Ford shot the officer twice in the abdomen. \textit{id}. Ford returned moments later, stole the officer's car keys, and then shot him in the back of the head at close range. \textit{id}. at 437.
\textsuperscript{11} Ford v. State, 374 So. 2d 496 ( Fla. 1979).
\textsuperscript{12} Ford, 106 S. Ct. at 2598.
\textsuperscript{13} \textit{id}. at 2599; \textit{id}. at 2615 (Rehnquist, J., dissenting).
\textsuperscript{14} \textit{id}. at 2598.
\textsuperscript{15} \textit{id}.
\textsuperscript{16} \textit{id}.
\textsuperscript{17} \textit{id}. This conspiracy further developed into a hostage delusion where Ford believed that 135 of his friends and family were being held hostage in prison. \textit{id}.
\textsuperscript{18} \textit{id}.
\textsuperscript{19} \textit{id}.
\textsuperscript{20} Brief for Petitioner at 2, Ford v. Wainwright, 106 S. Ct. 2595 (1986).
Ford's counsel believed that further evaluation was needed, and Dr. Harold Kaufman then evaluated Ford.21 Throughout the interviews, Ford recognized the existence of the death penalty but did not believe he could be executed.22 Based on his observations, Dr. Kaufman concluded that Ford neither understood why he was to be executed nor made any connection between the crime of which he had been convicted and the death penalty.23

Eventually Ford regressed to the point where he could only speak in one-word codes.24 He made such statements as "[h]ands one, face one. Mafia one. God one, father one, Pope one. . . . Leader one."25 After Ford reached this level of incomprehensibility, Ford's counsel invoked procedures established by Florida law "governing the determination of competency of a condemned inmate."26

22. Id. During Ford's counseling sessions with Dr. Kaufman, Ford stated: "'I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed." Id. (quoting Interview of Ford by Dr. Harold Kaufman (Nov. 1983)).
23. Id. at 2599. A typical example of Ford's state of mind was recorded on November 3, 1983, by Dr. Kaufman during his interview with Ford. Ford stated:

The guard stands outside my cell and reads my mind. Then he puts it on tape and sends it to the Reagans and CBS . . . I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed . . . CBS is trying to do a movie about my case . . . I know the KKK and the news reporters all [sic] disrupting me and CBS knows it . . . I won't be executed because of no crime . . . maybe because I'm a smart ass . . . my family's back there (in pipe alley . . . you can't evaluate me. I did a study in the army . . . a lot of masturbation . . . I lost a lot of money on the stock market. They're back there investigating my case. Then this guy motions with his finger like when I pulled the trigger. Come on back you'll see what they're up to — Reagan's back there too. Me and Gail bought the prison and I have to sell it back. State and federal prisons. We changed all the other counties and because we've got a pretty good group back there I'm completely harmless. That's how Jimmy Hoffa got it. My case is gonna save me.

Brief for Petitioner at 4 n.4., Ford.
25. Id.
26. Id. See FLA. STAT. ANN. § 922.07 (West 1985). Section 922.07 sets forth the procedures that must be followed when a person under a death sentence appears to be insane. Section 922.07 provides:

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

(2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall is-
Pursuant to procedures set forth in Florida statutes, the Governor of Florida appointed a panel of three psychiatrists to examine Ford to determine whether he understood the nature and effect of the death penalty and why it was to be imposed upon him.\textsuperscript{27} Three psychiatrists interviewed Ford together for thirty minutes and then filed a written report of their conclusions with the Governor.\textsuperscript{28} Although the three psychiatrists produced different diagnoses, each concluded that Ford understood the consequences of the death penalty and why it was to be imposed upon him.\textsuperscript{29}

Florida law directs the Governor, after receiving a report from the panel, to determine whether the "person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."\textsuperscript{30} Upon receiving the panel's report, the Governor signed the death warrant and ordered Ford's execution to occur before noon on June 1, 1984.\textsuperscript{31} However, ten days prior to the scheduled execution date, Ford's counsel filed a petition for writ of habeas corpus and an application to stay the execution.\textsuperscript{32} In this petition, Ford's counsel requested an evidentiary hearing on the question of Ford's competency for execution.\textsuperscript{33}

Although the Florida Supreme Court denied the petition,\textsuperscript{34} the Eleventh Circuit Court of Appeals granted a certificate of probable cause and stayed Ford's execution.\textsuperscript{35} The Eleventh Circuit concluded that Ford had not abused his right to claim insanity and was there-

\textsuperscript{27} Ford, 106 S. Ct. at 2599.
\textsuperscript{28} Ford v. Wainwright, 451 So. 2d 471, 473 (Fla. 1984).
\textsuperscript{29} Ford v. State, 451 So. 2d 471, 475 (Fla. 1984).
\textsuperscript{30} FLA. STAT. ANN. § 922.07 (West 1985).
\textsuperscript{31} Ford v. Wainwright, 451 So. 2d 471, 473 (Fla. 1984).
\textsuperscript{32} Brief for Respondent at 7-8, Ford.
\textsuperscript{33} Ford v. State, 451 So. 2d 471, 475 (Fla. 1984).
\textsuperscript{34} Id.
\textsuperscript{35} Ford v. Strickland, 734 F.2d 538, 543 (11th Cir. 1984).
fore entitled to a hearing to determine whether he was currently insane based on the eighth and fourteenth amendments.\(^{36}\)

The United States Supreme Court later rejected the effort to vacate the stay.\(^{37}\) In Ford’s appeal to the Eleventh Circuit, he asserted that his right not to be executed was guaranteed by the eighth amendment, and that the Florida statute failed to provide him due process.\(^{38}\) However, the court rejected Ford’s contentions and held that the statute allowing the Governor to make decisions involving the death penalty did meet the standards required by procedural due process.\(^{39}\) The United States Supreme Court then granted Ford’s petition for certiorari to resolve the question of whether the eighth amendment prohibits the execution of an insane person.\(^{40}\)

Ford argued to the Supreme Court that the execution of incompetents was forbidden because execution “makes no measurable contribution to the penological justifications for the death penalty, inflicts excessive suffering, and interferes with the right of access to the courts.”\(^{41}\) Ford also contended that he should not be executed because the eighth amendment provides a “prohibition against execution.”\(^{42}\) The state recognized the common-law rule that the insane should not be executed.\(^{43}\) However, the state insisted that the common-law rule was not based on an individual right but rather on an emotional appeal to the tribunal’s discretion to postpone the decision to execute.\(^{44}\) Therefore, the state argued, the framers of the Constitution “could not have intended that this social policy be incorporated in the Eighth Amendment as a fundamental personal right.”\(^{45}\)

Although the Court had never addressed the issue of whether the Constitution places a substantive restriction on the state’s power to take the life of an insane prisoner, the common-law rule that prohibited the infliction of the death penalty on the insane was upheld.\(^{46}\) The Court noted the following justifications for the common-law rule: (1) an insane person is incapable of assisting counsel in the

\(^{36}\) Id. at 540.


\(^{38}\) Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985), rev’d, 106 S. Ct. 2595 (1986).

\(^{39}\) Id.

\(^{40}\) Ford, 106 S. Ct. at 2599.

\(^{41}\) Brief for Petitioner at 7, Ford.

\(^{42}\) Ford, 752 F.2d at 527.

\(^{43}\) Brief for Respondent at 12, Ford.

\(^{44}\) Id. See Solesbee v. Balkcom, 339 U.S. 9, 13 (1950).

\(^{45}\) Id. at 12-13.

\(^{46}\) Ford, 106 S. Ct. at 2598. The Court also addressed the issue of whether the district court was under an obligation to hold an evidentiary hearing on the question of Ford’s sanity. Id. at 2602. This issue is outside the scope of this Note.
fight to keep the sentence from being imposed; the person's insanity is punishment enough; a humanitarian mandate exists which prohibits executing insane persons; the deterrence rationale would not be served by executing the insane because executing an insane individual does not serve as an example to others; retribution is not achieved by executing the insane; and a person should not be executed while incapable of making peace with that person's maker.

The Court, in its support of the common-law rule and the rationale behind the rule, found that the "various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced."

The Court reflected upon noted past restrictions upon sovereign power and seriously questioned the "retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." According to the Court, a heightened standard is imperative when ascertaining a prisoner's sanity before execution. The Court concluded that the manner in which the Governor rendered his decision failed to meet minimum standards of reliability required for a constitutionally protected interest. In so holding, the court reasoned:

Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the constitution altogether. . . . Thus, the ascertainment of

47. Id. at 2600-01 (quoting 4 W. BLACKSTONE, COMMENTARIES *24-25) (Asking: "'And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defense [sic]?'").
48. Id. at 2601 (citing 4 W. BLACKSTONE, COMMENTARIES *24-25) (stating that "madness is its own punishment").
49. Id. (citing E. COKE, THIRD INSTITUTE 6 (6th ed. 1680)) (stating that execution of the insane "simply offends humanity.").
50. Id. (citing E. COKE, THIRD INSTITUTE 6 (6th ed. 1980)) (stating that execution of the insane "provides no example to others").
51. Id. (quoting Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. REV. 381, 387 (1962)) (reasoning that society's interest in retribution is not furthered by executing the insane because such executions have "'lesser value' than that of the crime for which [the prisoner] is to be punished.").
52. Id. (quoting HAWLES, Remarks on the Trial of Mr. Charles Bateman, 11 How. St. Tr. *477 (1816)) (stating that "it is uncharitable to dispatch an offender 'into another world when he is not of a capacity to fit himself for it.'"). It has been argued that there is little significance to this reason because "it is quite impossible to believe that external destiny depends in any degree on the frame of mind you were in at the particular moment [of death] rather than on the general tenor of the life." Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. REV. 381, 388 (1962) (quoting GOWERS, A LIFE FOR A LIFE? 44, 113 (1956)).
53. Ford, 106 S. Ct. at 2602.
54. Id.
55. Id. at 2603.
56. Id. at 2604.
EXECUTION OF THE INSANE

prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding.57 Based on Ford's inability to comprehend the reasons for his penalty and its implications at the time of execution, the Court held that Ford had been denied adequate procedures for such a critical matter.58 For this reason the Court ruled that Ford was entitled to an evidentiary de novo hearing in the district court concerning his competence for execution.59

While the majority held that the eighth amendment prohibits the execution of an insane prisoner,60 Justice Rehnquist and Chief Justice Burger strongly dissented,61 and Justices O'Connor and White dissented in part and concurred in part.62 Justice Rehnquist addressed the great weight placed on the history of the common-law rule by the Court, but also noted that "no matter how longstanding and universal, laws providing that the State should not execute persons the executive finds insane are not themselves sufficient to create an Eighth Amendment right that sweeps away as inadequate the procedures for determining sanity crafted by those very laws."63 Justice Rehnquist relied on an earlier case in which the Court held that "'society must have power to try, convict, and execute sentences.'"64 Justice Rehnquist also remarked on possible negative implications of the majority's opinion.65 He argued that if the Court created a constitutional right to a judicial determination of sanity before a sentence could be enforced, finality in the execution of death sentences would be unnecessarily complicated and delayed.66 Justice Rehnquist further recognized that Ford had already received a full trial on the issues of guilt and penalty and that "the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity."67

Justices O'Connor and White agreed with Justice Rehnquist that the eighth amendment does not give rise to a substantive right not to

57. Id. at 2603.
58. Id. at 2606.
59. Id. Thus, the Court reversed the judgment of the court of appeals and remanded the case for further proceedings. Id.
60. Id. at 2602.
61. Id. at 2613-15 (Rehnquist, J., dissenting).
62. Id. at 2611-13 (O'Connor, J., concurring and dissenting).
63. Id. at 2614 (Rehnquist, J., dissenting).
64. Id. at 2614 (Rehnquist, J., dissenting) (quoting Solesbee v. Balkcom, 339 U.S. 9, 13 (1950)).
65. Id. at 2615 (Rehnquist, J., dissenting).
66. Id.
67. Id.
be executed while insane. Justice O'Connor asserted that although due process is involved in the right to avoid execution while insane, "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly."  

BACKGROUND

HISTORY OF THE DEATH PENALTY

Controversy best characterizes the issues of the death penalty and the execution of insane prisoners. For centuries, public controversy surrounding punishment by death has been acute. Ultimately, the battle between those in favor of the death penalty and those opposed to it has been fought on moral grounds. In a society that so strongly values the protection and sanctity of human life, it is not surprising that the punishment of death has produced strong views. However, the death penalty has been used since the beginning of civilized societies in order to penalize various acts.

The Supreme Court has previously held that the purpose of the death penalty is to express "society's moral outrage at particularly offensive conduct." Although all persons do not agree with the infliction of the death penalty, the Court has reasoned that it is necessary in a society in which citizens look to legal processes to punish wrongdoers. The imposition of capital punishment serves six recognized purposes: retribution, deterrence, prevention, restraint, rehabilitation, and education. However, the two principal social purposes are retribution and deterrence. Retribution, an age-old theory of punishment, is based on the idea that a criminal owes a duty to the com-

68. Id. at 2611 (O'Connor, J., concurring and dissenting).
69. Id. at 2612 (O'Connor, J., concurring and dissenting). Justice O'Connor further recognized the high probability for false claims and intentional delays. Id. She stressed that "regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary." Id. (citing G. Hazard & D. Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. REV. 381, 399-400 (1962)).
71. Id.
72. Id. at 333 (Marshall, J., concurring).
74. Id.
75. W. LaFave & A. Scott, Criminal Law 306-08 (2d ed. 1986). See also Furman, 408 U.S. at 342 (Marshall, J., concurring) (identifying the six purposes of capital punishment as: "retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy.").
76. Gregg, 428 U.S. at 183.
munity.\textsuperscript{77} Deterrence is based on the theory that punishment of persons who violate the criminal laws will also serve as a means of general prevention for the public.\textsuperscript{78} In deciding whether the execution of the insane is constitutional, courts must consider to what extent these purposes of the death penalty are defeated, if at all, by the fact of the prisoner's post-conviction insanity.\textsuperscript{79}

The theory of cruel and unusual punishment has been in existence since 1689 when the English Bill of Rights was drafted by Parliament.\textsuperscript{80} The cruel and unusual punishment theory was later incorporated into the eighth amendment of the United States Constitution.\textsuperscript{81} Certain forms of punishment have been considered cruel and unusual: burning at the stake, crucifixion, and breaking on the wheel.\textsuperscript{82} Quartering and the rack-and-thumb screw have also been recognized as cruel and unusual punishment.\textsuperscript{83} Punishments that may not inflict physical hardship or pain may still be considered cruel and unusual, such as deprivation of citizenship.\textsuperscript{84} Although some forms of physical or mental punishment have been determined cruel and unusual, the modern death penalty has been upheld.\textsuperscript{85}

Modern forms of carrying out the death penalty include electrocution,\textsuperscript{86} hanging,\textsuperscript{87} lethal gas,\textsuperscript{88} and shooting.\textsuperscript{89} Regardless of the

\textsuperscript{77} Note, Madness in the Criminal Law, 40 Temp. L.Q. 348, 358-59 (1967).
\textsuperscript{78} W. LaFAVE & A. SCOTT, supra note 75, at 307.
\textsuperscript{79} Comment, Execution of Insane Persons, 23 S. Cal. L. Rev. 246, 256 (1950).

One commentator has written:

If the reason is that punishment is an act of vengeance, then the prisoner's ability to appreciate his impending fate would seem to be the standard. A similar standard would apply if the reason is that it is "barbarous" to execute an insane person. If the policy is based on the right of the defendant to make his peace with God, then a realization of his original guilt should be added to the test. If the reason is that he should have an opportunity to suggest items in extenuation or make arguments for executive clemency, then the standard should probably involve intelligence factors as well as moral awareness.


"Cruel" has been interpreted to mean "excessive, punitive without, or beyond, a rational-utilitarian purpose." \textit{Id.} at 52. "Unusual" has been understood to mean "either randomly capricious and therefore unconstitutional or capricious in a biased, discriminatory way so as to particularly burden specifiable groups." \textit{Id.} at 53.

\textsuperscript{82} In re Kemmler, 136 U.S. 436, 446 (1890).
\textsuperscript{83} W. LaFAVE & A. SCOTT, supra note 75, at 177.
\textsuperscript{84} Trop v. Dulles, 365 U.S. 86, 103 (1958).
\textsuperscript{85} See infra notes 86-89 and accompanying text.
\textsuperscript{86} In re Kemmler, 136 U.S. at 449.
\textsuperscript{87} Dutton v. State, 123 Md. 373, 386, 91 A. 417, 419 (1914).
\textsuperscript{88} Gray v. Lucas, 710 F.2d 1048, 1061 (5th Cir. 1983), cert. denied, 104 S. Ct. 211 (1983). In \textit{Gray}, the Fifth Circuit Court of Appeals held that Gray was not entitled to federal relief from conviction on the ground of present insanity. \textit{Id.} at 1056. Gray had
methods used, the death penalty has been challenged as being a per se violation of the eighth amendment.\textsuperscript{90} However, the Court has rejected such a challenge and has noted that the death penalty is not inherently cruel, has been widely accepted by society, and serves the two principal purposes of retribution and deterrence.\textsuperscript{91}

In an attempt to define the contours of what constitutes cruel and unusual punishment, an examination of court holdings is necessary. One of the most widely recognized cases involved in the controversy surrounding the imposition of the death penalty is \textit{Furman v. Georgia}.

Prior to \textit{Furman}, the Court had never confronted the claim that a death sentence was always cruel and unusual punishment as defined by the eighth and the fourteenth amendments.\textsuperscript{93} In a 5-4 decision, the \textit{Furman} Court held that with respect to the facts before it, the procedure used by Georgia to impose the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments.\textsuperscript{94}

\textit{Furman} had been convicted of murder and sentenced to death under Georgia law.\textsuperscript{95} In his concurring opinion, Justice Brennan asserted that the words of the cruel and unusual clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{96} The clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."\textsuperscript{97}

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\begin{footnotes}
\item[90] Gregg, 428 U.S. at 158.
\item[91] Id. at 183, 187.
\item[92] 408 U.S. 238 (1972).
\item[93] Gregg, 428 U.S. at 168-69.
\item[94] Furman, 408 U.S. at 239-40. Each of the five Justices supporting the judgment wrote separately. \textit{Id.} at 240. Justice Stewart asserted that the death penalty in \textit{Furman} was being imposed "wantonly and . . . freakishly." \textit{Id.} at 310 (Stewart, J., concurring).
\item[95] \textit{Id.} at 239. Furman had killed a householder while trying to enter a home during the night. \textit{Id.} at 252. After his plea of insanity, Furman was committed to a state hospital for psychiatric examinations where physicians concluded that he was not capable of cooperating and preparing for his defense. \textit{Id.} at 252-53. However, the superintendent reported that Furman was "'not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense.' " \textit{Id.} at 253 (quoting Superintendent's report).
\item[96] \textit{Id.} at 269-70 (Brennan, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
\item[97] \textit{Id.} at 270 n.10 (Brennan, J., concurring) (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).
\end{footnotes}
tice Brennan further concluded that the death penalty was wrong in *Furnam* because it conflicted with four principles.\(^9\) These four principles were: (1) the death penalty is "unusually severe and degrading"; (2) there is a strong chance that the death penalty is imposed arbitrarily; (3) modern society has almost totally rejected the idea; and (4) the penalty is not necessarily any more effective than some less severe punishment.\(^9\)

Although Justice Stewart agreed with Justice Brennan's opposition to the death penalty, he added yet another reason for the impermissibility of the death penalty when he spoke of the death penalty's uniqueness.\(^10\) He described the uniqueness of this penalty in its "rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."\(^10\)

A different test was set forth by Justice Marshall.\(^10\) He argued that the determination of whether a punishment was cruel and unusual depends "not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."\(^10\)

Using this analysis, the remaining question is not whether Americans regard the death penalty as inhumanly cruel, but rather whether informed persons would find the punishment cruel in light of the purposes of the penalty and the available information regarding the matter.\(^10\) Justice Marshall emphasized that the "entire thrust of the Eighth Amendment is, in short, against 'that which is excessive.' "\(^10\)

In his dissenting opinion, Chief Justice Burger disagreed with

\(^9\) Id. at 305 (Brennan, J., concurring).
\(^9\) Id. at 282 (Brennan, J., concurring). Based on these four principles, Justice Brennan fashioned this cumulative test:

> If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

\(^10\) Id. at 306 (Stewart, J., concurring).
\(^10\) Id. The argument that the death penalty is uniquely irrevocable is not a persuasive because other punishments such as prison terms and fines are also irrevocable. Gale, *Retribution, Punishment, and Death*, 18 U. CALIF. DAVIS L. REV. 973, 1021 (1985).

\(^10\) See infra notes 103-05 and accompanying text.
\(^10\) *Furnam*, 408 U.S. at 361 (Marshall, J., concurring) (quoting United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952)).
\(^10\) Id. at 362 (Marshall, J., concurring).
\(^10\) Id. at 332 (Marshall, J., concurring).
the majority and urged the removal of personal feelings when deciding whether a punishment is cruel and unusual.\textsuperscript{106} Instead, he argued that the constitutional inquiry must focus on the language of the eighth amendment.\textsuperscript{107} Using the Court's rationale in \textit{McGautha v. California},\textsuperscript{108} Chief Justice Burger referred to the words of Justice Black, who wrote that the eighth amendment "'cannot be read to outlaw capital punishment because that penalty was in common use . . . at the time the Amendment was adopted. It is inconceivable . . . that the framers intended to end capital punishment by the Amendment.'"\textsuperscript{109}

Chief Justice Burger's view that the death penalty was not cruel and unusual was based on several factors.\textsuperscript{110} First, he noted that the constitutional significance of the death penalty had not changed from past years.\textsuperscript{111} Second, the manner in which a prisoner is executed involves no greater physical pain than it did when the eighth amendment was adopted, nor is the anguish experienced by a person awaiting execution today more severe than in past years.\textsuperscript{112} Finally, Chief Justice Burger remarked that if every punishment that created extreme stress was in violation of the eighth amendment, then "capital punishment would clearly have been impermissible in 1791."\textsuperscript{113}

In his dissent, Justice Blackmun considered human perceptions in addressing the problem and stated:

> It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts that . . . this is the moral and the 'right' thing to do, that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families.\textsuperscript{114}

Four years after the \textit{Furman} decision, the Court upheld the constitutionality of the death penalty when it decided \textit{Gregg v. Georgia}.\textsuperscript{115} The \textit{Gregg} Court concluded that the imposition of a death sentence could be enforced but that the enforcement depended on the circumstances of the crime, the present character of the defend-

\textsuperscript{106} Id. at 375 (Burger, C.J., dissenting).
\textsuperscript{107} Id.
\textsuperscript{108} 420 U.S. 183 (1971).
\textsuperscript{109} \textit{Furman}, 408 U.S. at 381 (Burger, C.J., dissenting) (quoting \textit{McGautha}, 402 U.S. at 226) (Black, J., concurring)).
\textsuperscript{110} See infra notes 112-14 and accompanying text.
\textsuperscript{111} \textit{Furman}, 408 U.S. at 382 (Burger, C.J., dissenting).
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 410 (Blackmun, J., dissenting).
\textsuperscript{115} 428 U.S. 153, 207 (1976).
ant, and the procedure followed in arriving at the decision.\textsuperscript{116} Gregg had been charged with committing armed robbery and murder and had been sentenced to death for each count.\textsuperscript{117} On appeal to the United States Supreme Court, Gregg challenged the death sentence on the basis that it constituted cruel and unusual punishment.\textsuperscript{118} The Court reasoned that the imposition of the death penalty was not cruel and unusual if the penalty was not "cruelly inhumane or disproportionate to the crime involved."\textsuperscript{119}

The Court's holding was contingent on a two-part test used to determine that the death penalty was not cruel and unusual.\textsuperscript{120} Based on the application of this test, the eighth amendment demands that "a challenged punishment be acceptable to contemporary society," and that the punishment must be in accord "with the basic concept of human dignity at the core of the Amendment."\textsuperscript{121} In order for a punishment to be deemed constitutional, it must satisfy both levels of the test.\textsuperscript{122}

On the same day Gregg was decided, the Court in Jurek v. Texas\textsuperscript{123} ruled that, under the facts before it, the imposition of the death penalty was not cruel and unusual punishment.\textsuperscript{124} Jurek had been convicted of murder and sentenced to death.\textsuperscript{125} In upholding the death penalty, the Court required the jury to consider several factors to determine whether a particular defendant would be a continual threat to society.\textsuperscript{126} The Court considered these factors as relevant: (1) the defendant's past criminal offenses, (2) the "range and severity" of these past offenses, (3) the defendant's age, (4) whether at the time of the offense charged the defendant was "acting under duress or under the domination of another," and (5) whether the defendant was under an "'extreme form of mental or emotional

\begin{itemize}
  \item \textsuperscript{116} Id. at 187.
  \item \textsuperscript{117} Id. at 158, 161.
  \item \textsuperscript{118} Id. at 162.
  \item \textsuperscript{119} Id. at 175. The Court recognized the uniqueness of the death penalty, but noted that "when a life has been taken deliberately by the offender, we cannot say the the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes." Id. at 187 (footnote omitted).
  \item \textsuperscript{120} Id. at 182.
  \item \textsuperscript{121} Id. (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).
  \item \textsuperscript{122} Id. Cf. Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765, 775-76 (1980) (proposing a two-part standard for assessing whether the execution of the presently incompetent is cruel and unusual under the eighth amendment).
  \item \textsuperscript{123} 428 U.S. 262 (1976).
  \item \textsuperscript{124} Id. at 268.
  \item \textsuperscript{125} Id. at 264-65. Jurek had choked and strangled Adams with his hands and had drowned her in a river in the course of an attempted kidnapping and forcible rape. Id. at 265.
  \item \textsuperscript{126} Id. at 269, 272-73.
\end{itemize}
pressure.’ ”

In summary, the Court has noted that the framers of the eighth amendment did not intend to disallow capital punishments but sought to prevent punishments that were excessive or disproportionate. Further, the Court has reasoned that it was not likely that the framers intended to end capital punishment with the cruel and unusual clause, because at the time the clause was adopted the death penalty was commonly used and authorized by law.

**EXECUTION OF THE INSANE**

The belief against executing the presently incompetent has been a cardinal principle of Anglo-American jurisprudence since the early days of common law. At common law, execution of an incompetent person was prohibited as it was considered “‘savage and inhuman.’” Such executions were viewed as “‘a miserable spectacle . . . of extream [sic] inhumanity and cruelty.’” The basic reason behind this belief is that an individual should not be executed if so mentally unsound “‘as to be incapable of understanding the nature and purpose of the punishment about to be executed upon him.’” Although this principle is widely held, there are diverse explanations of varying degrees of persuasiveness in support of it.

One explanation of this rule is that if the defendant was sane, the defendant would be able to argue why this sentence should not be imposed. Another explanation is that the prisoner's insanity in itself is sufficient punishment. A theological rationale is that an insane person should not be executed because he or she cannot make peace with God while insane. The final justification for the rule against executing the insane is “that it is unnecessary to put the insane prisoner to death.”

Within a time span of almost ninety years, courts have analyzed the issues surrounding an insanity plea asserted between the sentec-

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127. Id. (quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. 1975)).
128. See supra notes 82-84 and accompanying text.
129. See supra notes 80-81 and accompanying text.
130. See infra notes 131-32 and accompanying text.
132. Id. at 2601. (quoting E. COKE, THIRD INSTITUTE 6 (6th ed. 1680)).
134. See infra notes 135-38 and accompanying text.
136. Hazard and Louisell, supra note 52, at 384. The idea is “frequently expressed in the Latin ‘furiosus solo furore punitor.’” Id. at 384 n.10.
138. Hazard and Louisell, supra note 52, at 388-89.
One of the first cases to focus on the issue was *Nobles v. Georgia*. In July of 1895, Elizabeth Nobles was tried, found guilty of murder, and sentenced to death by the Superior Court of Twiggs County, Georgia. After an order had suspended her death sentence, a petition was presented which asserted that Nobles was "'now insane." The Georgia Supreme Court denied the petition.

On a writ of error, the United States Supreme Court focused on whether a suggestion of insanity after conviction and sentencing required a trial by jury to satisfy the requirements of due process of law. Although the Court recognized the common-law proposition that executions should be stayed if the condemned become insane, the Court held that a plea of insanity did not give rise to an absolute right to have the issue of insanity tried before a jury. The Court concluded that since there was no absolute right to a jury trial, "the manner in which such question should be determined was purely a matter of legislative regulation."

Fifty years later, courts were still searching for the proper resolution of this problem. In *Phyle v. Duffy*, Phyle had been sentenced to death for first degree murder by a California Superior Court. Phyle challenged the California procedures that found him sane and able to be executed. Phyle contended that he was about to be executed only because a state doctor had concluded that he had been restored to sanity. However, the doctor did not conduct any hearings on the matter, nor was Phyle ever given the opportunity to have an original court hearing or a judicial review of the doctor's decision. Phyle argued that this procedure denied him due process of

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139. See infra notes 140-73 and accompanying text.
140. 168 U.S. 398, 405 (1897).
141. Id. at 399.
142. Id. (quoting Petition of Plaintiff at —).
143. Id. at 401.
144. Id. at 405.
145. Id. at 409.
146. Id.
147. See infra notes 157-60 and accompanying text.
148. 334 U.S. 431 (1948). The Superior Court decision had been affirmed by the California Supreme Court. Id.
149. Id. at 432.
150. Id. at 433. Section 1367 of the California Penal Code provides:

A person cannot be tried or adjudged to punishment while such person is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.

CAL. PENAL CODE § 1367 (West 1986).
151. Id. at 433.
152. Phyle, 334 U.S. at 433.
law as guaranteed by the fourteenth amendment.\textsuperscript{153} Under the California Penal Code, the entire issue of sanity was solely dependent upon whether the warden had “good reason to believe” that the defendant was insane.\textsuperscript{154} In compliance with the court’s decision of insanity, Phyle’s execution date was suspended and he was sent to the state hospital.\textsuperscript{155} However, eighteen days later, the medical superintendent found Phyle sane, and a new execution date was set.\textsuperscript{156}

As in Nobles,\textsuperscript{157} the central issue in Phyle was whether the sanity of a defendant who had already been sentenced to death had to be redetermined by an additional judicial proceeding to constitute due process.\textsuperscript{158} In its analysis, the Phyle Court reasoned that since the attorney general was the state’s highest non-judicial legal officer, his statement that Phyle had not tried to take advantage of the insanity plea deserved “great weight.”\textsuperscript{159} The Court, relying on Nobles, noted that “due process of law had never necessarily envisioned a full court hearing every time the insanity of a condemned defendant was suggested.”\textsuperscript{160}

A governor’s power to determine a prisoner’s sanity was again brought under attack two years later in Solesbee v. Balkcom.\textsuperscript{161} The Court held that the standards of due process had been met under the Georgia statutes governing procedures for determining a prisoner’s sanity.\textsuperscript{162} The Court agreed with the Georgia Supreme Court’s rea-

\textsuperscript{153} Id. at 433-34.

\textsuperscript{154} \textsc{Cal. Penal Code} § 3701 (West 1986). Pursuant to section 3701, the warden must give notice to the district attorney if a prisoner is believed to be insane. \textit{Id.} At this point, the court must immediately summon and impanel a regular jury of 12 persons to hear the insanity inquiry. \textit{Id.} Under section 3703 of the California Penal Code, if the defendant is found insane, the defendant’s death sentence is suspended and the defendant is taken to a medical facility of the Department of Corrections to remain until sanity is restored. \textit{Id.} § 3703.

\textsuperscript{155} \textit{Phyle}, 334 U.S. at 435.

\textsuperscript{156} \textit{Id.} at 436. Once the medical superintendent certifies that the defendant is sane, the defendant is remanded to the custody of the warden for execution, and that order cannot be suspended except by the act of the governor or the warden of the state prison. \textit{Id.} at 437.

\textsuperscript{157} See supra notes 139-46 and accompanying text.

\textsuperscript{158} \textit{Phyle}, 334 U.S. at 433.

\textsuperscript{159} \textit{Id.} at 441.

\textsuperscript{160} \textit{Id.} at 443. The Court further reasoned that a defendant cannot, without regard for society’s interests, call for delays in execution on the sole basis of a lack of full judicial inquiry. \textit{Id.}

\textsuperscript{161} 339 U.S. 9, 10 (1950). George Solesbee had been convicted of murder and sentenced to death by electrocution. \textit{Id.} at 9. He had requested a postponement of death due to post-conviction insanity and contended that the fourteenth amendment required that this insanity claim be decided by a judicial or administrative tribunal. \textit{Id.} at 9-10.

\textsuperscript{162} \textit{Id.} at 14. Under the Georgia statutes, “[n]o person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity.” \textsc{Ga. Code Ann.} § 27-2601 (1931). Section 27-2602 states: “Upon satisfactory evidence
soning that a "person legally convicted and sentenced to death had no statutory constitutional right to a judicially conducted or supervised 'inquisition or trial' on the question of insanity subsequent to sentence."  

Although the Court recognized the possibility of error in the determination of sanity, it held that due process had not been offended because "society must have power to try, convict, and execute sentences."  

A somewhat different approach to the issue of a governor's right to decide between life and death for a condemned prisoner was taken in Caritativo v. California. Pursuant to a California statute, the warden had the duty to advise the district attorney if there was reason to believe a prisoner was insane. The warden in Caritativo did not believe that the petitioners were insane and therefore never submitted the issue to a jury. Based solely on the authority of Solesbee, the Court upheld the warden's conclusions.  

In a strong dissent, Justice Frankfurter, joined by Justices Douglas and Brennan, vehemently argued that the warden alone should not be able to decide the fate of a condemned person. Justice Frankfurter insisted on an established procedure that required the warden to listen to claims of insanity. In support of this belief, Justice Frankfurter asserted: "Surely the right of an insane man not to be executed, a right based on moral principles deeply embedded in the traditions and feelings of our people and itself protected by the Due Process Clause of the Fourteenth Amendment, merits the procedural protection that Amendment safeguards." Justice Frankfurter further stressed that the right to be heard in a life and death matter far outweighed the inconvenience that society would bear.  

Thus, although the general rule has been against the execution of the presently incompetent, it has been argued there is no violation of a condemned prisoner's constitutional rights if there is not a full

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164. Id. 339 U.S. at 13. The Court further states: "We cannot say that it offends due process to leave the question of a convicted person's sanity to the solemn responsibility of a state's highest executive with authority to invoke the aid of the most skillful class of experts on the crucial questions involved." Id. § 27-2602.
165. Id. at 549, 550-51 (1958) (Harlan, J., concurring).
166. Id. at 550 (Harlan, J., concurring).
167. Id. at 551 (Harlan, J., concurring).
168. Id. at (per curiam).
169. Id. at 552 (Frankfurter, J., dissenting).
170. Id. at 557 (Frankfurter, J., dissenting).
171. Id.
172. Id. at 558 (Frankfurter, J., dissenting).
hearing every time sanity is questioned.\textsuperscript{173}

\section*{ANALYSIS}

Although many cases and articles have addressed the question of whether the death penalty is cruel and unusual under the Eighth Amendment,\textsuperscript{174} considerably less authority exists regarding the issue of the constitutionality of the execution of a prisoner found to be insane after exhausting all legal avenues of relief. In \textit{Ford v. Wainwright},\textsuperscript{175} the United States Supreme Court expanded the already controversial questions surrounding the death penalty and addressed an issue it had never before faced — whether the Constitution forbids the execution of the insane.\textsuperscript{176} This Note concludes that a study of the imposition of the death penalty demonstrates that the Eighth Amendment does not prohibit the execution of insane prisoners after they have exhausted all possible legal remedies.\textsuperscript{177}

The facts in \textit{Ford} clearly support the proposition that the Eighth Amendment does not prohibit the execution of prisoners who plead post-conviction insanity. At no time during the many years of legal proceedings did Ford or his counsel suggest that Ford may have been incompetent.\textsuperscript{178} Yet, ten days prior to his scheduled execution, a series of motions were filed by Ford's counsel as a last attempt to have Ford's execution stayed.\textsuperscript{179} The United States Supreme Court granted Ford's petition for certiorari "in order to resolve the important issue of whether the Eighth Amendment prohibits the execution of the insane."\textsuperscript{180} In keeping faith with common-law principles, the Court, in a 5-4 decision, felt "compelled" to hold that the Eighth Amendment forbids the execution of the insane prisoner.\textsuperscript{181} As a result of this decision, Ford's execution was stayed.\textsuperscript{182}

When resolving the issue of whether the execution of an insane prisoner is cruel and unusual, the Court has stated that it cannot rely on "[l]urid descriptions of the death scene [that] have painted a horrible picture of the execution. . . . A description of the execution scene which revolts and repels is no more valid a basis upon which to

\begin{thebibliography}{99}
\bibitem{} See supra notes 63-67 and accompanying text.
\bibitem{} See supra note 3 and accompanying text.
\bibitem{} 106 S. Ct. 2595 (1986).
\bibitem{} Id. at 2598.
\bibitem{} See infra notes 224-41 and accompanying text. This Note concludes that the death penalty, if imposed at all, should be enforced against all prisoners equally.
\bibitem{} Ford, 106 S. Ct. at 2598.
\bibitem{} Brief for Respondent at 7-8, \textit{Ford}.
\bibitem{} Ford, 106 S. Ct. at 2599.
\bibitem{} Id. at 2602.
\bibitem{} Id. at 2606.
\end{thebibliography}
make a decision than is the gore of the criminal homicide scene."\textsuperscript{183} The analysis must not be driven by personal beliefs regarding the "morality and efficacy of the death penalty," but must focus solely upon the language and the intent of the eighth amendment.\textsuperscript{184}

As a means of dissecting the uncertain language of the eighth amendment, the history and purpose behind the death penalty must be analyzed. The prohibition of cruel and unusual punishment has existed since 1689 when the English Bill of rights was drafted by Parliament.\textsuperscript{185} The cruel and unusual clause was later adopted into the eighth amendment of the Constitution.\textsuperscript{186} The amendment's explicit language, in addition to records of its legislative history, indicates that the primary concern of the amendment was the prevention of torture and not the elimination of capital punishment.\textsuperscript{187} Therefore, a punishment that was "clearly permissible" when the Constitution was adopted and that is still accepted by the Court today cannot be "incompatible with the Eight Amendment."\textsuperscript{188} Courts have recognized the anguish that is experienced by prisoners while awaiting execution but have also noted that if every punishment that produced emotional anxiety was considered cruel, then all punishments that created suffering would be cruel and impermissible.\textsuperscript{189}

Prior to \textit{Ford}, no Court had ever concluded that the eighth amendment prohibits the execution of insane prisoners.\textsuperscript{190} In prior cases, the Court merely focused on the precedent of common law as a basis for upholding the death penalty.\textsuperscript{191} For example, in \textit{Trop v. Dulles},\textsuperscript{192} Chief Justice Warren stated that "[w]hatever the arguments may be against capital punishment . . . the death penalty has

\begin{footnotes}
\footnotetext[184]{Id. at 375 (Burger, C.J., dissenting).}
\footnotetext[185]{Granucci, \textit{"Nor Cruel and Unusual Punishments Inflicted: The Original Meaning}, 57 CALIF. L. REV. 839, 855 (1969).}
\footnotetext[186]{See supra note 80 and accompanying text.}
\footnotetext[187]{Furman, 408 U.S. at 377 (Burger, C.J., dissenting). The attempt to establish the framers' intentions may lead to four obstacles. Bedau, \textit{Thinking of the Death Penalty as a Cruel and Unusual Punishment}, 18 U.C. DAVIS L. REV. 873, 893 (1985). The problems involved in determining the framers' intent include: (1) there is no text showing the framers' shared intentions in incorporating the cruel and unusual punishment clause into the eighth amendment; (2) the framers did not leave any statements regarding their understanding of the clause; (3) the framers left no specification as to what constituted prohibited punishment under the clause; and (4) the framers provided no "exhaustive catalogue" of punishments considered prohibited under the clause. \textit{Id.} at 893.}
\footnotetext[188]{Furman, 408 U.S. at 381-82 (Burger, C.J., dissenting).}
\footnotetext[189]{Id. at 382 (Burger, C.J., dissenting).}
\footnotetext[190]{\textit{Ford}, 106 S. Ct. at 2598.}
\footnotetext[191]{See infra notes 192-94 and accompanying text.}
\footnotetext[192]{356 U.S. 86 (1958).}
\end{footnotes}
been employed through our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.\textsuperscript{193} Approximately thirteen years later, Justice Black also expressed his interpretation of what he believed the framers intended, and stated that the words "cruel and unusual" could not be "read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which ancestors came at the time the Amendment was adopted."\textsuperscript{194}

The imposition of capital punishment serves six recognized purposes: retribution, deterrence, prevention, restraint, rehabilitation, and education.\textsuperscript{195} There are also several justification's for the common-law rule against the execution of insane prisoners: (1) an insane person is unable to assist counsel in an attempt to prevent the sentence from being imposed;\textsuperscript{196} (2) the person's sanity is punishment in itself;\textsuperscript{197} (3) humanitarian ideas prohibit the execution of the insane;\textsuperscript{198} (4) executing the insane would not served as an example to others;\textsuperscript{199} (5) retribution would not be served because the prisoner would not be able to understand the inflicted punishment;\textsuperscript{200} and (6) an insane prisoner should not be executed while incapable of making peace with that prisoner's maker.\textsuperscript{201}

Although the \textit{Ford} Court recognized the common-law purposes and felt "compelled" to adhere to these principles, it failed to apply the common-law purposes to the facts and merely upheld them without further analysis.\textsuperscript{202} The Court has stated that the two primary social purposes are retribution and deterrence.\textsuperscript{203} Although the Court claimed to upheld common-law principles, the purposes of retribution and deterrence are not served by the \textit{Ford} decision.\textsuperscript{204}

\textbf{Deterrence and Retribution}

Deterrence is a common-law theory premised on the idea that

\textsuperscript{193} \textit{Id.} at 99.
\textsuperscript{194} \textit{McGautha} v. California, 402 U.S. 183, 226 (1971) (Black, J., concurring).
\textsuperscript{195} \textit{See supra} note 75 and accompanying text.
\textsuperscript{196} \textit{See supra} note 47 and accompanying text.
\textsuperscript{197} \textit{See supra} note 48 and accompanying text.
\textsuperscript{198} \textit{See supra} note 49 and accompanying text.
\textsuperscript{199} \textit{See supra} note 50 and accompanying text.
\textsuperscript{200} \textit{See supra} note 51 and accompanying text.
\textsuperscript{201} \textit{See supra} note 52 and accompanying text.
\textsuperscript{202} \textit{Ford}, 106 S. Ct. at 2602. After merely mentioning the common-law rationales prohibiting the execution of condemned prisoners, the Court served directly to procedural questions without analyzing common law any further. \textit{Id.}
\textsuperscript{203} \textit{See supra} note 76 and accompanying text. The purposes that will not be addressed include prevention, restrain, rehabilitation and education. \textit{See supra} note 75 and accompanying text.
\textsuperscript{204} \textit{See infra} notes 205-09 and accompanying text.
punishing persons who violate criminal laws will serve as a means of general prevention for the public.\textsuperscript{205} The deterrence theory is not served by the \textit{Ford} decision because prisoners may use the \textit{Ford} decision as a means to escape execution by merely claiming insanity.\textsuperscript{206} Arguably, prisoners will not be deterred from committing a crime when they know that a plea of insanity, even following conviction, will allow them to escape the ultimate fate of execution.\textsuperscript{207} Similarly, the \textit{Ford} decision defeats the purpose behind general deterrence for the public because it exemplifies how a person can commit a serious crime and avoid the penalty by pleading post-conviction insanity.

Retribution is a theory based on the belief that a criminal owes a duty to society.\textsuperscript{208} This theory fails to be served by the \textit{Ford} decision because if a prisoner's execution is stayed due to post-conviction insanity, the prisoner is not required to pay the debt to society but rather slips through a loophole in the criminal system.\textsuperscript{209}

\textbf{CLOSING THE LOOPTHOLE}

In \textit{Gregg v. Georgia},\textsuperscript{210} the Supreme Court concluded that the death penalty did not violate the eighth and fourteenth amendments under all circumstances.\textsuperscript{211} The \textit{Gregg} Court examined the circumstances of the crime, the character of the defendant, and the procedures followed in arriving at the decision to uphold the death penalty.\textsuperscript{212}

If the factors utilized by the \textit{Gregg} Court were applied in \textit{Ford}, Ford's claim of insanity would have had no basis.\textsuperscript{213} The circumstances of the crime and the procedures followed to impose to death penalty would remain unchanged.\textsuperscript{214} The only remaining relevant factor would be the defendant's character.\textsuperscript{215} The only time Ford's character would be at issue would be during the post-conviction period because Ford never suggested that he lacked the mental competency while committing the offense, during the trial, or at sentencing.\textsuperscript{216}

\textsuperscript{205} See supra note 78 and accompanying text.
\textsuperscript{206} See infra notes 228-29 and accompanying text.
\textsuperscript{207} See infra note 232 and accompanying text.
\textsuperscript{208} See supra note 77 and accompanying text.
\textsuperscript{209} See supra notes 73-74 and accompanying text.
\textsuperscript{210} 428 U.S. 153 (1976).
\textsuperscript{211} See supra note 115 and accompanying text.
\textsuperscript{212} See supra note 116 and accompanying text.
\textsuperscript{213} See infra notes 214-21 and accompanying text.
\textsuperscript{214} See supra note 116 and accompanying text.
\textsuperscript{215} See supra note 116 and accompanying text.
\textsuperscript{216} See supra note 12 and accompanying text.
In analyzing the post-conviction character of a defendant, the Fifth Circuit Court of Appeals devised a test in Gray v. Lucas.\(^{217}\) Although the Court recognized that there was no definite test utilized to afford a prisoner the constitutional right not to be executed while presently insane,\(^{218}\) it did look at the particular facts of the case and also at the character of the defendant.\(^{219}\) After examining the defendant's character, the court concluded that Gray, although psychotic, would not be deprived of his ability to understand the nature or purpose of his punishment.\(^{220}\)

The test in Gray focused on the character of the defendant at each procedural level.\(^{221}\) Relying on Solesbee, the Gray Court examined whether the prisoner's mental deficiencies would deprive him of the ability to understand the punishment and the act for which he was being punished.\(^{222}\) Arguably, these are the factors the Ford Court should have analyzed rather than merely upholding common-law principles. Using this test, the focus is on individual defendants and whether they understand the nature and purpose of the punishment so as to have retributive value. Applying the test in Gray to the Ford facts, Ford would have failed to bring himself under the protection of the Constitution because the three psychiatrists concluded that Ford understood the consequences of the death penalty and why he was being punished.

For over eleven years the facts of the Ford case were litigated.\(^{223}\) However, it was not until ten days prior to his scheduled execution date that Ford pleaded insanity.\(^{224}\) Using the factual analysis as set forth in Gray, Ford had a sufficient amount of time to comprehend and understand the nature and purpose of his punishment.\(^{225}\) Doctors' reports concluded that Ford, although psychotic, had "enough cognitive functioning to understand the nature and the effects of the death penalty and why it [was] to be imposed upon him."\(^{226}\) Although Ford argued that the Constitution prohibits the execution of the insane, the "constitutional rule prohibiting the trial of an incompetent defendant nor the constitutional doctrine guaranteeing a prisoner access to court would appear, by itself, to provide an independent constitutional argument for prohibiting the execution of
the presently incompetent.”

In *Ford*, Justice Rehnquist recognized the loophole in the majority opinion and stated in dissent that the execution of an insane prisoner does not constitute cruel and unusual punishment. He emphasized that the postponement of execution due to insanity “'bears a close affinity ... to reprieves of sentences in general.'”

Justice Rehnquist further argued that a postponement after a defendant had already been afforded a full trial would merely complicate the matter further and lead to “spurious claims of insanity.”

A condemned prisoner who pleads post-conviction insanity, as Ford did, has already exercised all constitutional rights to a fair trial and sentencing proceeding and “executing him while he is presently incompetent would not appear to take advantage of his mental disability to rob him of any constitutional rights.”

There are several reasons why a state, under similar circumstances, should be able to carry out a prisoner's sentence of death even though the prisoner has become incompetent following conviction. First, if a condemned prisoner has an unlimited right to the postponement of execution due to insanity, the process of execution will be interminable. A prisoner could repeatedly allege incompetency each time an execution date neared. If every condemned prisoner alleged insanity prior to each execution, the “state's ability to impose capital punishment would be completely frustrated.”

Second, there is an inconsistency in that there are those who support the death penalty for the sane, yet brand it as cruel and unusual for the insane. Such a position seems hypocritical. In *Phyle v. Duffy*, Justice Traynor criticized this inconsistent treatment, stating: “Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment of sane men, a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses?” The true issue...
seems to be whether it is less immoral to execute insane prisoners than it is to delay the execution until they understand the nature of the proceedings and then execute them. Third, the decision to stay the execution is only temporary, every state returns the condemned prisoner to death row upon restoration of sanity. Finally, death sentences must be carried out because if society does not punish criminals for their offensive conduct, people may resort to "self-help, vigilante justice, and lynching."
Gary Alvord is one such prisoner. Mr. Alvord has been sentenced to death for the murders of three women. However, his execution date has been stayed because he was deemed to be insane after his conviction. Alvord’s situation demonstrates the bizarre loophole created by the Ford decision. He is currently being treated for his insane condition at a hospital and “[t]he moment [Alvord] shows sign of sanity, the treatment team will give him a pat on the back for cooperating so well with the treatment and a ticket for the first leg of his trip back to death row.”

Alvord heightens the dilemma of the execution of insane prisoners. While the Court does not permit the insane to be executed, the Court does provide psychiatric treatment to the condemned person which, if successful, merely places the prisoner back on death row. Thus, the prisoner is cured to be killed.

CONCLUSION

As demonstrated by the condemned prisoners already seeking protection under Ford, one ramification of the Ford decision is that it has provided a loophole to the ultimate fate of execution. This loophole provides a great potential for “false [insanity] claims and deliberate delay.” What is clearly unique about the condemned prisoner’s claim is that it suspends the execution indefinitely. Secondly, the Ford decision has created a new dilemma because prisoners, such as Alvord, are being “cured to be killed.” If the courts do not allow society to try, convict, and execute sentences, and if courts base the right to execute a prisoner on present competency, then the real issue to be decided is whether the prisoner is insane at the precise instant of execution. However, the resolution of present competency is only conclusive at the very moment of execution.

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249. Alder, supra note 247, at 29.
250. See infra note 253 and accompanying text.
251. Alder, supra note 247, at 33.
252. Id. at 29.
253. Ford, 106 S. Ct. at 2612 (O’Connor, J., concurring and dissenting) (citing Nobles v. Georgia, 168 U.S. 398, 405-06 (1897)).
254. Id. at 2615 (Rehnquist, J., dissenting).
255. Hazard and Louisell, supra note 52, at 400.