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Virtually every state that authorizes the death penalty has adopted by case law, statute, or implication, the common law rule prohibiting the use of that sanction against an insane prisoner. Although

1. Eleven states no longer inflict the punishment of death as a criminal sanction. Two of these states have explicitly abolished capital punishment. Mich. Const. art. 4, § 46; W. Va. Code § 61-11-2 (1977). Nine other states authorize either life imprisonment or substantial prison terms as the maximum criminal penalty. ALASKA STAT. § 11.15.010 (1970); HAWAII REV. STAT. § 706-600 (1976); IOWA CODE Ann. § 902.1 (West Supp. 1978); ME. REV. STAT. tit. 17-A, § 1251 (Supp. 1978); MINN. STAT. ANN. § 609.185 (West Supp. 1977); N.D. CENT. CODE § 12.1-32-01 (1976); OR. REV. STAT. § 161.605 (1975); S.D. COMP. LAWS ANN. § 22-6-1 (1978); Wis. STAT. ANN. § 939.50 (West Supp. 1978). These 11 states are not relevant to the discussion in this Note and are, therefore, not included in any subsequent compilations of state procedures.

2. Four states have adopted in their case law the common law rule against executing insane prisoners. Although several states provide for the respite and execution of insane prisoners, the use of that sanction against an insane prisoner. Although


Two states provide only that the governor is empowered to suspend executions. IDAHO CODE § 19-2708 (1948 & Supp. 1973); N.H. REV. STAT. ANN. § 4:24 (1970). However, Idaho dictates that the English common law is applicable in all courts of the state, absent a specific statutory provision, Idaho CODE § 73-116 (1973), and the common law provides that no insane person can be executed, see p. 535 & note 11 infra. New Hampshire, on the other hand, creates a strong presumption that a convicted prisoner will not be executed while insane. N.H. REV. STAT. ANN. § 4:24 (1970) ("The governor, with the advice of the council, may respite . . . the execution of a sentence of death upon a convict . . . if it appears to their satisfaction that the convict has become insane.")

Only Texas and Vermont are apparently without any current statutory provisions or case law addressing the execution of insane prisoners.
the procedures employed to implement this rule vary considerably,5 most states relegate the initial evaluation of a prisoner’s insanity claim to the exclusive discretion of a prison administrator.6 After a determination that the prisoner has raised a credible insanity claim, the administrator usually reports to a state executive official or state court judge, who initiates a proceeding to examine the prisoner’s sanity.7 If found to be sane, the prisoner is returned to the state prison for execution; if found to be insane, the prisoner is sent to a state mental hospital until he regains his sanity and can be returned to prison for execution.8

Although this procedure has been upheld as constitutionally sufficient by the United States Supreme Court, only three opinions have been written on the issue in the last eighty-two years,9 and the latest was written in 1958. The Supreme Court has subsequently prescribed more stringent constitutional guidelines governing both state procedures involving capital punishment and procedures threatening the deprivation of due process of law.10 This Note argues that the previously approved state procedures for assessing the sanity of prisoners sentenced to death are inadequate when analyzed in light of these more recent decisions, and that more extensive procedural protections are constitutionally required to protect both the convicted prisoner’s right not to suffer cruel and unusual punishment and his right to due process. In addition, the Note proposes a framework of procedural safeguards designed to protect the rights of condemned prisoners to raise the issue of insanity and to have that claim properly evaluated.

7. See pp. 539-40 infra.
8. See H. Weihofen, Mental Disorder as a Criminal Defense 468-70 (1954). This Note does not directly address the constitutional implications of the procedures used in returning prisoners to prison upon the restoration of sanity, although much of the same reasoning concerning the condemned prisoner’s initial sanity claim is most probably applicable. Cf. pp. 544-48 infra (advocating minimum procedural due process requirements of notice, hearing, and proper balancing); pp. 550-52 infra (applying requisite procedural standards in capital cases to condemned prisoner’s insanity claim).
10. See pp. 544-50 infra.
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I. Development and Extent of Contemporary Procedures

The substantive policy against executing the insane has its origin deep in the common law. Analysis of the rationale underlying this policy and of the procedures that have traditionally implemented it illuminates the need for constitutional safeguards.

A. The Common Law and Constitutional Justification

The common law provided that no insane person could be executed. Although the rationale for the rule is obscure, a number of explanations have been advanced. It has been suggested, for example, that an insane prisoner may be unable to reflect intelligently on his crime, his trial, and the proceedings employed after trial. Without such reflection, the prisoner is deprived of the opportunity to devise reasons for a stay of execution. Similarly, executing a prisoner who is unable to reflect on his conduct and predicament has been viewed as depriving him of his last opportunity to make his peace with God.

It has also been suggested that executing an insane prisoner is forbidden because such executions would insignificantly serve the societal interests in deterrence and retribution. As one commentator has suggested, the spectacle of an insane man’s execution is perhaps too “miserable” a sight to serve any public educational purpose.


12. See Hazard & Louisell, Death, The State, and The Insane: Stay of Execution, 9 U.C.L.A. L. Rev. 381, 381-89 (1962) (thorough analysis of purposes underlying common law rule). The authors contend that “[t]he very multiplicity of explanations [for the common law rule] suggest that the rule may have been devised to meet an earlier theoretical or practical need or social consensus and has survived the obsolescence of the originating cause.” Id. at 383 (footnote omitted).


15. E. Coke, supra note 11, at 6. Contra, Hawles, supra note 11, at 652 (arguing that execution of madman will strike terror into others, “for the Terror to the living is equal, whether the Person be mad or in his Senses”).
and deferring the execution will not significantly diminish the general deterrent effect of capital punishment. Moreover, some believe that executing an insane prisoner would not satisfy society's need for catharsis and revenge, because a retributive society is unable to exact a life of equal value to the one taken.

There also may be constitutional justifications for excusing the insane from execution, although the Supreme Court has never directly addressed this issue. Justice Frankfurter, for example, argued that the states' uniform adoption of the common law rule grants the insane a Fourteenth Amendment due process right not to be executed. In addition, execution of the insane may violate the Eighth and Fourteenth Amendments as a cruel and unusual punishment.

16. The theory suggests that the potential offender is not deterred by the execution of an insane prisoner because he cannot empathize with the plight of the insane convict. See Hazard & Louisell, supra note 12, at 384-86.

17. Retribution serves in part as a release for the law-abiding citizenry because it counteracts a subconscious temptation to break the law. Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in the Death Cell*, 73 Yale L.J. 425, 435 (1964). For this release to be effective, however, society must be able to identify with the prisoner, and such identification is impossible if the prisoner is insane. Hazard & Louisell, supra note 12, at 387.

In addition, retribution "is an expression of society's moral outrage at particularly offensive conduct." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (footnote omitted). Yet, by executing an insane prisoner, society may be punishing a person who, for all moral purposes, is not the same person who committed the crime. See Solesbee v. Balkcom, 339 U.S. 9, 19 (1950) (Frankfurter, J., dissenting) (questioning both whether insane prisoner is still himself and whether he is same man who was convicted for crime). But see White, *A Prison Psychosis in the Making*, 4 J. Am. Inst. Crim. L. & Criminology 237, 244 (1913) (psychosis causing prisoner's present insanity may in fact be same mental state or stressful reaction that occurred when person committed crime).

18. See Note, Incompetency to Stand Trial, 81 Harv. L. Rev. 454, 458-59 (1967) ("[T]he societal goal of institutionalized retribution may be frustrated when the force of the state is brought to bear against one who cannot comprehend its significance.") (footnote omitted). But see Ehrenzweig, supra note 17, at 437-38 (society's primitive desire for revenge is not deprived by execution of insane prisoners because society simply desires extermination of criminal, whether sane or not); Hazard & Louisell, supra note 12, at 386 (same).

19. See Solesbee v. Balkcom, 339 U.S. 9, 11 (1950) (limiting review to question of whether Georgia procedure employed to determine sanity of convicted prisoner offends due process); Nobles v. Georgia, 168 U.S. 398, 403-06 (1897) (issue for review is not whether insane person can be executed, but rather what procedures should be used to determine whether convict is insane).


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Under the standard outlined by Justice Marshall in his concurrence in *Furman v. Georgia*, execution of an insane prisoner would constitute cruel and unusual punishment because the insane were not executed at the time the Constitution was adopted, because the punishment is unusual, excessive, and serves no valid legislative purpose, and because popular sentiment is strongly opposed to such use of the punishment.

B. Existing Procedures for Determining the Sanity of the Condemned

Although almost every state, by case law or statute, has adopted the common law rule that a convicted prisoner cannot be executed while insane, the common law provides scant guidance for resolving the three basic issues involved in evaluating the condemned prisoner's sanity: (1) how the insanity claim is raised, (2) under what procedures the claim's validity is determined, and (3) according to what standard of insanity the claim is evaluated. In attempting to resolve these questions, the states have constructed different systems for determining whether or not the condemned prisoner is insane.
1. **Raising the Issue of Insanity**

The English common law allowed the issue of a condemned prisoner's insanity to be raised in the form of a simple motion to the court having jurisdiction over the prisoner.28 Some states have adopted this common law procedure without alteration.29 Other states require that a claim of insanity be made to the state governor.30 Twenty states, however, allow the issue of insanity to be raised only by the warden or sheriff having custody of the prisoner.31 In many of these states the prisoner's sanity will be examined only after a reasonable doubt has arisen in his custodian's mind.32 The manner in which such doubt can be implanted in the sheriff's or warden's mind, however, is uniformly left unstated. Consequently, it is unclear whether a warden or sheriff in these states can be compelled to inquire into a prisoner's sanity.33


30. Georgia, for example, provides that “[u]pon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, in his discretion, have said person examined.” Ga. Code Ann. § 27-2602 (1978). Five other states (Florida, Maryland, Massachusetts, New Hampshire, and New York) grant similar power to their chief executive. See, e.g., Fla. Stat. §§ 922.06-07 (1974); N.H. Rev. Stat. Ann. § 4:24 (1970).

31. There are 17 states (Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Indiana, Kansas, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Utah, and Wyoming) that permit sanity determinations only if the convict awaiting execution appears to the warden or the sheriff to be insane. See, e.g., Conn. Gen. Stat. § 54-101 (1977); Nev. Rev. Stat. § 176.425 (1977). South Carolina has a similar restriction, but it also permits others to raise the issue of insanity. S.C. Code § 44-23-210 (1976 & Supp. 1977) (issue can be raised either by superintendent of state mental health facility or warden). Two other states (Kentucky and Virginia) imply that the warden must raise the issue of insanity, because the warden is solely responsible for initiating the sanity hearing. Ky. Rev. Stat. § 431.240 (Supp. 1978); Va. Code § 19.2-177 (1975).

32. See, e.g., Ark. Stat. Ann. § 43-2622 (1964) (superintendent of penitentiary must be satisfied there are “reasonable grounds” for believing condemned prisoner is insane); Mo. Ann. Stat. § 552.060 (Vernon Supp. 1978) (warden must have “reasonable cause” to believe insanity).

33. See Hazard & Louisell, supra note 12, at 390 (in most states it is “unsettled whether mandamus will lie against a warden who is alleged to have wrongfully refused to initiate the inquiry”). Compare Caritativo v. California, 357 U.S. 549, 550 (1958) (Harlan, J., concurring) (warden has mandatory duty continually to check on condemned persons' mental condition) with id. at 555 (Frankfurter, J., dissenting) (no remedy available if warden fails to perform his duties properly).
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2. **Analyzing the Insanity Claim**

Once doubt as to the condemned prisoner's sanity has arisen, the states provide several different procedures for evaluating the merits of the insanity claim. A number of states have adopted the common law rule that permits the reviewing court to select the appropriate procedure in its discretion.\(^{34}\) Other states either regulate the procedure by statute\(^{35}\) or delegate the decision to the discretion of a state official such as the governor,\(^{36}\) the warden,\(^{37}\) or the state hospital director.\(^{38}\)

No state confers an absolute right on a prisoner to have a trial on the issue of his present sanity, although some states do require a trial after a plausible claim to insanity has been raised.\(^{39}\) Many states do not provide for a trial at all, but rather provide that physicians or psychiatrists be appointed to examine any prisoner presenting a reasonable insanity claim.\(^{40}\) If the medical experts agree that the prisoner

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\(^{34}\) See Solesbee v. Balkcom, 339 U.S. 9, 13 (1950) (restating common law rule); Nobles v. Georgia, 168 U.S. 398, 407 (1897) (same); H. Weihofen, supra note 8, at 465 (same). But see 4 W. Blackstone, supra note 11, at *425 (jury trial on questions of insanity is necessary).

Four states (Louisiana, Pennsylvania, Tennessee, and Washington) have adopted the common law rule in their case law. See note 2 supra (citing cases). Four additional states (Alabama, New Jersey, New Mexico, and Ohio) have a statutory rule similar to the Rhode Island provision that "the presiding justice of the superior court, or in his absence any justice of the superior court, may order such examination of said person as in his discretion he shall deem proper." R.I. Gen. Laws § 26-4-9 (1968); see, e.g., N.J. Stat. Ann. § 2A:165-11 (West 1971); N.M. Stat. Ann. § 41-14-4 (1964).


is insane, he will be committed, often without a trial or a hearing,\textsuperscript{41} to a mental health facility.

If a trial or hearing is initiated, the mode of inquiry varies among the states. If a trial is granted, it may be by jury\textsuperscript{42} or by the court;\textsuperscript{43} if a less formal hearing is prescribed, it may include many of the procedural safeguards of a trial\textsuperscript{44} or it may be a simple ex parte proceeding.\textsuperscript{45}

3. The Standard of Insanity

At common law, the test of insanity was whether the condemned man was aware of his conviction and the nature of his impending fate.\textsuperscript{46} Most states, however, have not adopted this test and have omitted any reference to the standard of insanity that is to be used. It is possible that the state's legal definition of insanity as used in other stages of the criminal justice system is regarded as sufficient.\textsuperscript{47}

\begin{enumerate}
  \item Thirteen states (Arkansas, Colorado, Connecticut, Delaware, Georgia, Kansas, Kentucky, Maryland, Massachusetts, Mississippi, Nebraska, South Carolina, and Virginia) do not require a trial or hearing on the medical examiners' reports. See, e.g., DEL. CODE ANN. tit. 11, § 406 (1974) ("[s]hould the report of the physicians be that the prisoner is mentally ill, he shall at once be ordered . . . to the Delaware State Hospital"); NEB. REV. STAT. § 29-2537 (1975) ("[i]f two of the commission shall find the convict insane, the judge shall suspend his execution").

  \item Four states (Arizona, California, Oklahoma, and Wyoming) require a jury trial after plausible evidence of insanity has been presented. See, e.g., CAL. PENAL CODE § 3701 (West 1970); WYO. STAT. § 7-13-901 (1977). Three other states provide that a jury trial may be held at the court's discretion (Alabama, Ohio) or with the concurrence of the court and the county sheriff (Utah). ALA. CODE § 15-16-23 (1975); OHIO REV. CODE ANN. § 2949.28 (Page 1975); UTAH CODE ANN. § 77-36-9 (1953).

  \item There are seven states (Illinois, Missouri, Montana, Nevada, New Jersey, New Mexico, and North Carolina) that provide a trial by the court. See, e.g., Mo. ANN. STAT. § 552.060 (Vernon Supp. 1978); MONT. REV. CODES ANN. §§ 95-2304, 506 (1969 & Supp. 1977).

  \item E.g., MONT. REV. CODES ANN. §§ 95-2304, 506 (1969 & Supp. 1977) (providing each party to sanity hearing rights to summon and cross-examine examining psychiatrists and to offer evidence); NEV. REV. STAT. § 176.435 (1977) (same).

  \item An ex parte hearing is conducted upon application of the state representative, without notice to the prisoner. See, e.g., Mo. ANN. STAT. § 552.060 (Vernon Supp. 1978) (warden required to notify only court, prosecuting attorney, state mental diseases director, and attorney general, each of whom may examine prisoner); N.M. STAT. ANN. §§ 41-14-4 to -5 (1964) (requiring attendance of only district attorney who may produce witnesses). The ex parte hearing, therefore, lacks many essential elements of an adversary trial, including notice, an opportunity to present evidence, an opportunity to confront and cross-examine witnesses, and the right to counsel.

  \item Hazard & Louisell, supra note 12, at 394 & n.44. Another way of stating this standard of insanity is whether the convicted prisoner is "‘aware of the proceedings against him.’” Id.

  \item The Montana statutory scheme, for example, states that "‘the mental fitness of the defendant [under sentence of death] will be determined in accordance with the provisions of chapter 5, Competency of the Accused.” MONT. REV. CODES ANN. § 95-2304 (1969 & Supp. 1977). But see note 168 infra (reviewing other insanity and competency tests, and demonstrating failure of these tests to relate to circumstances of condemned prisoner's insanity).
\end{enumerate}
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are a few states, however, that have attempted to set a specific standard of insanity for this stage of the criminal justice process. One such test is whether the prisoner can intelligently understand his crime, the nature of the proceedings against him, the purposes and extent of his punishment, and any fact that might make his punishment unjust or unlawful. The test also requires that the prisoner possess the intelligence to convey such information to his attorney or to the court.

II. The Supreme Court's Analysis of State Practices

A. The Cases

The United States Supreme Court has considered three constitutional challenges to the procedures employed in deferring the execution of insane prisoners. In each of these cases the Court upheld the constitutionality of the suspect state procedure. The petitioner in Nobles v. Georgia, who had been sentenced to death, was the first allegedly insane person to claim a right to a jury trial on the issue of her sanity. At that time, the Georgia procedure required the sheriff, at his discretion, to initiate an inquiry by a jury and report the results to the sentencing court. In upholding the procedure, the Supreme Court explained that because the common law had provided no right to a jury trial on the issue, the Georgia legislature was free to adopt whatever procedures it desired.


Four other states (Florida, Illinois, Missouri, and New Jersey) have included a test for insanity for this purpose in their statutes. See, e.g., FLA. STAT. § 922.07 (1974) (whether convicted prisoner "understands the nature and effect of the death penalty and why it is to be imposed upon him"); Mo. ANN. STAT. § 552.060 (Vernon Supp. 1978) (prisoner shall not be executed "if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out").


50. 168 U.S. 398 (1897).

51. Id. at 402-03. The procedures to be used at this inquiry were not delineated in the statute, but the Court implied that the procedures would entail less procedural safeguards than a criminal jury trial. Id. at 405.

52. Id. at 409.
Fifty-three years later, in *Solesbee v. Balkcom*, the Supreme Court again evaluated the procedures used to review a condemned prisoner's insanity claim. The case involved a revised Georgia statute that provided that the governor, if presented with satisfactory evidence that a person awaiting execution had become insane, could, in his discretion, select physicians to examine the prisoner. The Supreme Court rejected an attack on the procedure and affirmed the state court's assertion that the exemption from execution conferred on insane prisoners was a matter of grace, not of right. The Court analogized the postponement of execution to the state executive's unreviewable power to grant reprieve or pardon.

Justice Frankfurter, dissenting in *Solesbee*, argued that the right of a prisoner not to be executed while insane is protected by the due process clause of the Fourteenth Amendment against arbitrary procedures that may jeopardize that right. He concluded that a condemned prisoner claiming insanity should be afforded at least the right to a hearing.

The last of the three cases, *Caritativo v. California*, involved California's statutory provision vesting the warden with sole responsibility for initiating a judicial inquiry into a prisoner's sanity. The California Supreme Court had ruled that under state law the courts lacked jurisdiction to consider the sanity of a condemned prisoner

54. Id. at 10 n.1.
55. Id. at 10-11 (quoting *Solesbee v. Balkcom*, 205 Ga. 122, 126, 52 S.E.2d 433, 436 (1949)).
56. Id. at 11-12. In deciding not to extend the procedural safeguards available at trial to the postconviction sanity determination, the Court relied on its then recent holding in *Williams v. New York*, 337 U.S. 241 (1949), cited in *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950). In *Williams*, the Court held that it was not a denial of due process for a sentencing judge to use information supplied by witnesses that the accused could not confront or cross-examine, even though the judge imposed a death sentence over a jury recommendation of mercy. 337 U.S. at 252. *Williams* has recently been distinguished, however, by the Supreme Court in *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion of Stevens, J.). In that case, Justice Stevens, joined by Justices Stewart and Powell, asserted that Gardner was denied due process of law when his death sentence was imposed on the basis of information that he had no opportunity to deny or explain. Id. at 362. The opinion substantially undercut the reasoning in both *Williams* and *Solesbee* by stating that constitutional developments in the areas of capital punishment and due process require greater procedural protections for individuals convicted of capital crimes than for those found guilty of lesser crimes. Id. at 355-62.
58. Id. at 23-26.
59. 357 U.S. 549 (1958) (per curiam).
60. CAL. PENAL CODE §§ 3700-3701 (Deering 1941), quoted at 357 U.S. at 553-54 (Frankfurter, J., dissenting) (current version at CAL. PENAL CODE §§ 3700-3704.5 (West 1970 & Supp. 1978)).
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unless the warden initiated an inquiry into the prisoner’s sanity.\textsuperscript{61} In a one sentence, per curiam opinion that cited Solesbee, the United States Supreme Court affirmed the California court’s decision.\textsuperscript{62} Three justices, however, dissented from the Caritativo decision and one justice wrote a separate, concurring opinion. Justice Harlan’s concurrence argued that the California statute imposed upon the warden mandatory duties both to check the prisoner’s mental condition continually, and to make a responsible, good faith determination whether a judicial inquiry into sanity was necessary.\textsuperscript{63} Justice Frankfurter, joined by Justices Douglas and Brennan, dissented.\textsuperscript{64} Noting that the warden’s decision is both final and ex parte,\textsuperscript{65} he argued that the Constitution demands that the prisoner be granted a better opportunity to present his claim of insanity, although not necessarily in a formal adversary hearing or in a judicial proceeding.\textsuperscript{66}

B. Constitutional Shortcomings of Present Procedures

The Supreme Court has not considered the constitutional validity of procedures governing the insanity claims of condemned prisoners since 1958. A de facto moratorium on executions\textsuperscript{67} has concealed the issue during much of this time. The Court’s recent validation of the death penalty in Gregg v. Georgia,\textsuperscript{68} however, increases the likelihood

\textsuperscript{61} Caritativo v. Teets, 47 Cal. 2d 304, 303 P.2d 339 (1956), aff’d sub nom. Caritativo v. California, 357 U.S. 549 (1958). The California court refused to issue a writ of mandate to compel the warden to institute sanity proceedings. The court reasoned that the method of determining insanity was controlled by the state legislature, and that the method then in force did not permit the courts to suspend execution in order to investigate a prisoner’s sanity independently. A judicial proceeding was allowed under California procedure only after the warden had determined that one was necessary. \textit{Id.} at 306-07, 303 P.2d at 341; accord, People v. Riley, 37 Cal. 2d 510, 514-16, 235 P.2d 381, 384-85 (1951); \textit{In re Phyle}, 30 Cal. 2d 838, 847, 186 P.2d 134, 139-40 (1947), cert. dismissed, 334 U.S. 431 (1948).

\textsuperscript{62} 357 U.S. at 550.

\textsuperscript{63} \textit{Id.} at 550 (Harlan, J., concurring). Justice Harlan conceded that the prisoner was not guaranteed an opportunity to present his case to the warden, but claimed that once a judicial proceeding was initiated, the prisoner should have the opportunity to present his case, \textit{Id.}

\textsuperscript{64} \textit{Id.} at 552 (Frankfurter, J., dissenting).

\textsuperscript{65} \textit{Id.} at 556 (no obligation to afford “the condemned man, his counsel, or family, any opportunity whatsoever to present evidence or arguments highly relevant to the proper disposition of the case”).

\textsuperscript{66} \textit{Id.} at 556-59.

\textsuperscript{67} There were no executions in the United States from June 1967, until January 17, 1977, when Gary Gilmore was executed in Utah. \textit{See H. Bedau, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT} xiii, 62, 121 (1977).

\textsuperscript{68} 428 U.S. 153 (1976) (plurality opinion). In Gregg, Justices Stewart, Powell, and Stevens joined in the plurality opinion. Four other justices concurred in the judgment. \textit{See id.} at 207 (White, J.); \textit{id.} at 226 (Burger, C.J., and Rehnquist, J.); \textit{id.} at 227 (Blackmun, J.). Justices Brennan and Marshall dissented. \textit{See id.} (Brennan, J.); \textit{id.} at 231
that capital punishment will be renewed and that the insanity claims of condemned prisoners will again become an important issue. The long-dormant state procedures for dealing with these insanity claims, therefore, will also become significant.

Two recent series of Supreme Court cases, decided in the last decade, engender substantial doubt about the continued viability of these previously sustained procedures. The first series of cases concerns the basic procedural protections required in cases involving the threatened deprivation of "private" interests. The second series of cases addresses the procedures required in capital cases in order to prevent the imposition of cruel and unusual punishment. An analysis of developments in both these areas of constitutional law demonstrates the inadequacies of the procedural protection presently being afforded condemned prisoners with claims to insanity.

1. The Supreme Court Due Process Decisions

Recent Supreme Court decisions recognize that the requirements of the due process clause of the Fourteenth Amendment must be satisfied whenever the government places in jeopardy a substantial private interest in life, liberty, or property. This due process protection is extended regardless of how the interest is created or (Marshall, J.). Although only three justices joined the Gregg plurality, it has been treated as controlling law in subsequent cases, see Lockett v. Ohio, 98 S. Ct. 2954, 2963 (1978) (plurality opinion), and will be treated as such in this Note.

69. "Private" interests, as used in this Note, refer to the legal rights or interests of the affected individual or organization, as contrasted with "public" or governmental concerns. See Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

70. See, e.g., Lockett v. Ohio, 98 S. Ct. 2954, 2965 (1978) (plurality opinion) (death penalty procedure in Ohio held not to permit full consideration of defendant's character and record as required by Eighth Amendment's cruel and unusual punishment clause, and Fourteenth Amendment's due process clause); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (plurality opinion) (denial of due process when death sentence was imposed, at least in part, on basis of information that petitioner had no opportunity to deny or explain).

71. Liberty interests have been construed broadly. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974) (prison disciplinary scheme forfeiting prisoner good-time credits infringes liberty interest protected by due process clause); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (liberty right to conceive and to raise one's children protected by due process clause, and entitled father to hearing on his fitness as parent before deprived of custody of children).


73. It has been contended that statutes granting private interests determine not only the nature of the interest, but also the extent to which it is protected. See Arnett v. Kennedy, 416 U.S. 134, 153-55 (1974) (opinion of Rehnquist, J.); cf. Nobles v. Georgia,
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labeled. The procedural protection can be limited only if the private interest is nonexistent or de minimus.

These developments undermine the reasoning of earlier decisions holding that an insane prisoner’s interest in not being executed is a privilege granted by the state rather than a right not to be executed. Similarly, the view that the insane prisoner has no assurance of any procedural protections because there was no right to any specific procedures at common law is no longer valid. The Supreme

168 U.S. 398, 409 (1897) (“the manner in which such question [of a condemned prisoner’s insanity] should be determined was purely a matter of legislative regulation”). This reasoning, however, has been rejected by a majority of the Supreme Court. See Arnett v. Kennedy, 416 U.S. 134, 166-67 (1974) (Powell and Blackmun, JJ., concurring) (once interest is conferred, it is protected by constitutional principle of due process, not by legislative fiat); id. at 177-78 (White, J., concurring and dissenting) (same); id. at 211 (Marshall, Douglas, and Brennan, JJ., dissenting) (same); cf. Meachum v. Fano, 427 U.S. 215, 230-35 (1976) (Stevens, J., dissenting) (prisoner’s liberty interest is created and protected by Constitution, not by state prison regulations).

74. Prior to the recent series of decisions, see notes 70-72 supra (citing cases), the Court frequently declined to extend procedural due process protection to interests that it deemed to be privileges conferred by government largesse, such as government employment or state licenses. Due process protection was limited to explicitly defined constitutional rights. See, e.g., Barsky v. Board of Regents, 347 U.S. 442, 451 (1954) (privilege to practice medicine); Bailey v. Richardson, 182 F.2d 46, 60 (D.C. Cir. 1950), aff’d by an equally divided Court, 341 U.S. 918 (1951) (no right to government employment); Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439, 1439-42 (1968). The Supreme Court, however, no longer employs a mechanical, right-privilege analysis to govern the applicability of the due process clause. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 571 & n.9 (1972) (citing cases). A government benefit will be protected in some manner under the due process clause so long as it involves an important private interest.

75. See, e.g., Meachum v. Fano, 427 U.S. 215, 223-29 (1976) (transfer of state prisoner to inferior prison held not to infringe liberty because prisoner already forfeited liberty upon conviction and confinement); Bishop v. Wood, 426 U.S. 341, 344-50 (1976) (discharge of police officer did not deprive him of property or liberty interest protected by due process clause because he had no guarantee or claim of entitlement to job and was not limited in seeking other employment).

76. Although the gravity of an interest does not determine whether it is protected but only the extent to which it is protected, an interest will not be protected if it is deemed de minimus. See Ingraham v. Wright, 430 U.S. 651, 674 (1977) (as long as liberty interest is not de minimus, it is protected by some due process); Goss v. Lopez, 419 U.S. 565, 576 (1975) (as long as property deprivation is not de minimus, its gravity is irrelevant).


78. See Solesbee v. Balkcom, 339 U.S. 9, 13-14 (1950); Nobles v. Georgia, 168 U.S. 398, 409 (1897). It has been suggested that the common law controls the extent of the procedural protection afforded to private interests. Ingraham v. Wright, 430 U.S. 651, 674-76 (1977) (dictum) (contending that common law dictates extent of protection afforded child’s liberty interest in corporal punishment cases). This suggestion, however, was not even persuasive to the Court that made it, because Ingraham applied a traditional balancing analysis, see pp. 546-47 infra, to determine the procedural protection necessary. 430 U.S. at 675.
Court has consistently recognized the need for procedural mechanisms to safeguard even newly created statutory entitlements. The uniform adoption of the common law rule against executing insane prisoners has, in effect, vested that prisoner with a substantial interest—an entitlement to life while insane—that deserves the protection of the due process clause.

Determination of the existence of an interest deserving procedural protection constitutes only the first step in contemporary due process analysis. Once such an interest is identified, the extent of procedural protection must be established. To this end, the Court has employed a balancing process that weighs three distinct factors: the private interest that will be affected by government action, the public interest in limiting the fiscal and administrative burdens of additional procedural safeguards, and the probable effect such safe-


80. Although the precise nature of the condemned prisoner's interest may be uncertain, its traditional characterization by the Supreme Court as a "privilege," see p. 545 supra, is no longer viable because the right-privilege distinction has been abandoned, see note 74 supra. Justices Harlan and Frankfurter obliquely referred to the prisoner's interest as a Fourteenth Amendment right or a due process right. See Caritativo v. California, 357 U.S. 549, 550 (1958) (Harlan, J., concurring); id. at 557 (Frankfurter, J., dissenting). The Supreme Court, however, is unlikely to accept this vague label, preferring instead to characterize the affected interest as life, liberty, or property before determining the extent of due process protection. See, e.g., Bishop v. Wood, 426 U.S. 341, 343 (1976); Board of Regents v. Roth, 408 U.S. 564, 569 (1972).

A condemned prisoner's insanity claim would seem not to entail a liberty interest. First, the prisoner does not lose any additional liberty by being transferred from death row to a mental hospital. Second, the prisoner can be viewed as having forfeited any liberty interest by his conviction and confinement. See Meachum v. Fano, 427 U.S. 215, 223-29 (1976). The prisoner's interest is not precisely a property interest either, if a property right must be a tangible or fungible possession. See Restatement of Property, Introductory Note, at 3 (1936).

The condemned prisoner's interest, therefore, must be some subdivision of his interest in life. Much of his "life interest," of course, has been sacrificed by his conviction and sentence to death. Yet, a condemned prisoner retains enough of his interest in life to be granted some due process protection in post-sentencing procedures. Cf. Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion) (requiring specific kind of appellate review in capital cases to protect interests of condemned prisoner).

In the situation of an allegedly insane condemned prisoner, this residual "life interest" is supplemented by a common law and statutory right—the right not to be executed while insane. The state has, in effect, returned to the prisoner some of his forfeited interest in life, albeit only so long as he remains insane. Nonetheless, the supplemental right—this entitlement to remain alive while insane—is hardly de minimus, inasmuch as it affords the prisoner both the opportunity to make his peace with God and the further chance to challenge his conviction and sentence. See p. 535 supra. Once a state confers this entitlement on the prisoner, for whatever reason, the state cannot then deprive him of the entitlement without affording some due process protection. See pp. 544-45 supra.
guards will have on reducing the risk of erroneous decisions. If, for example, the private interest is considerable, the risk of error great, or the governmental interest attenuated, due process protections will generally be more extensive. On the other hand, if the private interest in a particular procedure is weak, the risk of error small, and the governmental interest substantial, more expedited procedural systems are permitted. The only indispensable procedural protections are notice and a hearing, but the form and timing of even these procedures are determined through the balancing process.


83. See, e.g., Goss v. Lopez, 419 U.S. 565, 579-80 (1975) (risk of error in school disciplinary process "not at all trivial," and should be guarded against with notice and hearing); Fuentes v. Shevin, 407 U.S. 67, 83 (1972) (great danger under replevin statutes that applicant's confidence in his case will be misplaced).

84. See, e.g., Stanley v. Illinois, 405 U.S. 645, 657-58 (1972) (state's interest in caring for children is de minimus if father is shown to be fit parent); Bell v. Burson, 402 U.S. 535, 540-41 (1971) (government's interest in reducing expense by not providing expanded hearing when suspending drivers' licenses minimal).

85. See, e.g., Dixon v. Love, 431 U.S. 105, 113 (1977) (private interest implicated when individual deprived of driver's license "not so great" as to require prior hearing); Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974) (deprivation of good-time credits for prisoners less significant than revocation of parole; full range of procedural protections at hearing not required).


88. See, e.g., Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950), quoted in Goss v. Lopez, 419 U.S. 565, 579 (1975) ("there can be no doubt that at a minimum [the words of the due process clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case"); see Board of Regents v. Roth, 408 U.S. 564, 570 n.8 (1972) ("constitutional requirements of opportunity for some form of hearing before deprivation of a protected interest, of course, does not depend upon such a narrow balancing process") (emphasis in original).

89. See, e.g., Goss v. Lopez, 419 U.S. 565, 579 (1975) (timing and content of notice and nature of hearing depend on appropriate accommodation of competing interests in-
In order to satisfy these due process requirements, the states must devise procedural schemes that adequately protect the interest of the insane prisoner in avoiding execution. State statutes can no longer indiscriminately prescribe the procedural system to be employed, but must reflect instead a balancing of the interests involved. These interests include the individual prisoner's entitlement to defer execution while insane, society's interest in avoiding the erroneous execution of insane criminals, and the governmental interests in reducing the expensive burden of formal judicial proceedings and in avoiding delaying tactics by prisoners.

2. The Supreme Court Death Penalty Decisions

In 1972, the United States Supreme Court issued a brief, per curiam opinion in *Furman v. Georgia* that reversed the death sentences imposed in three capital cases. That opinion held that imposition of the death penalty in these cases constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Four years later, the Supreme Court attempted to clarify the status of the death penalty in five separate, plurality opinions. These opinions rejected the contention that the death penalty is cruel and


90. See pp. 539-40 supra.

91. See pp. 562-63 infra.

92. A brief historical review of the Supreme Court's treatment of the death penalty issue over the last seven years is contained in the plurality opinion in *Lockett v. Ohio*, 438 S. Ct. 2954, 2961-63 (1978).

93. 408 U.S. 238 (1972).


95. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972). The meaning of the per curiam opinion is illuminated by reference to the decisive concurring opinions of Justices Stewart and White. See *Gregg v. Georgia*, 428 U.S. 153, 169 & n.15 (1976) (plurality opinion). Justice Stewart concluded that the sentences under review were impermissible because "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 309-10 (Stewart, J., concurring) (footnote omitted). Justice White, on the other hand, concurred because "the penalty [of death] is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* at 313 (White, J., concurring).

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unusual punishment per se. Instead, the plurality stated that although death is qualitatively different from other punishments, it constitutes an acceptable punishment for murder when administered under the aegis of a procedural system designed to eliminate the arbitrariness that the Court deemed cruel and unusual in Furman.

In these opinions, the Court introduced a series of constitutional guidelines to which a state procedural system is required to conform. These guidelines require that:

a) State procedures must reflect society's contemporary standard regarding the infliction of death as a penalty for the crime committed and for the particular criminal involved;

b) The state procedural scheme must suitably direct and limit the sentencing body's discretion by providing explicit criteria to direct sentencing decisions;

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97. E.g., Proffitt v. Florida, 428 U.S. 242, 247 (1976) (plurality opinion) (imposition of death penalty is not cruel and unusual punishment under every circumstance); Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion) ("[w]e now hold that the punishment of death does not invariably violate the Constitution").


99. Proffitt v. Florida, 428 U.S. 242, 247-48 & n.4 (1976) (plurality opinion) (opinion considering only constitutionality of death penalty for first-degree murder and not constitutionality of death penalty for sexual battery of child under 12 years of age); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion) (issue in case is only whether death penalty is acceptable punishment for murder). In the subsequent case of Coker v. Georgia, 433 U.S. 584 (1977), the plurality held that the death sentence for rape is a grossly disproportionate and excessive sentence and forbade it as cruel and unusual punishment. Id. at 593-600.

100. Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 188-89 (1976) (plurality opinion); id. at 189 ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

101. The plurality in Gregg v. Georgia, 428 U.S. 153, 179-82 (1976), analyzed three indicators of societal opinion: state legislative action, statewide popular referenda, and jury responses in actual cases. The plurality concluded that these three sources each demonstrate a "marked indication of society's endorsement of the death penalty for murder." Id. at 179. Contra, Furman v. Georgia, 408 U.S. 238, 360 (1972) (Marshall, J., concurring) (contending that "capital punishment . . . is morally unacceptable to the people of the United States at this time in their history"); id. at 293-300 (Brennan, J., concurring) (death penalty has been almost totally rejected by contemporary society).


102. Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976) (plurality opinion) (rejecting mandatory death penalty scheme because it does not provide "objective standards
c) State procedures must permit particularized consideration of relevant aspects of the character and record of each defendant and of the relevant circumstances of each crime.103

Application of these guidelines to the present procedures used in deferring an insane prisoner's execution reveals that most of the current state procedures are constitutionally insufficient in many respects. In particular, state procedural schemes that permit arbitrary or standardless decisions when insanity claims are raised,104 that do not enumerate explicit procedural standards to govern disposition of insanity claims,105 and that do not provide a definition of insanity to be used in these proceedings,106 all fail to direct and limit the discretion of official decisionmakers. Moreover, state procedural systems that permit insanity claims to be decided without a psychiatric examination107 fail to provide the specialized, professional consideration essential to a review of a condemned prisoner's insanity claim.

to guide, regularize, and make rationally reviewable the process for imposing a sentence of death’); Gregg v. Georgia, 428 U.S. 153, 189 (1976), quoted in note 100 supra (plurality opinion).

103. Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (plurality opinion); id. at 304 (“fundamental respect for humanity . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”); accord, Lockett v. Ohio, 98 S. Ct. 2954, 2963-67 (1978) (plurality opinion) (invalidating Ohio's death penalty scheme because it restricts consideration of mitigating circumstances, thus precluding individualized consideration of defendant’s character and offense required in capital cases).

104. Virtually every state screens the initial claim of insanity, either by limiting the number of individuals who can raise the claim or by restricting hearings to reasonable claims. See p. 538 supra. This screening process, even if conducted by responsible and qualified personnel, permits wholly arbitrary decisions without any opportunity for review. See, e.g., Caritativo v. Teets, 47 Cal. 2d 304, 303 P.2d 339 (1956), aff'd sub nom. Caritativo v. California, 357 U.S. 549 (1958), discussed at pp. 542-43 supra; N.H. REV. STAT. ANN. § 4:24 (1970) (“The governor, with the advice of the council, may respite . . . the execution of a sentence of death . . . if it appears to their satisfaction that the convict has become insane.”) In order to reduce the danger of arbitrariness, therefore, the condemned prisoner must be guaranteed at least one hearing on his insanity claim, see pp. 554-55 infra, as well as the opportunity for review of denials of requests for subsequent hearings, see pp. 563-64 infra.

105. Sixteen states (Alabama, Arkansas, Colorado, Connecticut, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maryland, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Tennessee, and Washington) provide no statutory guidelines to assist the deliberative body in weighing the insanity claims of a convicted prisoner. See, e.g., ARK. STAT. ANN. § 43-2622 (1964) (“[t]he State Hospital officials shall cause an inquiry to be made into the mental condition of the convict”); R.I. GEN. LAWS § 26-4-9 (1968) (“Justice of the superior court, may order such examination of said person as in his discretion he shall deem proper”).

106. Only eight states provide a standard of insanity intended for the circumstances of a condemned prisoner. See note 48 supra.

107. Although almost every state permits some form of inquiry into the convicted prisoner’s sanity once a plausible claim has been raised, there are 18 states (Alabama, Arizona, California, Idaho, Kentucky, Louisiana, Maryland, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, Utah, Wash-
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Although the plurality’s reasoning would appear to mandate that procedural safeguards govern the condemned prisoner’s insanity claim, language in Gregg v. Georgia suggests that the analysis applies only to the initial sentencing decision. The plurality stated that other decisions—such as a prosecutor’s decision whether to seek the penalty or a governor’s decision whether to grant a pardon—are not subject to the imposition of procedural safeguards. The plurality opinion articulated two reasons for this limited position. First, the plurality viewed certain decisions, such as the decision to postpone the execution of an insane prisoner, as decisions “which may remove a defendant from consideration as a candidate for the death penalty,” not a decision to impose the penalty. Second, the plurality suggested that it may be impossible to articulate realistic guidelines at other stages, because a decision to impose guidelines would result in the de facto elimination of the death penalty, “by placing totally unrealistic conditions on its use.”

These concerns, however, should not render constitutional safeguards inapplicable to the condemned prisoner’s insanity claim. The decision to defer execution is only a temporary postponement of execution, not a decision removing the prisoner from his ultimate fate. Moreover, both the decision not to accept a prisoner’s insanity claim and the determination that the prisoner is sane move a prisoner along the path to death as readily as do the decisions of a sentencing judge or jury. In addition, the assumption that standards

108. Gregg v. Georgia, 428 U.S. 153, 199 & n.50 (1976) (plurality opinion). The plurality divided the initial sentencing decision into three separate elements: the statutory definition of what constitutes a capital crime, the statutory criteria for selecting the class of criminal defendants subject to capital penalties, and the judicial determination that a particular defendant shall receive the death penalty. Id. at 196-98.

109. Id. at 199 & n.50.
110. Id. at 199.
111. Id. at 199 n.50.
112. Every state returns the condemned prisoner to prison for execution upon restoration of sanity. See notes 2-4 supra (citing cases and statutes); cf. H. Weihofen, supra note 8, at 468-70 (discussing prior state statutes concerning return to prison).
could not be formulated at this stage of the criminal process ignores both the Supreme Court's successful assumption of the more onerous task of standardizing the jury's sentencing deliberation and the noteworthy guidelines already drafted by some states that assure due process protection in similar situations.

Perhaps the most compelling justification for extending procedural protection to the insanity claim is the Court's decision in Furman. Furman held that the arbitrary or capricious imposition of the death penalty is cruel and unusual punishment. Yet, by deciding not to investigate a condemned prisoner's insanity claim, the warden or sheriff is effectively reimposing the penalty. Moreover, the judge or jury that evaluates an insanity claim reimposes the penalty when they reject that claim. Either decision to reject the insanity claim, therefore, violates the Eighth and Fourteenth Amendments if made arbitrarily or capriciously. Only by extending the structural guidelines to these decisions can the Court ensure that the condemned prisoner is furnished with the procedural protections mandated by Furman.

guidelines to other stages of criminal process); see C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 14-18, 69-74 (1974). Professor Black argues that the death penalty is not the result of simply one choice by a judge or jury, but results from a number of choices, including the prosecutor's decision whether to plea bargain and the governor's decision whether to pardon or commute the sentence. Id.

114. Gregg v. Georgia, 428 U.S. 153, 192-95 (1976) (plurality opinion). The standards for determining the insanity of the condemned may also, by necessity, be somewhat general, but they provide guidance and reduce the likelihood of arbitrary or capricious action. See pp. 553-64 infra.

115. Three states (Florida, Illinois, Indiana), in particular, furnish statutory procedures that reduce the risk of arbitrary or erroneous determinations of sanity. See Fla. Stat. § 922.07 (1974); Act of July 26, 1972, Pub. Act No. 77-207, § 5-2-3, Ill. Ann. Stat. ch. 38, § 1005-2-3 (Smith-Hurd 1973); Ind. Code Ann. §§ 16-14-8-1 to -3 (Burns 1973 & Supp. 1978). The Indiana statute is directed at cases in which the prisoner contests a transfer to a mental institution; consequently, it fails to provide procedures that govern the initial allegation of insanity. Nonetheless, the Indiana procedure is instructive. It provides that when the warden believes the inmate is in need of care, there must be a hearing if requested before transfer; notice of the time, place, and reason for the hearing; a psychiatric examination; release of a copy of the psychiatrist's detailed report; an opportunity to present evidence, to cross-examine witnesses, and to be represented by counsel at the hearing; an impartial decision based on the evidence presented at the hearing; and a written decision stating the evidence relied on. Ind. Code Ann. § 16-14-8-3 (Burns 1973).

116. 408 U.S. 238 (1972), discussed at p. 548 supra.

117. Id.

118. For an argument that discretionary decisions made at both the preconviction and postsentencing stages "plainly help to determine who ultimately shall be executed," see Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1712 (1974). The Note contends that arbitrariness becomes more likely at these stages if discretion has been limited at other stages. Id. at 1715-16.
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III. Creating a New Procedural Framework for Determining
the Insanity of the Condemned

In light of the constitutional principles articulated in recent due process and death penalty cases, it is apparent that Nobles, Solesbee, and Caritativo are no longer controlling. At the very least, the due process clause requires that a condemned prisoner be provided notice of when and how his insanity claim will be reviewed and a hearing in order to review that claim prior to execution. Moreover, a proper balancing of interests requires that, at a minimum, the procedural scheme provide for proper diagnosis of the prisoner's mental condition, an adequate opportunity for review, and efficient but fair control of repeated or feigned insanity claims. These provisions will also help guarantee that the condemned prisoner is protected by the explicit standards and particularized consideration required in capital cases. The failure of many state procedures to provide these protections, however, suggests that condemned prisoners are being

119. Cases in which prior notice and a hearing have not been provided at all have involved exceptional circumstances. See Boddie v. Connecticut, 401 U.S. 371, 379 (1971) ("root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations") (emphasis in original). Examples of these exceptional situations include Goss v. Lopez, 419 U.S. 565, 582-83 (1975) (no presuspension hearing required for students whose presence in school poses continuing danger to persons or property); Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974) (sequestration of property valid without notice and hearing because defendant and creditor both had property interests at stake); Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 896 (1961) (sensitive military secrets on base required expulsion of all unapproved personnel). Even in these cases, however, some type of preliminary administrative, or post-termination hearing was provided. See, e.g., Mathews v. Eldridge, 424 U.S. 319, 339 (1976) (furnishing recipients of disability benefits prior review and response to administrative action as well as post-termination, evidentiary hearing); Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974) (providing immediate full hearing following execution of sequestration writ). In the case of condemned prisoners with insanity claims, however, the only conceivable solution is prior notice and a hearing, because denial of the insanity claim results in execution.

120. Proper diagnosis involves both use of a proper definition of insanity, see pp. 561-62 infra, and utilization of personnel qualified to evaluate an insanity claim, see p. 560 infra. Without such proper analysis, the individual's interest in not being executed while insane is inadequately protected, and the risk of error is dramatically increased.

121. No procedural scheme can be absolutely error free. Cf. Furman v. Georgia, 408 U.S. 238, 366 (1972) (Marshall, J., concurring) (noting that innocent men have been convicted and executed). In the case of a convicted prisoner's insanity claim, however, the entitlement to life granted by society is illusory unless error is reduced as much as possible. A system of review helps reduce this error. See pp. 563-64 infra.

122. See pp. 562-63 infra.

123. No state presently guarantees a hearing upon the mere suggestion of insanity, see note 41 supra (13 states do not require hearing even for claims supported by medical evidence), and no state provides all the constitutionally sufficient procedures, see pp. 554-64 infra.
deprived of due process and are suffering cruel and unusual punishments.

To remedy these constitutional deficiencies, the Court should mandate a procedural framework governing state statutory schemes that incorporates these fundamental requirements of the due process and death penalty cases. This Note proposes such a framework and applies it to current procedures affecting condemned prisoners' insanity claims.

A. Raising the Issue of Insanity

Under the due process clause of the Fourteenth Amendment, a condemned prisoner cannot be divested of his entitlement not to be executed while insane until the state provides notice and a proper hearing on his insanity claim. Unfortunately, in determining what are valid insanity claims and hence whether a prisoner has a valid entitlement, the screening processes erected by most states permit a hearing on a condemned prisoner's insanity claim only at the discretion of a warden or governor. These procedures, however, invite the kinds of standardless, arbitrary decisions in capital cases that the Supreme Court has deemed cruel and unusual punishment. Moreover, by vesting the warden or governor with unreviewable discretion, these procedures allow insanity claims to be raised and rejected without any hearing or psychiatric investigation at all and, thus, deprive the condemned prisoner of both minimal due process protections and the particularized consideration of his relevant characteristics required in capital cases.

A state, therefore, cannot screen initial insanity claims by limiting the number of persons who can initiate an inquiry into sanity, or by restricting any subsequent proceedings to "reasonable" claims. The condemned prisoner must be guaranteed at least one hearing upon the mere suggestion of insanity, and the prisoner or a person acting on his behalf must be permitted to raise the question without the concurrence of the warden. It is true that requiring at least one hearing in every case involving insanity claims will increase administrative

124. See p. 538 supra.

125. The warden or governor may never be satisfied that a prisoner's insanity claim is a reasonable one and, therefore, may arbitrarily refuse to hold any hearing. See White, supra note 17, at 243-44 (suggesting that death cell psychosis is natural result of criminal act and should not be considered in carrying out prescribed sentence). But cf. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (deliberate indifference to prisoner's serious medical claim constitutes cruel and unusual punishment).

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costs. Nonetheless, the important private interest in life, coupled with the significant risk of error in an arbitrary screening system, substantially outweighs the administrative justification for limiting hearings.

The suggestion of insanity itself could most simply and efficiently be raised by a petition similar in form to a habeas corpus petition. This initial petition would have to allege only that the prisoner is suspected of being insane. The petition should be directed to the state executive official or state court judge empowered to suspend the prisoner's execution; the individual who receives the petition should be required to postpone the execution and initiate an appropriate sanity investigation.

B. The Notice Requirement

Before a condemned prisoner's insanity claim is evaluated, the prisoner should receive notification that insanity will delay execution. Moreover, the condemned prisoner should be informed when his insanity claim will be reviewed, the type of proceeding that will be used, and the standard of insanity that will be employed. Unfortunately, traditional forms of notice are of little value to an insane prisoner who acts alone. A genuinely insane person can be expected neither to comprehend fully the manner in which a sanity investigation will be initiated, nor to understand or challenge the nature of the sanity inquiry while it is conducted. Notice, there-

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127. The delay in execution caused by the hearing requirement, however, should not adversely affect legitimate government interests in imposing the death penalty generally. See pp. 535-36 supra.


131. Petitions for subsequent hearings could then be restricted to a higher burden of proof, inasmuch as the risks of arbitrariness or deprivation of due process decrease once one full hearing is granted. See pp. 562-63 infra.


133. See 1 M. MERRILL, MERRILL ON NOTICE § 8 (1952) (defining various acts of notification including formal communication between parties, delivery of document or letter, and public placement or publication of letter).

134. For a brief discussion of the nature of psychosis, and some of its effects on a defendant's perception and behavior, see A. GOLDSTEIN, THE INSANITY DEFENSE 25-33
fore, cannot realistically be fashioned to the limited capabilities of an insane prisoner, and some alternative procedure must be employed to satisfy the due process notice requirement. One solution is to provide for legal counsel to represent a convicted prisoner from the moment his death sentence is imposed until his execution. The presence of an attorney would assure that a notice requirement is effective, and would serve to safeguard other interests of the condemned prisoner.

The decision whether to require appointed counsel, however, ultimately hinges on application of the due process balancing procedure. Nonetheless, when a condemned prisoner raises an insanity claim, a significant government interest is implicated. (135) See Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970), quoted in Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (opportunity to be heard must be tailored to capacities and circumstances of those who are to be heard).

In another context, a court held that only counsel has the "capability to examine, under an voluntary transfer from prison to mental hospital). It may be suggested that a nonlawyer guardian should represent the allegedly insane prisoner's interests. But permitting the representation requirement to be satisfied by nonlawyers deprives the convicted prisoner of the expertise necessary to protect his interests, both specifically in relation to his insanity claim, (137) and generally in relation to the evolving legal doctrines implicating the Eighth and Fourteenth Amendments. Moreover, counsel could assist the convicted prisoner in pursuing other postconviction remedies such as federal or state collateral attacks, petitions for writ of error in habeas proceedings, see Developments, supra note 130, at 1187-98 (outlining advantages for petitioner and court in appointing counsel at each of these postconviction procedures is constitutionally required).

Inasmuch as the same disabilities that undermine adequate notice would also handicap the prisoner during the insanity hearing, the presence of counsel is necessary at the hearing to ensure that requisite procedural standards are met, and that the proper definition of insanity is used. (138) See pp. 561-62 infra, that the proper definition of insanity is used, see pp. 561-62 infra, and that the condemned prisoner's interests are protected against arbitrariness after the initial hearing both in judicial review proceedings, see pp. 563-64 infra, and in the determination of subsequent insanity claims.

Moreover, counsel could assist the convicted prisoner in pursuing other postconviction remedies such as federal or state collateral attacks, petitions for writ of error in habeas proceedings, see Developments, supra note 130, at 1187-98 (outlining advantages for petitioner and court in appointing counsel at each of these postconviction procedures is constitutionally required).

(137) Although normally defendant may seem to function normally, he may be unable to interpret or apply rules to his particular situation, be disproportionately influenced by irrational beliefs or perceptions, and have difficulty handling concepts).

(138) See pp. 546-47 supra. Compare Morrissey v. Brewer, 408 U.S. 471, 482-89 (1972) (declining to decide whether parolee is entitled to appointed counsel, but noting substantial liberty interest at stake, strong risk of erroneous decision, and absence of any state interest in denying all procedural guarantees) with Apprendi v. California, 538 U.S. 464 (2003) (holding that, in a capital sentencing proceeding, the government must prove all statutory aggravating factors beyond a reasonable doubt).*
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interest in reducing costs and in eliminating unnecessary interference with the sanity determination is outweighed by a strong risk of error and a substantial private interest that is unlikely to be protected without counsel. The peculiar circumstances of an allegedly insane condemned prisoner, therefore, provide more compelling grounds for the appointment of counsel than do the needs of other prisoners in postappellate proceedings in which the Supreme Court has refused to require counsel. For the allegedly insane convict, the notice requirement of the due process clause does not permit another alternative.

C. The Requirement of a Hearing

Despite suggestions to the contrary, the due process clause does not require a full, trial-type hearing in every case. Like notice, the

139. Cf. United States v. Cohen, 530 F.2d 43, 48 (5th Cir.), cert. denied, 429 U.S. 855 (1976) (denying right to counsel at psychiatric examination because it might defeat purpose of examination); Thornton v. Corcoran, 407 F.2d 695, 711 app. (D.C. Cir. 1969) (denying counsel at pre-indictment psychiatric examination because it would inhibit free expression and exchange of ideas). Fears of disruption from participation by counsel might be allayed if the attorney's function at the hearing is redefined so as to encourage full examination of all the relevant evidence. See Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Tex. L. Rev. 424, 451-57 (1966) (suggesting new role of attorneys in representing both client and court). But see ABA Canons of Professional Ethics No. 7 (lawyer should represent client zealously within bounds of law).

140. See note 128 supra (sanity determinations unreliable and invalid).

141. See pp. 555-57 & note 137 supra.

142. The Supreme Court's refusal to require counsel in postappellate proceedings hinges on the belief that such proceedings are not critical stages of a criminal prosecution in which the assistance of counsel is absolutely necessary to protect the defendant's rights. In Ross v. Moffitt, 417 U.S. 600 (1974), the Court held that neither due process nor equal protection requires the appointment of counsel in discretionary appellate review proceedings. The Court reasoned that the defendant is adequately protected by pro se review petitions, supplemented by transcripts and briefs from lower court proceedings. Id. at 610-16.

This rationale has been frequently criticized, particularly in capital cases in which any proceeding involving the death penalty can be viewed as critical, see Carey v. Garrison, 403 F. Supp. 395 (W.D.N.C. 1975) (Ross v. Moffitt should not apply in capital punishment cases and counsel must be appointed to aid in pursuit of postconviction relief), and in which the assistance of counsel is regarded as essential to the proper protection of defendant's rights, see, e.g., H. Bedau, supra note 67, at 27-31 (refusal to appoint counsel for postappellate review deprives prisoners of due process by denying them meaningful access to all available state and federal remedies); Comment, supra note 137, at 1485 (hearing on insanity necessitates appointment of counsel).

143. See Solesbee v. Balkcom, 339 U.S. 9, 12 (1950) (implicitly assuming that only conceivable alternative procedure for evaluating insanity claims of condemned prisoners is full judicial hearing); Nobles v. Georgia, 168 U.S. 398, 405 (1897) (same).

hearing can be tailored to the nature of the interest threatened and the particular circumstances of the person involved.

The unique predicament of a condemned prisoner, of course, dictates that the hearing precede the termination of his entitlement not to be executed while insane; his interest cannot be restored after execution.\textsuperscript{145} The form of the hearing, however, may be subject to any number of variations. Most states presently use variations of three general types of hearings: discretionary review by one individual, examination by medical experts, or review by formal adjudication.\textsuperscript{146} An evaluation of these general hearing provisions under the Eighth and Fourteenth Amendments suggests the kinds of legislative provisions that will satisfy constitutional requirements.

Because the only issue to be resolved is the condemned prisoner's insanity,\textsuperscript{147} the most appropriate hearing mechanism is an administrative inquiry conducted before a medical panel of psychiatric experts.\textsuperscript{148} In order to reduce administrative costs, the panel should optimally consist of only three experts. A panel consisting of less than three entails unacceptable risks of either arbitrary decisions or unresolvable differences in opinion.\textsuperscript{149} The panel could be selected on a rotating basis from a list of qualified psychiatrists retained by the state for a nominal fee.\textsuperscript{150} Alternatively, the panel could be composed of state psychiatrists from local medical hospitals,\textsuperscript{151} although any fis-

\textsuperscript{145} See note 119 supra.
\textsuperscript{146} See pp. 559-40 supra.
\textsuperscript{147} The definition of the term "insanity" constitutes a distinct and important issue. As used in the state statutes, "insanity" signifies a legal conclusion and not a medical standard. See A. Goustein, supra note 134, at 60. There has, however, been substantial controversy concerning the use of psychiatrists who translate legal definitions into medical terms. Although this controversy reflects legitimate problems in the use of psychiatrists, it is beyond the scope of this Note to suggest an alternative to the almost universal statutory use of the term "insanity." The Note will, however, suggest a standard of insanity designed to clarify the role of the psychiatrist in reviewing a prisoner's insanity claim. Psychiatrists will not be expected to draw legal conclusions, but are instead to determine whether the prisoner's condition satisfies more factual, medical standards. See pp. 561-62 & note 170 infra.
\textsuperscript{148} Cf. Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821, 823, 825 (1968) (development of social and psychological sciences makes possible valuable alternatives to traditional judicial proceedings in certain circumstances). But see Ennis & Litwack, supra note 128 (nonjudicial determinations should be limited since there is no evidence of greater reliability or accuracy).
\textsuperscript{149} But see Project, The Administration of Psychiatric Justice: Theory and Practice in Arizona, 13 Ariz. L. Rev. 1, 61 (1971) (shortage of psychiatrists in all but four most populous counties of Arizona). In cases of shortages of psychiatrists, an alternative procedure would have to be considered. See pp. 559-60 infra.
\textsuperscript{150} Cf. ABA Project on Standards for Criminal Justice §§ 2.1-4 (Approved Draft 1968) (outlining standards for assigned counsel systems, including provisions for assignment, eligibility, rotation, and compensation).
\textsuperscript{151} States should not be permitted to rely exclusively on nonpsychiatric personnel to evaluate the convicted prisoner's insanity claim. See note 107 supra (listing states that do...
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cal or administrative benefits of this approach would be substantially undercut by its potential for prejudice. 152

Another approach that is currently employed by a number of states 153 requires a formal adjudication of the insanity claim. This type of hearing has the advantages of easy implementation of procedures 154 and, in jury trials, substantial connection to contemporary community standards. Judicial resolution, however, adds greatly to the government's administrative burden and fiscal expense, without any significant additional protection of individual interests. The prisoner's entitlement to remain alive while insane should depend entirely on medical opinion that is unlikely to be illuminated by a judge or jury. 155 The addition of a judge or jury only increases the likelihood of arbitrary rejection of the medical opinion and of erroneous evaluation of that opinion.

The third approach currently in use empowers a state executive official with the authority to conduct the insanity hearing. Although this solution initially appears to possess the advantages of minimal administrative burden and expense, it is realistically no more efficient than a medical panel. The state administrator would still have to rely on psychiatric opinion in order to determine and protect private interests adequately. 156 Moreover, this option introduces the greatest potential for error and arbitrariness. As an ongoing participant

not guarantee psychiatric examination); A. Goldstein, supra note 134, at 133-34 (in some states, examinations conducted in state hospitals are sometimes not done by certified psychiatrists).

152. See Project, supra note 149, at 175-76 & n.139 (overcrowding in state mental hospitals colors perception of state hospital directors and makes them less likely to approve prison-to-hospital transfers); cf. Ennis & Litwack, supra note 128, at 726-29 (psychiatric diagnosis is influenced by clinician's personal bias, personality, value system, and attitudes). But see Withrow v. Larkin, 421 U.S. 35, 47 (1975) (combination of investigative and adjudicative functions in one body does not necessarily create unconstitutional risk of bias).

153. See pp. 539-40 supra.


155. See Weihofen, A Question of Justice: Trial or Execution of an Insane Defendant, 37 A.B.A.J. 651, 710 (1951) (conclusion of impartial experts accepted by judge or jury in 891 out of 894, and 207 out of 208 cases).

156. In most instances the warden does not possess the sophisticated psychological training to evaluate the sanity of the prisoner properly. White, supra note 17, at 240 (even in presence of trained psychiatrist, psychotic individual can continue to maintain seemingly sane behavior). See generally A. Goldstein, supra note 134, at 25-36 (difficulty in perceiving and diagnosing psychotic state of defendant).
in the prison, a warden would be vulnerable to systematic bias. Similarly, a state hospital director might rely on wholly inappropriate considerations. Relying on the authority of a single administrator, therefore, can only lessen the possibility that the prisoner's claim will receive objective evaluation.

Regardless of the hearing mechanism chosen, the hearing itself must be governed by minimal procedural standards that lessen the potential for arbitrary decisions and guarantee particularized consideration of the prisoner’s relevant characteristics. The hearing mechanism, therefore, must ensure that the condemned prisoner's present sanity has been determined recently. His protected entitlement is not to be executed while insane; consequently, previous psychiatric examinations or evidence should not be dispositive of present sanity. The hearing panel or officer should either conduct an independent psychiatric examination or allow evidence of present sanity to be submitted. Because errors resulting from the initial hearing are ir-

158. See note 152 supra (overcrowding in state mental hospitals makes hospital directors less willing to approve prison-to-hospital transfers).
159. See p. 550 supra.
160. Previous adjudications or evaluations of the condemned prisoner’s sanity are “hardly helpful in forming a judgment as to whether there is reasonable doubt as to the sanity of [the prisoner] . . . at a later time.” Welch v. Beto, 355 F.2d 1016, 1019 (5th Cir.), cert. denied, 385 U.S. 839 (1966); see Pizzi, Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems, 45 U. Cin. L. Rev. 21, 37-38 (1977) (method and extent of psychiatric examination differs substantially between test for competency and test for insanity). It is conceivable that previous diagnoses might be relevant in some situations, particularly those cases involving chronic mental illness that are marked by periodic remission or those diseases that are cyclical. See A. Goldstein, supra note 134, at 29-31. In these circumstances, a prior diagnosis might be useful in substantiating a psychiatrist’s present theory. However, the use of prior psychiatric evidence is generally not well advised because it will rarely be relevant to the proper test of insanity, see pp. 561-62 infra, and the examinations will rarely be as thorough as they should be, see Gilmore v. Utah, 429 U.S. 1012, 1019 & n.2 (1976) (Marshall, J., dissenting) (questioning thoroughness of prior insanity examination); Project, supra note 149, at 40-51 (examples of cursory insanity hearings).
161. But see A. Goldstein, supra note 134, at 131-40 (problems associated with “impartial” appointed psychiatrists and necessity of ensuring that defense is allowed to use its own expert witnesses). A danger of relying entirely on impartial experts is that their diagnoses will rarely be seriously questioned, see note 155 supra, even though there is no consensus among psychiatrists on individual diagnoses. See A. Goldstein, supra note 134 at 133; J. Ziskin, Coping With Psychiatric and Psychological Testimony 183 (2d ed. 1975) (percentage of agreement among psychiatrists only 54%).
162. There are instances in which the state may have to bear the additional expense of experts paid to present an indigent prisoner’s case. For example, if the panel is composed entirely of state psychiatric officials, the prisoner should be permitted to introduce independent expert psychiatric opinion.
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reversible, the procedures employed should also guarantee that all factual findings and assumptions are fully analyzed. Despite government interests to the contrary, therefore, a prisoner’s entitlement cannot be adequately protected without the assistance of counsel and an opportunity for that counsel to confront and cross-examine witnesses. In addition, procedural provisions must couple this reduction of error with the minimization of arbitrariness. To accomplish this, hearing officers should be required to issue a statement of reasons and to make that statement available to the prisoner’s counsel. Such a statement entails little additional expense, and it significantly safeguards private interests by ensuring that the decision-maker has complied with the requisite standards and has undertaken a particularized consideration of the prisoner’s character.

D. A Definition of Insanity

No state procedural scheme can adequately standardize or direct the sanity determination without defining explicitly the applicable standard of insanity. The Eighth and Fourteenth Amendments’ concern with structured discretion, particularized consideration, and minimization of error demands a definition of insanity tailored to the needs of this unique proceeding. Moreover, there is no government

163. See note 189 supra.
164. See pp. 556-57 supra.
165. Due to the importance of the conclusion reached at the hearing, due process requires an opportunity to confront and cross-examine witnesses. See Goldberg v. Kelly, 397 U.S. 254, 259-70 (1970); J. Ziskin, supra note 161, at 304-06 (noting areas of weakness in psychiatric testimony and objectives in effective cross-examination); Ennis & Litwack, supra note 128, at 743-46 (psychiatric judgments are unreliable and invalid; defendant must be given meaningful opportunity to introduce and cross-examine witnesses).
166. Without such a statement, the state might have to bear the expensive burden of an additional hearing on the facts, pursuant to a petition for collateral relief. See Townsend v. Sain, 372 U.S. 293, 312-16 (1963) (requiring federal courts to hear evidence if habeas corpus charges cannot be conclusively decided from record).
168. See Comment, Execution of Insane Persons, 23 S. Cal. L. Rev. 246, 256 (1950) (test for insanity should depend on rationale adopted by state in prohibiting execution of insane); cf. Hazard & Louisell, supra note 12, at 395 (test should be broad enough to avoid unnecessary taking of life, yet narrow enough to prevent feigned insanity).

Presently, legal determinations of insanity vary both with the stage of the criminal prosecution, see Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (test for competency to stand trial is whether defendant can consult with lawyer and understand proceedings); Saddler v. United States, 531 F.2d 83, 86 (2d Cir. 1970) (test for sanity prior to sentencing is whether defendant can understand nature of proceeding or exercise right
interest that weighs against the need to formulate a proper standard. Some states have adopted a test that is particularly directed at the circumstances of the condemned prisoner. 169 This test requires that the prisoner understand the nature of the proceedings against him, the purposes and extent of his punishment, and the fate that awaits him. Moreover, the prisoner must possess sufficient understanding to be aware of any facts that may make his punishment unjust, and have the ability to convey such information to his attorney. 170 Such a standard satisfies the requirements of both the Eighth and Fourteenth Amendments because it is tailored to reflect the explanations commonly given for deferring execution of the insane. 171

E. Procedures for Dealing with Repeated Insanity Claims

The elimination of restrictions on who can raise an insanity claim and the provision of a full hearing every time such a claim is raised create substantial concern that the condemned prisoner may take undue advantage of state procedures. The fear is that the prisoner will attempt to postpone his execution interminably by feigning into allocution); Schoeller v. Dunbar, 423 F.2d 1183, 1194 (9th Cir.), cert. denied, 400 U.S. 834 (1970) (Hulstedler, J., dissenting) (test for competency to plead is whether defendant can make reasoned choice among alternatives and whether he understands nature of plea), and with the specific test adopted at each stage, see M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843), discussed in A. GOLSTEIN, supra note 134, at 45-66 (test for sanity at trial whether "the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong"); A. GOLSTEIN, supra note 134, at 67-79 (irresistible impulse test for sanity at trial asks whether mental disease prevented defendant from controlling his conduct); ALI MODEL PENAL CODE § 4.01 (Proposed Final Draft No. 1 1961), discussed in A. GOLSTEIN, supra note 134, at 86-88 (test for sanity at trial reviews defendant's "capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law"). None of these tests for insanity, competency, or criminal responsibility, however, relates to the circumstances of the condemned prisoner's sanity, because neither his prior conduct nor the cause of his criminal behavior is at issue. Moreover, all these tests fail to address entirely the bases for the common law exemption against execution. See pp. 535-36 supra.

169. See p. 541 supra. The Supreme Court itself is unlikely to mandate a uniform test of insanity. See Powell v. Texas, 392 U.S. 514, 536-37 (1968) ("[F]ormulating a constitutional rule [in insanity cases] would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold.") The test envisioned here, however, is not a rigid psychiatric standard. It resembles the competency test adopted by the Court in Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam), see note 168 supra. It is, therefore, broad enough to apply to other condemned prisoners if changing community standards or developing medical knowledge permits other prisoners to qualify for the exemption from execution.

170. An operational definition of insanity for these purposes involves asking the insanity examiner whether the prisoner can in fact communicate with his lawyer and not whether such a handicap results from a specific mental condition. Although the determinations will still be largely medical, the conclusions will be more factual than legal.

171. See pp. 535-37 supra.
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sanity after every adverse hearing. The individual entitlement to procedural protection, however, diminishes and the government interest in expediting execution becomes more substantial once a prisoner's present sanity is fully examined. When the state has provided one full hearing on the prisoner's insanity claim, therefore, it should be permitted to review subsequent claims under a more expedited system. A requirement that the expedited review entail a complete written record of findings would facilitate meaningful judicial review that could ensure that no genuine insanity claims are ignored.

F. A System of Review

Many present procedural systems do not permit condemned prisoners to obtain review of a denial of their insanity claim, either because the decision not to initiate an inquiry is unreviewable, or because there is no appeal from the insanity determination hearing. Such restrictions reflect the government interest in limiting administrative and financial costs. These limits also represent an effort to preserve the purported deterrent and retributive values of capital punishment by avoiding the indefinite postponement of executions. This latter justification is unpersuasive, however, because the execution of an insane person does not serve any societal justifications for punishment. Moreover, the government's interest in minimizing administrative costs is probably outweighed by the significant risk of error at the initial hearing.

172. See Nobles v. Georgia, 168 U.S. 398, 405-06 (1897) ("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"); Caritativo v. California, 357 U.S. 549, 551 (1958) (Harlan, J., concurring) (voicing similar fears of "interminable delaying maneuvers").

173. A permissible second system of review might be similar to present state schemes that require preliminary review by a warden and a hearing only after the demonstration of a reasonable claim to sanity. See p. 538 supra.

174. E.g., Caritativo v. Teets, 47 Cal. 2d 304, 303 P.2d 339 (1956), aff'd sub nom. Caritativo v. California, 357 U.S. 549 (1958) (warden's decision not to institute sanity proceedings held unreviewable); N.Y. CORSEC. LAW § 654 (McKinney Supp. 1977) ("No judge, court, or officer, other than the governor, can reprove or suspend the execution of a defendant.")

175. E.g., State v. Nordstrom, 21 Wash. 403, 58 P. 248 (1899), aff'd sub nom. Nordstrom v. Van De Vanter, 181 U.S. 615 (1901) (determination by lower court that defendant was sane held unreviewable); Ala. CODE § 15-16-23 (1975) ("mode of suspending the execution of sentence after conviction on account of the insanity of the convict shall be exclusive and final and shall not be reviewed or revised by or renewed before any other court or judge"); see In re Phyle, 30 Cal. 2d 898, 186 P.2d 134 (1947), cert. dismissed, 334 U.S. 431 (1948) (no right to judicial determination of sanity upon certification by hospital that prisoner is sane).

176. See pp. 535-36 supra.
Some mechanism for reconsideration of insanity claims is, therefore, appropriate. Under current statutory schemes, the two most common review methods are writs of mandamus directed to the warden$^{177}$ and petitions for habeas corpus directed to state or federal courts.$^{178}$ Under the proposed statutory schemes, however, hearings must be conducted in every case, so mandamus is no longer relevant. The habeas corpus petition, on the other hand, should continue to be encouraged. It is a relatively uncomplicated and efficient system of review$^{179}$ that can usually be performed ex parte in both state and federal courts.$^{180}$ By providing for the use of habeas corpus in cases concerning condemned prisoners' insanity claims, it will be more likely that the reasons given by the hearing examiner for his decision will reflect reliance on proper procedural and substantive standards.

Conclusion

In the past decade, the Supreme Court has consistently extended procedural due process protection to individuals threatened with the deprivation of private interests, including those individuals threatened with the death penalty. These protections must be extended to those prisoners who have been granted a common law or statutory entitlement to remain alive while insane. This entitlement, like other substantial private interests, is governed by the due process clause. Only a statutory framework similar to that outlined in this Note will guarantee that the requirements of due process are satisfied.

177. See Phyle v. Duffy, 334 U.S. 431 (1948) (dismissing habeas corpus request for judicial determination of sanity because state remedy of mandamus was still available to compel warden to initiate judicial proceedings). But see Hazard & Louisell, supra note 12, at 390 (even when mandamus is available, applicant may be required to demonstrate prima facie case of insanity before hearing will be granted).

178. See In re Phyle, 30 Cal. 2d 838, 851-61, 186 P.2d 134, 142-47 (1947), cert. dismissed, 334 U.S. 431 (1948) (Schauer, J., dissenting) (habeas corpus petition is proper procedure for challenging return to prison upon restoration to sanity); cf. Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam) (allowing state prisoner to challenge conditions of his confinement by federal habeas corpus petition, even though he had not exhausted all available state remedies).

179. See Developments, supra note 130, at 1041, 1174 n.132 (administrative burden of habeas petitions very slight due to usual quick dismissal with brief or no hearing).

180. See 28 U.S.C. §§ 2241-2255 (1970) (federal habeas corpus procedure). A state prisoner, however, must first exhaust available state remedies, including state collateral relief. Id. § 2254(b); see Schneckloth v. Bustamonte, 412 U.S. 218, 266 (1973) (Powell, J., concurring) (absent constitutional claim of innocence, federal habeas review should consider only whether fair opportunity was provided to raise claim in state courts).