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# Performing "Competency to Be Executed" Evaluations: A Psycholegal Analysis for Preventing the Execution of the Insane

Mark A. Small
*University of Nebraska College of Law*

Comment

# Performing "Competency to be Executed" Evaluations: A Psycholegal Analysis for Preventing the Execution of the Insane



## I. INTRODUCTION

The Supreme Court's decision in *Ford v. Wainwright*[1] held that the eighth amendment prohibits execution of the insane.[2] As a result, prisoners awaiting execution now have a constitutional right not to be executed if they are found incompetent. By constitutionalizing what had been largely a common law or statutory right, the Court also instructed states to establish procedures to insure that execution of the insane did not in fact occur. Historically, those procedures that governed the determination of competency to suffer execution centered around "competency to be executed examinations" performed by

1. 106 S. Ct. 2595 (1986).
2. *Id.* The legal concept of "insanity" in this context translates to the psychological assessment of whether the prisoner is "incompetent to suffer execution."

mental health professionals. Many of these procedures failed to take into account ethical and practical dilemmas inherent in the performance of such examinations. Today most states, including Nebraska, have yet to reform their laws to comply with the Court's holding in *Ford*. The purpose of this comment is to present a psycholegal analysis examining how psychology may best be considered when constructing constitutional statutes.

Part II of this comment outlines the contours of the legal context which govern "competency to be executed" evaluations. Primarily, this is accomplished by noting the recent Supreme Court decision that both establishes a substantive right for prisoners and suggests procedures a state may adopt to safeguard this right. Part III explores the nature of the specific assessment of competency by examining both legal and psychological tests. Specifically reviewed are the ethical and practical considerations facing an evaluator called upon to perform a "competency to be executed" evaluation.

In Part IV, Nebraska's current statutory procedure for determining competency to suffer executions is analyzed and shown to be constitutionally defective. Finally, recommendations are made to both remedy Nebraska's statute and facilitate the interaction of law with psychology in conducting assessments of competency to suffer execution.

## II. LEGAL CONTEXT

The legal context in which competency examinations for the purpose of execution are administered has changed recently as a result of the Supreme Court's decision in *Ford v. Wainwright*.[3] *Ford* is discussed in some detail for two reasons. First, the case provides a typical example of the legal proceedings surrounding a prisoner awaiting execution. Second, the case announces the law relevant to determining competency to suffer execution and suggests the likely paths states will take when reworking their statutes.

### A. Facts of the Case

Alvin Ford was convicted of murder and sentenced to death in 1974 by a Florida state court. He was sane at time of the offense, trial, and sentencing. He subsequently began to act abnormally, showing signs of an apparent mental disorder. Ford's counsel had two psychiatrists examine him, one of whom determined that Ford was incompetent to suffer execution. Ford's counsel then invoked the Florida statute used to determine competency of prisoners awaiting execution.[4] The Governor of Florida, following procedures outlined in the statute, ap-

3. *Id.*
4. FLA. STAT. § 922.07 (1985).

pointed three psychiatrists to examine Ford. Together they examined him for thirty minutes in the presence of eight other people. Two of the psychiatrists concluded that Ford understood enough to be executed. The other psychiatrist concluded that Ford did not understand the nature of the proceedings against him and, therefore was insane. The Governor then signed a death warrant.

After unsuccessfully seeking a hearing in state court to determine anew Ford's competency, Ford's counsel filed a habeas corpus proceeding in federal district court, seeking an evidentiary hearing. The district court denied the petition without a hearing, the court of appeals affirmed, and the Supreme Court agreed to hear the appeal.[5]

### B. Holdings of the Court

The first issue the Supreme Court addressed was whether the eighth amendment prohibits the execution of the insane. The Court first reviewed the reasoning behind the common-law prohibitions against executing the insane, noting that "virtually no authority condoning the execution of the insane at English common law" was known.[6] Further, "[t]he various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced."[7] The Court claimed it was compelled to conclude that the eighth amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane.[8] Thus, prisoners sentenced to death and later determined to be insane have a constitutional right not to be executed.

After having determined that insane prisoners have a constitutional right not to be executed, the Supreme Court held, by a five-to-four vote, that due process requirements shall accompany this right.[9] In dissent, Justice Rehnquist emphasized the real problem the Court faced — "[s]ince no state sanctions execution of the insane, the real battle being fought in this case is over what procedures must accom-

5. Ford v. Wainwright, 752 F.2d 526 (11th Cir.), *cert. granted*, 106 S. Ct. 566 (1985).
6. Ford v. Wainwright, 106 S. Ct. 2595, 2601 (1986).
7. *Id.* at 2602.
8. Only three previous Supreme Court decisions addressed this issue. In Nobles v. Georgia, 168 U.S. 398 (1897), the Supreme Court upheld a state court's dismissal of a prisoner's petition for a hearing, stating that a jury trial was unnecessary. Fifty-three years later in Solesbee v. Balkom, 339 U.S. 9 (1950), the Court stated that the state was under no obligation to provide a hearing. In Caritativo v. California, 357 U.S. 549 (1958), the Court issued a per curium opinion upholding the California Supreme Court's ruling that the courts lacked jurisdiction to consider the sanity of a condemned prisoner unless the warden initiated an inquiry into the prisoner's sanity.
9. Justices Marshall, Brennan, Blackmun, and Stevens voted that due process requirements shall accompany this right. Justice Powell wrote an opinion which concurred in part and result. Justices O'Conner and White concurred in the result in part and dissented in part. Justices Burger and Rehnquist dissented.

pany the inquiry into sanity."[10] Because a constitutional right was now involved, the Court scrutinized whether Florida's procedures were adequate for the purpose of determining sanity.[11] The Court concluded that Florida's procedures for determining sanity were inadequate to preclude federal review of the federal issue. Specifically, Florida's statute was found to violate due process in three ways: "the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions"; "placement of the decision wholly within the executive branch"; and "failure to include the prisoner in the truth-seeking process."[12] As a consequence, the Court held that the district court must grant a hearing de novo on the question of whether Ford was competent to stand execution.

### C. Court Suggestions to Remedy the Statute

A constitutional right was at stake in *Ford*; therefore, due process was required. The Court wrote four separate opinions in attempting to identify what procedures would qualify as passing due process requirements. Speaking for the Court, Justice Marshall stated: "We do not here suggest that only a full trial on the issue of sanity will suffice to protect the federal interests; we leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences."[13] Thus, the task of enacting legislation which provides the constitutional safeguards necessary to survive federal review of sanity of a prisoner awaiting execution is left to the states. Although the Court placed the responsibility of constructing a constitutional statute on the states, the opinions of Justices Marshall, O'Connor, and Powell offer advice as to how states may meet this task.

In the opinion of the Court, Justice Marshall noted that the "lodestar of any effort to devise a procedure must be the overriding dual

10. Ford v. Wainwright, 106 S. Ct. 2595, 2615 (1986)(Rehnquist, J., dissenting). "Sanity," as a legal term of art is used to refer to the legal defense used in criminal proceedings, as well as a pseudonym for "competency" in other contexts. Whatever the context, a finding of sanity generally goes to answering the legal question and not the forensic question facing an examiner — that is, whether the prisoner understands the nature of his execution.

11. Florida's statutory procedures were found to be inadequate for the purpose of determining a condemned prisoner's sanity because: (1) they failed to provide an adequate assurance of accuracy sufficient to satisfy the requirement of Townsend v. Sain, 372 U.S. 293 (1963); (2) they failed to provide a fact-finding procedure "adequate to afford a full and fair hearing" on the critical issue as required by 28 U.S.C. section 2254 (d)(2); and (3) no state court played a role in any determination to which a presumption of correctness under section 2254 (d)(2) could attach. Thus, the Court held that the petitioner was entitled to a de novo evidentiary hearing in the district court on the question of his competency to be executed. Ford v. Wainwright, 106 S. Ct. 2595, 2602-03 (1986).

12. *Id.* at 2604-05.

13. *Id.* at 2605-06.

imperative of providing redress for those with substantial claims [of insanity] and of encouraging accuracy in the fact-finding determination."[14] Justice Marshall also stated that a substantial threshold of what constitutes insanity may be necessary in order to hold down the number of frivolous claims.[15] Additionally, he noted that the adversarial presentation of evidence by experts is important in the effort to insure due process.[16] Finally, he suggested that states look to their own procedures for determining whether a defendant is competent to stand trial.[17]

Justice Powell agreed that Florida's statute was deficient in not allowing Ford a chance to present evidence on his own behalf, but Powell nevertheless took a more restrictive view of the state's obligation to comport with due process. Justice Powell first noted that because a prisoner was initially found competent to stand trial, a substantial threshold showing of insanity was justified to trigger the due process requirements. Justice Powell then stated that the question was primarily a subjective one based on expert opinion and the ordinary adversary model was not "necessarily the best means of arriving at sound, consistent judgments as to a defendant's sanity."[18] Justice Powell acknowledged that the Court need not determine the precise limits that due process imposes in this area, but he nevertheless suggested his view of how the state could go about meeting constitutional requirements: "[M]y view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the state's own psychiatric examination."[19]

Justice O'Connor, in an opinion joined by Justice White, concurred in part and dissented in part. Regarding the extent to which due process should be accorded, O'Connor noted that "[o]nce society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accord-

14. *Id.* at 2606.

15. *Id.*

16. *Id.*

17. *Id.* at n.4. The Court first made reference to Florida's statutes for appointing experts and determining competence to stand trial. FLA. STAT. §§ 916.11-916.12 (1985 & Supp. 1986). This statute allows the court to appoint at least two but no more than three psychiatrists or psychologists to examine the mental condition of a defendant. The statute further states that to the extent possible, one of the appointed psychiatrists should be state-employed. The Court also referred to Florida's statute for involuntary placement. FLA. STAT. § 394.467 (Supp. 1986). This statute specifically details due process requirements to which an involuntary placed person is entitled.

18. Ford v. Wainwright, 106 S. Ct. 2595, 2611 (1986)(Powell, J., concurring).

19. *Id.*

ingly."[20] Additionally, Justice O'Connor raised the problem that the interest of not being executed while insane can never be finally determined. Up to the moment of execution, the prisoner may claim to be incompetent to suffer execution, and thus require determination of that issue. Justice O'Connor, however, emphasized that there must be an opportunity to be heard, echoing the concern voiced earlier by both the majority and Justice Powell.

Writing in dissent, Justice Rehnquist, joined by Chief Justice Burger, claimed that no constitutional basis for a right of the insane not to be executed existed, and, therefore, it was unnecessary to comment on what procedures a state should adopt.

In summary, the Supreme Court found Florida's procedures for determining the competency of a prisoner awaiting execution to be inadequate. Although the specific question of how the State of Florida might remedy its procedures was not addressed directly, Justices Marshall, Powell, and O'Connor each identified factors they would have considered in determining whether due process requirements were met. These suggested procedures form a continuum from the maximum of a full trial to the minimum of allowing the prisoner a chance to present evidence on his own behalf.

In holding that Florida's statute was unconstitutional, the Court called into question the constitutionality of every state statute which had similar provisions.[21] Of the states which currently have statutes identifying procedures to be used when a condemned prisoner is thought to be insane, none provide the opportunity for a prisoner either to present evidence on his own behalf or challenge the testimony of court-appointed psychiatrists.[22] With over 1,900 prisoners on death row across the country and an average of at least one person being added every two days,[23] there is likely to be an increase in claims for incompetency once a person has been convicted and sentenced to death. There remains then, the task of revising these state statutes in order to comport with due process as outlined by the Supreme Court's decision in *Ford*. Such revisions should include not only consideration of the appropriate legal reforms, but also how those legal reforms affect the administration of the underlying psychological test.

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20. *Id.* at 2612 (O'Connor, J., concurring in part and dissenting in part).
21. The Court noted that 26 states currently had procedures for the stay of execution due to intervening insanity. *Id.* at 2601 n.2.
22. S. BRACKEL, J. PARRY & B. WEINER, THE MENTALLY DISABLED AND THE LAW 706 (3d ed. 1985).
23. *See* JUSTICE STATISTICS BULLETIN, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1 1987.

## III. LEGAL TEST

The first task in establishing constitutional procedures is to determine an appropriate legal test. The legal test for determining competency to suffer execution varies in language across jurisdictions but remains substantively the same. The common-law definition was "that the condemned man is aware of his conviction and the nature of his impending fate."[24] Some state statutes contain the additional provision that the prisoner have the capacity to assist counsel in relevant legal tasks.[25] Combining the two, commentary to the Criminal Justice Mental Health Standards suggests the following legal test:

> Does the inmate understand the nature of the proceedings against him, what he was tried for, the purpose of the punishment, or the nature of the punishment? Does the inmate recognize or understand any fact which might exist which would make his punishment unjust or unlawful, or . . . to convey such information to counsel or to the court?[26]

Whether the single question of competency to understand the execution is used, or the additional component of competency to assist counsel is required, the legal test remains fairly straightforward.

However, "as is often true of common-law principles, . . . the reasons for the rule are less sure and less uniform than the rule itself."[27] The most common rationale behind the policy for not allowing the "insane" to suffer execution can be traced at least as far back as Blackstone, who noted:

> If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of execution.[28]

Other rationale summarized by the Supreme Court in *Ford* include: (1) the execution simply offends humanity; (2) the execution provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment; (3) it is uncharitable to dispatch an offender into another world when he is incapable of preparing for it; (4) execution serves no purpose because madness is its own punishment; and (5) retribution is not served, as the life taken has a "lesser value" than that of the crime for which the offender is to be punished.[29]

In summary, the elements to prove incompetency to a legal deci-

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24. Ford v. Wainwright, 106 S. Ct. 2595, 2608 n.3 (1986).
25. Heilbrun, *The Assessment of Competency for Execution: An Overview*, 5 BEHAV. SCI. & L. 383, 386 (1987).
26. A.B.A. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.7(b) (1984).
27. Ford v. Wainwright, 106 S. Ct. 2595, 2601 (1986).
28. *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES *24-S (1769)).
29. *Id.*

sion maker vary little across jurisdictions.[30] The substantive legal test does not vary as much as the procedures governing the psychological assessment of the competency. Although the psychological assessment also is relatively straightforward, the unique context in which the assessment is conducted presents considerations usually not encountered by clinicians.

## IV. PSYCHOLOGICAL ASSESSMENT

An overview of the issues which routinely arise in forensic assessment as well as the specific clinical approaches for assessing competencies in the criminal context can be found elsewhere and need not be reviewed here.[31] However, there are both evaluation and treatment issues which are unique to the administration of "competency to be executed" evaluations.

### A. Evaluation Issues

Because of the specificity contained in the legal test, the assessment for competency to be executed may be one of the easier assessments made in the forensic field. Providing enough relevant information to the legal decision maker may not necessitate extensive clinical expertise. Indeed, one questions whether the expertise of a clinician is needed at all. Professor Morse notes:

> [A]lthough the law has given mental experts considerable responsibility for helping decide legal questions raised by crazy behavior, experts have less competence to assist in these decisions than is commonly believed. Moreover, much of the factual knowledge necessary for legal decision making is accessible to lay observers as well as experts.[32]

This may be particularly true in the context of the death row inmate whose every behavior may be monitored by state actors.[33]

If, however, a clinician is called upon to assess the prisoner, the following psycholegal factors should be considered: possible sources of bias, limits of confidentiality, the prisoner's competency to consent,

30. Ward and Heilbrun both provide a summary of specific statutes and the varying definitions of competency. *See* Heilbrun, *supra* note 25, at 383; Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U.L. REV. 35 (1986). It should be noted that because of a presumption towards competency, the burden of proving these elements remains with the defendant.

31. *See, e.g.*, T. GRISSO, EVALUATION COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (1986); G. MELTON, J. PETRILA, N. POYTHRESS & C. SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (1987) [hereinafter PYSCHOLOGICAL EVALUATIONS].

32. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 602 (1976).

33. Ewing, *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives*, 5 BEHAV. SCI. & L. 175 (1987).

the prisoner's fifth amendment right, and reporting of the findings to the legal decision maker.

A finding of competency to be executed has the almost inevitable consequence of the prisoner being executed. For this reason, clinicians should be particularly concerned that a personal bias for or against the death penalty does not influence their evaluation. An additional source of bias may stem from whatever party has hired the clinician. In many states, the evaluation is carried out at the request of the state. With the state as the client, the evaluator should make his or her role clear to the prisoner at the outset of the evaluation.

The Ethical Principles of Psychologists require that the person to be examined be told the nature and purpose of the exam, as well as the limits of confidentiality.[34] Additionally, the American Psychological Association Ethical Principles state that individuals have a "freedom of choice with regard to participation" in any assessment procedures.[35] Thus, in an effort to obtain consent, the beginning of any evaluation should include remarks explaining the nature and purpose of the examination.

An initial inquiry may be necessary to determine whether a prisoner is competent enough to consent to such an evaluation. This competency determination has implications for the "competency to be executed" evaluation. If the prisoner is found incompetent to give consent, the evaluation to determine competency to be executed still may be carried out, although the prior finding alone may present strong evidence of incompetency to suffer execution. If the prisoner is found competent yet refuses to give consent, the suggestion has been made that an evaluator take the following steps: (1) advise the prisoner of any known sanctions that may be imposed as a result of the refusal; (2) arrange for the prisoner to talk with his or her attorney for further explanations; (3) advise the individual whether a report may be sent anyway and of the implications of the refusal for the completeness or validity of the report; and (4) take precautions against the use of "scare tactics" to coerce the individual's participation.[36] The latter is particularly important in the present case where a clinician may threaten to recommend a finding of "competent to be executed" unless consent to the evaluation is given. By not making such a threat, respect for the prisoner's autonomy is affirmed.

A similar issue concerns the prisoner's fifth amendment right to silence. Although the Supreme Court has not directly ruled on the issue of whether a defendant who is about to undergo an evaluation for competency to be executed has a right to remain silent, an analogy

34. AMERICAN PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS (1981).
35. AMERICAN PSYCHOLOGICAL ASS'N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS Principle 6 (1981).
36. PSYCHOLOGICAL EVALUATIONS, *supra* note 31, at 55.

can be drawn from a previous ruling in *Estelle v. Smith*.[37] In *Estelle*, the Court held that there was "no basis to distinguish between the guilt and penalty phases of a capital murder trial so far as the protection of the fifth amendment privilege is concerned."[38] Thus, in matters of sentencing evaluations, the state should not be able to obtain its own clinical evaluation on capital sentencing issues unless the defendant decides to use a clinical evaluation at the capital sentencing hearing.

For "competency to be executed" evaluations, the sentencing has already taken place. One important limitation the Court noted was that *Estelle* did "not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."[39] The Court thus retreated from advocating a strong fifth amendment position across assessment contexts. In balancing a prisoner's interest in remaining silent against the state's interest in not executing incompetent prisoners, the court probably would favor the state and allow the assessment.

From a practical view, the exercise of a right to remain silent almost always would work to the disadvantage of the prisoner. First, if the prisoner were competent enough to understand his fifth amendment right, this would present evidence of reasoning similar to that necessary to understand his execution. Conversely, if the defendant understood his right and then *chose* to remain silent, a clinician may be hard pressed to show that the defendant was not competent to be executed.

Finally, a clinician needs to pay special attention in wording the forensic report. Although the language contained in the legal test may be simple, the clinician should be careful not to report his findings in terms of answering the ultimate legal question. The question of whether a prisoner is competent to be executed is a legal and moral judgement beyond the scope of authority of mental health experts.[40]

### B. Treatment Issues

A clinician called upon to perform an evaluation for competency to be executed is not being asked for a specific diagnosis or whether the prisoner is amenable to treatment. However, clinicians may be called upon to provide treatment for those determined to be incompetent to be executed. Thus, in performing the evaluation for competency to be executed, the examiner may find himself indirectly evaluating

37. 451 U.S. 454 (1981).
38. *Id.* at 462-63.
39. *Id.* at 469 n.13.
40. For discussion on the difference between legal and clinical questions, see *supra* note 31.

whether the prisoner is in need of treatment. Indeed, should some psychopathology be found, some argue that the clinician has an ethical duty[41] to provide therapy for the inmate's psychological suffering.

For clinicians treating incompetent prisoners, the purpose of the "treatment" is subject to debate. Is the treatment designed primarily to relieve suffering or to restore the prisoner to competency? From a legal standpoint, the clear goal is to restore the prisoner to competency. However, from the ethical obligations of the therapist, the goal is to relieve suffering. Whatever the reason, the ultimate effect of such treatment hastens the death of the prisoner.

There are no clear ethical guidelines for clinicians charged with the responsibility of treating death row inmates found incompetent to be executed. Some have argued that in order to remain true to humanitarian goals, clinicians should avoid the role altogether.[42] In contrast, others have suggested that the decision to execute is a legal, not a medical one, and thus treatment should be administered in order to relieve the suffering of the inmate.[43] The withholding of treatment on the ground that the execution will be hastened may represent a concealed protest against the death penalty.[44]

## V. NEBRASKA'S STATUTE

### A. Constitutional Deficiencies

In 1973 Nebraska enacted a statute setting forth the procedures for determining the sanity of convicts under the sentence of death. In 1986, some slight modifications were made to the statute, changing its language to reflect sex neutrality and substituting the word "incompetency" for "insanity."[45] Surprisingly, no changes were made to rem-

41. *See* Mossman, *Assessing and Restoring Competency to be Executed: Should Psychiatrists Participate?*, 5 BEHAV. SCI. & L. 397, 407 (1987).

42. *See* Ewing, *supra* note 33. *See also* Radlett & Barnard, *Ethics and the Psychiatric Determination of Competency to be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY & L. 37 (1986).

43. *See, e.g.*, Mossman, *supra* note 41.

44. Mossman, *supra* note 41, at 402.

45. NEB. REV. STAT. § 29-2537 (Cum. Supp. 1988).

> **Convict: appears to be mentally incompetent, notice to judge; suspend sentence; commission appointed; findings; suspension of execution; when.** If any convict under sentence of death shall appear to be mentally incompetent, the warden or sheriff having him or her in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict.
>
> If he or she shall determine that there is not sufficient reason for the appointment of a commission, he or she shall so find and refuse to suspend the execution of the convict. If the judge shall determine that a commission ought to be appointed to examine such convict, he or she

edy provisions found to be unconstitutional by the Court in *Ford*. In light of the Supreme Court's ruling in *Ford*, the Nebraska statute fails to pass constitutional muster for the same reasons the Florida statute was found defective. The statute does not provide the prisoner a role in the fact-finding process. Nor does the statute allow the prisoner to challenge the testimony which is used in determining the decision of his competency. The statute also fails to meet the third objection raised by the majority in *Ford*, that the decision be made by a neutral fact finder. Under the current Nebraska statute, the determination of competency to be executed is mandated if two of three state examiners determine that the prisoner is competent.[46] Like other state statutes, the statute, at a minimum, must be revised in order to meet these three constitutional objections.

### B. Psycholegal Considerations

A close examination of Nebraska's statute reveals other issues

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shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk as a commission to examine such convict. The commission shall examine the convict with a view of determining whether he or she is mentally competent or mentally incompetent and shall report its findings in writing to such judge within ten days after its appointment. If for any reason any of such superintendents cannot serve in such capacity, the judge shall appoint in his or her place one of the assistant superintendents of such center. If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become mentally competent, he or she shall appoint a commission in the manner provided in this section, who shall make another investigation as to the mental competency of the convict, and in said case said convict is again declared mentally incompetent, his or her execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent.

46. In Nebraska, the psychiatric examination is conducted by a commission of superintendents or assistants of state regional centers at Lincoln, Hastings, and Norfolk. Although the judge is to appoint three superintendents from the three regional centers, the determination of "competent enough to suffer execution" is mandated if two of the three find the convict competent. This provision is constitutionally defective according to *Ford*, as the three superintendents are officers of the state, albeit in an indirect way. The governor appoints the Director of Public Institutions, who in turn hires the superintendents. Because the evaluation team is still ultimately under the control of the executive branch, the statute places the decision of execution wholly within the executive branch. Thus, the Nebraska statute fails to meet the due process requirement outlined in *Ford*, that is, that a neutral fact finder make the determination of insanity. Additionally, the clinicians in charge of the evaluation are expressly working for the state, raising a potential bias in performing the evaluation.

which must be addressed if a thorough revision is to be undertaken. Taking into account the role of the clinician, the following issues are examined: how the plea is initially raised; notice; judge's approval of the examination; standard of competency to be used; characteristics of death row; and repeated claims of incompetency. How the plea of incompetency initially is raised is an important initial consideration. Currently, the statute provides that the warden or sheriff having custody initially may raise the issue.[47] This procedure invites an arbitrary decision. Moreover, vesting the warden or sheriff with unreviewable discretion may deprive the prisoner of minimal due process protection. Unlike some jurisdictions, it is unclear whether mandamus will lie in Nebraska against a warden or sheriff who wrongfully refuses to initiate the inquiry.[48] Clinicians could play a role in educating those in charge of making such initial determinations. For example, information on the warning signs of incompetency could be distributed through educational seminars.

The procedures to accompany a plea of incompetency also require attention. The statute presently omits any reference to notice.[49] A prisoner should receive notice that incompetency will delay execution. A prisoner also should be made aware of the procedures and standards to be used in reviewing a claim of incompetency. The obvious problem is that if a prisoner is truly incompetent, it is unlikely that he will be able to understand the meaning of notice. At least one commentator has suggested that to overcome this problem, an attorney should be appointed immediately after sentencing to represent the prisoner until execution.[50]

The statute also states that the judge of the district court of the district where the prisoner was tried is to approve the necessity of an examination.[51] It is important to note that the judge approves only of an examination, not a trial, once the issue is raised. Thus, by the time a clinician becomes involved, at least two lay people already are satisfied that a genuine issue of incompetency exists. Additionally, one of these two — the warden — probably has had extensive contact with the prisoner and may provide useful information in conducting the examination.

The Nebraska statute omits any reference to the standard of incompetency that is to be used.[52] There is no Nebraska case law which provides a standard of incompetency that is uniquely applicable to this

47. *See* NEB. REV. STAT. § 29-2537 (Cum. Supp. 1988).
48. *See* Shank v. Todhunter, 189 Ark. 881, 75 S.W.2d 382 (1934)(mandamus upheld, but only when petitioner makes a prima facia case of insanity).
49. *See* NEB. REV. STAT. § 29-2537 (Cum. Supp. 1988).
50. Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979).
51. *See* NEB. REV. STAT. § 29-2537 (Cum. Supp. 1988).
52. See *id.*

proceeding. The current test in Nebraska of mental competency to stand trial is whether the defendant has the capacity to understand the nature and object of proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense.[53] Implicit in the omission of a standard in the statute is that the definition of incompetency provided in other stages of the criminal justice system be used as the standard. In cases of such confusion, clinicians should make some effort to ascertain the standard the court is expecting to use in making the final determination.

For the clinician, the particular characteristics of death row also must be taken into account. The process of being condemned to die at some indefinite point in the future while being confined for prolonged periods in the brutalizing and dehumanizing conditions on a "death row" has been suggested to lead to insanity.[54] Suicide attempts are not uncommon to inmates of death row, which often indicates an early symptom of psychological impairment. Clinicians should consider the entire context when performing the evaluation.

The entire process brings up an interesting if not circular problem. The state sentences a prisoner to die and sends him to death row. Death row conditions increase the probability of the prisoner becoming incompetent.[55] The state cannot then execute the incompetent prisoner.

In Nebraska, if the commission finds the prisoner incompetent, the execution is suspended until further order. The judge is to reappoint a commission if the convict appears to have regained his competency. This continues until the prisoner is determined either competent or incurably incompetent. To handle the problem of a prisoner repeating claims of incompetency after an unsuccessful attempt, the judge is to continually assess whether there is sufficient reason for the appointment of a commission. Justice Powell's suggestion in *Ford* that a high threshold be established to initially trigger the process thus is satisfied by the judge's discretion on whether to appoint a commission.[56] In

53. State v. Evans, 218 Neb. 849, 359 N.W.2d 790 (1984).

54. Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 862 (1983). *See also* People v. Anderson, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972) ("the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture").

55. Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972).

56. The problem of an ad infinitum appeal process in which the prisoner continually petitions that he is insane appears unresolvable. As one writer concluded: "Some unreviewable discretion must ultimately be permitted the execution officer." Comment, *Execution of Insane Persons*, 23 S. CAL. L. REV. 246, 252 (1950). It has also been suggested that perhaps a higher standard would be needed upon any subsequent claims of insanity, once it was established at an earlier date that the prisoner was sane. Note, *supra* note 50, at 563.

any subsequent revision of the statute, the availability of a judge to initially review the evidence provides an effective mechanism to both cut down the number of complaints and to establish an initial threshold. Again it bears emphasizing that there is no articulated standard of review in the statute for the judge to use in determining the appointment of a commission.

In summary, Nebraska's statute must be revised in order to survive a constitutional challenge. Along with remedying the constitutional defects identified in *Ford*, other revisions can be made to improve the statute. These other modifications include identifying by whom and how the claim of incompetency may be raised, and identifying both the standard necessary to trigger determination of competency and the standard needed to prove competency.

### C. Remedying the Statute

In *Ford*, the Supreme Court suggested that a state look to its statutes regarding competency to stand trial and involuntary commitment for guidance in constructing appropriate procedures.[57] Both Nebraska statutes presuppose a hearing in the procedures they outline.

Although Nebraska's mental health commitment laws are relevant to the present issue, there is some difficulty in using these statutes as a model to revise the statute concerning incompetency to suffer execution. The primary purpose of the mental health commitment statutes is to assist a person in resisting the label of mental illness. Those statutes contain due process requirements designed to safeguard personal liberty. In contrast, the prisoner awaiting execution has no liberty interest at stake. The prisoner actually succeeds (avoids execution) when the label of mental illness is applied. As the mental health commitment statutes were constructed for the purpose of resisting the label of mental illness, its utility would depend on how well its purpose is thought to parallel the purpose of the post-conviction insanity statute.

Currently, Nebraska's mental health commitment statutes provide the following: a right to be represented by council, the right to independent evaluation, the right to appear personally and be afforded the opportunity to testify on one's behalf, the right to present witnesses and tangible evidence in defending against the petition at the hearing, and the right to confront and cross-examine adverse witnesses and evidence equivalent to the rights granted under the United

57. This section assumes that the statute should be remedied, rather than an alternative course of eliminating the procedure altogether. Such a conclusion would entail abolishing the death penalty. The availability of a stay of execution based on incompetency opens another procedure for prisoners wishing to delay execution, thus increasing the state's expense in maintaining the system.

States Constitution and Nebraska Constitution.[58] The statutes also allow the person to waive any of these rights.[59]

By adopting language from these mental health commitment statutes, the state would be able to remedy the current constitutional defects. Specifically, by allowing a prisoner to present evidence in his own behalf and cross-examine evidence, two of the three constitutional defects would be remedied. The ability to present evidence in his own behalf would include the right to an independent examination. The third constitutional objection raised in *Ford*, that the decision be made by a neutral fact finder, almost necessitates the need for a trial, or at least a hearing. The solution to resolving all of the constitutional problems found in the statute is to revise the statute to guarantee the right to an independent evaluation, the right to present evidence, the right to challenge evidence, and the right to have the decision made by a neutral party.

The *Ford* Court also suggested a state look to its criminal statute for determining competency for guidance. Nebraska's insanity defense statute[60] sets a standard of preponderance of the evidence and places the burden on the defendant to prove the defense of not responsible by reason of insanity. In revising the present "incompetent to be executed" statute, two standards need to be explicated — one to initially determine whether a trial should be held, and the other to determine what threshold need be passed in order to meet the definition of incompetency. A low standard, such as preponderance of the evidence, should be set to initially trigger judicial review of claims of incompetency. A low standard would lessen the discretion of those determining whether a trial is necessary and safeguard the incompetent prisoner's chance of being heard. A higher standard could be imposed to determine whether the prisoner is actually incompetent once he has made it beyond the initial threshold.

The Nebraska statute further allows for an annual review by the court. This procedure may help reduce some of the difficulty of the ethical dilemma faced by the psychotherapist. However, a procedure should be set up so that those in charge of treatment will not be those who review the case for the court.

## VI. CONCLUSION

Of the many other areas where psychology is called upon by the law to assist the fact finder, none contain the dilemmas of a "competency to be executed" examination. When the prisoner is mentally ill, the ability of the state to take a life depends almost exclusively on the

58. NEB. REV. STAT. §§ 83-1049, 83-1052, 83-1056, 83-1058, 83-1059 (1987).
59. *Id.*
60. NEB. REV. STAT. § 29-2203 (1985).

results of this examination. For this reason, this article has focused on the complex interaction of psychological and legal factors which currently govern "competency to be executed" examinations and has suggested ways that may improve the alliance between the mental health and legal professions.

The Supreme Court's decision in *Ford* has constitutionally invalidated many state statutes for determining the competency of prisoners awaiting execution. How these statutes are eventually remedied will affect the legal context in which "competency to be executed" evaluations are carried out. Those who ultimately revise competency statutes would do well to take into account the effect of procedural changes on the actual clinical assessment. Particular attention should be paid to the ethical and practical considerations facing an evaluator called upon to perform a "competency to be executed" evaluation.

In order to comply with the due process demands of *Ford*, revisions of such statutes should include a hearing by a neutral fact finder, the right to an independent evaluation, the right to present evidence, and the right to challenge evidence. Additional revisions might include articulating the standard to be used both in triggering the due process requirements and in determining competency. Clinicians should play an active role in reforming these laws in order to lessen the potential for ethical dilemmas and to insure that incompetent prisoners are not executed.

*Mark A. Small '90*