THE RIGHTS OF THE INSANE OFFENDER

The plea of insanity as a defense to a criminal charge, as a bar to prosecution, and as a means of avoiding punishment is one of the oldest and most abused contentions in our judicial system. The settled policy in favor of bringing to justice those who transgress the precepts of the state has given way in certain situations to a less distinct policy favoring liberation of the mentally ill from the procedural and penal rigors of the criminal law. To give effect to the latter policy, courts and legislatures have provided substantive and remedial safeguards for the accused person whose mental integrity is in doubt or clearly deficient. The constitutional mandate of due process has played a part in defining these protective principles. Recent legislative and judicial developments, notably on the federal level, suggest a review of the methods of determining sanity at various stages of a criminal prosecution and the effect such determination has on subsequent proceedings.

I. INSANITY AT THE TIME OF THE OFFENSE

A. Substantive Right

The mental condition of an accused becomes important initially at the time the acts involved took place. Insanity is a defense to crime because its existence negatives the two essential elements of a crime, the act and the intent. An insane person can neither form the criminal intent, nor, since he cannot control the course of his actions, can he commit a criminal act.

The classic tests of insanity at the time of the offense were enunciated more than a century ago in McNaghten's Case: (1) a defendant was not insane at the time of the offense unless at that time he either did not know right from wrong, or else did not know that the act he was performing was wrong; (2) an insane delusion is no defense unless the defendant believed that the delusion represented reality where such reality would itself be a defense, and his act was the direct result of such misconception. While these principles have been adopted without modification in a number of American jurisdictions, another group of states has added to this

2. See Miller, Criminal Law § 35 (1934).
3. See Davis v. United States, 160 U. S. 469, 484 (1895); See 1 Wharton, Criminal Law § 49 (12th ed. 1932). However, evidence of mental deficiency short of "legal insanity" is not relevant to the question of premeditation and deliberation. Fisher v. United States, 328 U. S. 463 (1946).
6. See Miller, Criminal Law § 37 (1934).
test an "irresistible impulse" qualification, which excuses the offender if at the time of the act he had lost control over his action so that, even knowing right from wrong, he could not restrain himself from inflicting the harm.\(^7\)

The Supreme Court has never determined whether or not the right to be absolved from criminal responsibility is a part of substantive due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. The underlying question is whether this "right" is "fundamental"\(^8\) and "implicit in the concept of ordered liberty."\(^9\) The federal courts have said that "humanity and justice" require that a defendant be permitted to raise the defense of insanity,\(^10\) and it would seem to be a simple matter to harmonize this language with the accepted test of due process. The highest courts of Mississippi\(^11\) and Washington\(^12\) have held that legislation abolishing the defense of insanity violated the due process provisions of their state constitutions.

Most states, however, provide specifically by statute that a lunatic or insane person cannot be found guilty of a crime.\(^13\) Consequently, the serious problems of due process arise in the area of procedure rather than in matters of substance.

B. Procedural Rights

Generally, no special plea is necessary in order to raise the issue of insanity,\(^14\) and evidence of this issue may be introduced under a general plea of not guilty.\(^15\) On the other hand, a plea of guilty admits mental competency at the time of the offense.\(^16\)

Since a sound mental state is essential to criminal responsibility, the issue of sanity at the time of the offense is ordinarily tried by the same jury which passes on the other elements of the criminal charge,\(^17\) and the defendant is not entitled to a separate trial on this


13. See Glueck, Mental Disorder and the Criminal Law 504-643 (1927).

14. See Miller, Criminal Law § 40 (1934).


issue by a jury drawn for that specific purpose. At common law
the jury trial could not be waived.

The Sixth and Fourteenth Amendments to the United States
Constitution have raised the common law rule providing for jury
trial of the insanity defense to the level of a constitutional mandate.
Therefore, unless there is an intelligent waiver, the determination
must be made by a jury. The reports of competent medical exami-
ners can be of no more than persuasive influence, and attempts to
make them conclusive have been held to be unconstitutional usurpa-
tions of the function of the jury.

Similarly, whether or not the insanity defense is a part of
substantive due process, a defendant who properly raises the issue
is entitled to procedural due process in its determination. This
would include the right to counsel, the right to a trial before an
impartial tribunal, and such other rights as "fundamental prin-
ciples" prescribe.

If the suggestions of insanity at the time of the offense is not
raised until after conviction, it may not be availed of unless it can
be shown that the contention is based on evidence which was not
available at an earlier time, and which might have affected the
verdict. If the defendant is not satisfied with the decision of the
court or jury with respect to his defense of insanity, he may pro-
cceed by appeal to secure a review of this determination. Since
an erroneous disposition of this defense does not affect the court's
jurisdiction, it may not be reviewed under a writ of habeas corpus.

II. INSANITY AFTER THE OFFENSE BUT BEFORE CONVICTION

A. Substantive Right

Since an insane person is unable to act in his own defense and is
considered to be helpless before the court, the universal rule

18. United States v. Fore, 38 F. Supp. 140 (S.D. Cal. 1941); see
(1936).
29. United States v. Ragen, 167 F. 2d 543 (7th Cir.), cert. denied, 335
U. S. 830 (1948); Whitney v. Zerbst, 62 F. 2d 970 (10th Cir. 1933).
30. Forthoffer v. Swope, 103 F. 2d 707, 709 (9th Cir. 1939); People
is that one in such a state cannot plead to an indictment or be tried.\textsuperscript{31} Consequently, when it appears before or during trial that an accused person is suffering from a mental defect, further proceedings are suspended pending restoration of the defendant to a competent condition.\textsuperscript{32} Insanity at this stage, however, is not a defense to the criminal charge, but rather a collateral issue involving the defendant's fitness for trial.\textsuperscript{33} Upon recovery, the prosecution of the indictment will resume in the usual manner.

The test of present insanity is whether or not the accused is mentally capable of understanding the nature and gravity of the charge against him, and of rationally presenting a defense or assisting his counsel in such presentation.\textsuperscript{34} The burden is on the defendant to establish incompetency.\textsuperscript{35} In determining whether or not the defendant can understand the charge against him, the nature and complexity of the offense are relevant.\textsuperscript{36} One court has suggested that the entry of a plea of guilty by counsel implies a belief that his client is sane,\textsuperscript{37} but this is of little relevance, since the issue concerns the \textit{fact} of competency.

The trial of a mentally incompetent person is a denial of due process.\textsuperscript{38} The sovereign power of the state to proceed against an insane person charged with a felony\textsuperscript{39} must yield to the fundamental right of an accused to be present, mentally as well as physically, at his own trial.\textsuperscript{40} The court has a duty to determine the defendant's sanity before it accepts a plea of guilty.\textsuperscript{41} If he is unsound at

\textsuperscript{31} See Smoot, Law of Insanity § 452 (1929).
\textsuperscript{32} See United States v. Boylen, 41 F. Supp. 724 (D. Ore. 1941); see People v. Ah Ying, 42 Cal. 18, 21 (1871).
\textsuperscript{33} See McIntosh v. Peschor, 175 F. 2d 95, 98 (6th Cir. 1949); People v. Cornelius, 332 Ill. App. 271, 275, 74 N. E. 2d 900, 901 (2d Dist. 1947).
\textsuperscript{34} Freeman v. People, 4 Denio 9 (N.Y. 1847); see Moss v. Hunter, 167 F. 2d 683, 685 (10th Cir.), \textit{cert. denied}, 334 U. S. 860 (1948).
\textsuperscript{38} Yontsey v. United States, 97 Fed. 937 (6th Cir. 1899); see United States v. Ragen, 149 F. 2d 968, 970 (7th Cir.), \textit{cert. denied}, 326 U. S. 791 (1948).
\textsuperscript{39} See Higgins v. McGrath, 98 F. Supp. 670, 674 (W.D. Mo. 1951).
\textsuperscript{40} See Moss v. Hunter, 167 F. 2d 683, 685 (10th Cir.), \textit{cert. denied}, 334 U. S. 860 (1948); Ashley v. Peschor, 147 F. 2d 318, 319 (8th Cir. 1945).
any stage of the proceedings, the court is without jurisdiction to
decide the cause, and any judgment entered or sentence imposed
is therefore void.\textsuperscript{42}

While a number of states have legislatively emphasized this
prohibition against trying a madman,\textsuperscript{43} the remaining states and
the federal system have found sufficient insurance against the
wrongful deprivation of the accused's liberty in the common law
and the Constitution.

B. Procedure

The manner of raising the issue of present insanity before and
during trial is immaterial.\textsuperscript{44} Although ordinarily the issue is raised
at the time of arraignment, the plea may be heard subsequent to
that time.\textsuperscript{46}

The trial court has the ultimate responsibility for determining the
defendant's fitness for trial,\textsuperscript{46} and no court other than the one in
which the indictment is pending can decide this question.\textsuperscript{47} The
choice of the mode of trial is within the sound discretion of the trial
court,\textsuperscript{48} but the court cannot act arbitrarily, and the record should
evidence an exercise of discretion.\textsuperscript{49} When the question is raised
before trial, the four alternatives commonly resorted to by the
courts\textsuperscript{50} in absence of statute are (1) determination by the court

\textsuperscript{42} Honaker v. Cox, 51 F. Supp. 829 (W.D. Mo. 1943) (insanity at time
of trial); see People v. Ragen, 55 F. Supp. 143, 145 (N.D. Ill. 1944), rev'd
on other grounds, 149 F. 2d 948 (7th Cir. 1945), cert. denied, 326 U. S.
It is not double jeopardy to subject the defendant to a second trial after the
first conviction has been invalidated because of his insanity. Robinson v.
United States, 144 F. 2d 392 (6th Cir. 1944), aff'd 324 U. S. 282 (1945).

\textsuperscript{43} Cal. Pen. Code § 1367 (1949); N. Y. Pen. Code § 1120. See Glueck,
Mental Disorder and the Criminal Law, 504-643 (1927).

\textsuperscript{44} See Youtsey v. United States, 97 Fed. 937, 941 (6th Cir. 1899);

\textsuperscript{45} See Youtsey v. United States, 97 Fed. 937, 940, 941 (6th Cir. 1899);
v. State, 214 Ark. 581, 217 S. W. 2d 259 (1949), where the court found
a waiver of a mental examination.

\textsuperscript{46} See United States v. Harriman, 4 F. Supp. 186, 187 (S.D. N.Y.
1933).

\textsuperscript{47} See Higgins v. McGrath, 98 F. Supp. 670, 674 (W.D. Mo. 1951);
Ex parte Charlton, 185 Fed. 880, 883 (C.C.D. N.J. 1911), aff'd 229 U. S.
447 (1913).

\textsuperscript{48} United States v. Boylen, 41 F. Supp. 724 (D. Ore. 1941); see
Proc. § 4236 (2d ed. 1943).

\textsuperscript{49} Youtsey v. United States, 97 Fed. 937 6th Cir. 1899). But cf. People
v. Kirby, 15 Cal. App. 264, 114 Pac. 794 (1st Dist. 1911), where the denial of
a motion was held to be equivalent to an express finding of sanity, and
United States v. Baldi, 192 F. 2d 540 (3d Cir. 1951), cert. granted, 20, U. S. L.
Week 3251 (U. S. March 24, 1952), where the court found no prejudice in
the denial of the opportunity to have the court exercise this discretion.

\textsuperscript{50} See United States v. Harriman, 4 F. Supp. 186 (S.D. N.Y. 1933).
itself, (2) delivery of the defendant to a mental institution for a period of time for observation and report, (3) examination by a panel of medical experts,\textsuperscript{51} and (4) a hearing before a jury.

If a hearing is held, with or without a jury, the accused, since he must prove incompetency, has the right to open and close the case and to cross-examine witnesses.\textsuperscript{52} If an examination by a panel of experts is ordered, the court may adopt the report of the examiners as final. However, it is not bound to do so,\textsuperscript{53} and the courts have, on occasion, injudiciously rejected the findings of the experts and substituted their own impressions on the matter.\textsuperscript{54} While in the rare instances in which a jury trial is used the issue usually is given to a special jury,\textsuperscript{55} any jury verdict on this question is of only advisory effect.\textsuperscript{56} If present insanity is not raised until the trial has begun, the issue will be submitted to the trial jury for a special finding.\textsuperscript{57}

A finding of present insanity is conclusive only as of the time of investigation and is by no means final.\textsuperscript{58} The trial court may at any time order the defendant to be delivered up for trial,\textsuperscript{59} and any court of competent jurisdiction can order a new inquiry if a substantial doubt of the continued insanity of the defendant is raised.\textsuperscript{60} A defendant found insane prior to conviction has no right to a hearing or a jury trial on the question of his return to sanity.\textsuperscript{61}

Although due process may require notice to the defendant and an opportunity for him to be heard,\textsuperscript{62} it does not require a hearing in

\textsuperscript{51} In a recent murder prosecution in Minnesota, the court ordered separate examinations and reports by two sets of experts. State v. Sandvik, Criminal No. 42174, 4th Dist. Minn., April, 1952.


\textsuperscript{54} See Higgins v. McGrath, 98 F. Supp. 670 (W.D. Mo. 1951). In United States v. Gundelfinger, 98 F. Supp. 630 (W.D. Pa. 1951), the court rejected the findings of the experts, asserting that they had misunderstood the purpose of the examination, but it refused to order a new examination.

\textsuperscript{55} 9 Cyc. Fed. Proc. § 4236 (2d ed. 1943).


\textsuperscript{57} See Youtsey v. United States, 97 Fed. 937, 941 (6th Cir. 1899).

\textsuperscript{58} See Higgins v. McGrath, 98 F. Supp. 670, 673, 674 (W.D. Mo. 1951); Ex parte Charlton, 185 Fed. 880, 884 (C.C.D. N.J. 1911), aff'd 229 U. S. 447 (1913).

\textsuperscript{59} In re Buchanan, 129 Cal. 330, 61 Pac. 1120 (1900); cf. People v. Elder, 104 N. E. 2d 120 (1st Dist. Ill. 1952).

\textsuperscript{60} See Higgins v. McGrath, 98 F. Supp. 670 (W.D. Mo. 1951).

\textsuperscript{61} See Haislip v. United States, 129 F. 2d 53, 54 (D.C. Cir. 1943).

\textsuperscript{62} Walters v. McKinnis, 221 Fed. 746 (W.D. Pa. 1915). The court in United States v. Jackson, 16 F. Supp. 126, 130 (M.D. Pa. 1936), suggested that this case was overruled by Hammon v. Hill, 228 Fed. 999 (W.D. Pa. 1915). But the Court of Appeals for the District of Columbia has since expressed its opinion that the Hammon case was erroneously decided. Barry
any particular manner at any particular stage of the proceedings. It has been held that where a statute provides for the appointment of an impartial medical examiner to investigate and report to the court on the mental condition of an accused, the Constitution does not require the appointment of additional expert assistance to aid the defense in the preparation of its own case. But it is not clear whether or not due process requires court-appointed experts for an indigent defendant when no other psychiatric testimony is available to him. On the other hand, it is settled that a compulsory mental examination of a defendant does not infringe on his constitutional privilege against self-incrimination.

A recent decision of the Municipal Court of Appeals for the District of Columbia extended the constitutional right to the appointment of counsel to a pre-trial lunacy inquisition. However, this decision seems to have been based on a misconception of the nature of the inquiry as a "semi-criminal" proceeding. Although the right to appointment of counsel is normally associated only with criminal proceedings, it is conceivable that fundamental unfairness might result from subjecting the accused to an examination on this fact issue without the benefit of an advocate prepared to present his position. If the court's denomination of the proceeding as "semi-criminal" is accepted, a persuasive argument can be made that the defendant is deprived of future liberty unconstitutionally if counsel is denied him.

On the other hand, a person is entitled to retain counsel at all

v. Hall, 98 F. 2d 222 (D.C. Cir. 1938), in which the court struck down a civil commitment statute which failed to provide for notice and an opportunity to defend.


67. Evans v. United States, 83 A. 2d 876 (D.C. 1951). The court also held that one who has been classified as prima facie insane cannot waive counsel.

68. Id. at 880.

stages of the prosecution of the indictment against him.\textsuperscript{70} In addition, the federal constitution requires the appointment of counsel by the court in all federal cases where the defendant is unable to procure legal assistance himself.\textsuperscript{71} Since an insane person obviously cannot be depended upon to retain his own counsel, the court must provide counsel for him from and after the time of arraignment.\textsuperscript{72} Moreover, since waiver of counsel at trial can only be made "intelligently", any attempted waiver by a person who is thought to be insane, or is later proven to be so, is ineffective.\textsuperscript{73}

A considerable number of states have prescribed by statute a procedure for the determination of pre-trial sanity.\textsuperscript{74} Usually the statutes provide for a sanity determination whenever the question is raised, whether it is raised by the prosecution, the defense, or the court itself.\textsuperscript{75} But it remains within the court's discretion to determine whether there is a sufficient question to justify the invocation of the statutory procedure.\textsuperscript{76}

While some of the statutes call for a preliminary examination by experts to determine the necessity for a hearing on the sanity issue,\textsuperscript{77} others direct that a jury shall be impanelled immediately to hear the question.\textsuperscript{78} In some states there are statutes providing for a procedure to determine whether the defendant is restored and

\textsuperscript{70} Hawk v. Olson, 326 U. S. 271 (1945). The right to counsel includes the right to a private consultation with the defendant. \textit{Ex parte} Ochse, 238 P. 2d 561 (Cal. 1951).

\textsuperscript{71} Tomkins v. Missouri, 323 U. S. 485 (1945); \textit{see} Betts v. Brady, 316 U. S. 455, 464 (1942). There is no duty for the court to provide counsel before the defendant is brought into court. \textit{See} Commonwealth v. McNeil, 104 N. E. 2d 153, 155 (Mass. 1952).

\textsuperscript{72} Hawk v. Olson, 326 U. S. 271 (1945). \textit{But cf.} United States v. Baldi, 192 F. 2d 540 (3d Cir. 1951), \textit{cert. granted}, 20 U. S. L. Week 3251 (U. S. March 24, 1952), where the court held that failure to provide counsel at the time of a plea of not guilty by a defendant whose mental condition was questionable was not unconstitutional, in absence of a finding of prejudice to defendant's case.

\textsuperscript{73} Honaker v. Cox, 51 F. Supp. 829 (W. D. Mo. 1943); Robinson v. Johnston, 50 F. Supp. 774 (N. D. Cal. 1943), \textit{aff'd} 144 F. 2d 392 (6th Cir. 1944), \textit{aff'd} 324 U. S. 282 (1945).


\textsuperscript{75} Glueck, \textit{op. cit. supra} note 74, at 504-643.

\textsuperscript{76} \textit{See} United States v. Baldi, 192 F. 2d 540, 545 (1951), \textit{cert. granted}, 20 U. S. L. Week 3251 (U. S. March 24, 1952); Robinson v. Commonwealth, 243 S. W. 2d 673, 674 (Ky. 1951).

\textsuperscript{77} Glueck, \textit{op. cit. supra} note 74, at 504-643.

NOTES

ready for trial. Most of these require no more than the certification of the hospital authorities.  

In Massachusetts the "most far-sighted piece of legislation yet passed on this subject" has been in operation for a quarter of a century. The famed Briggs Law, which provides for the routine mental examination of all serious offenders within the statutory classification before the trial of the indictment, has met with great success. The law has rid the Massachusetts courts of the plague of the "battle of the experts" which too often accompanies the trial of the sanity issue, by providing for competent detached observation and diagnosis. It has also greatly minimized the abuse of the insanity plea, and it has taken the responsibility for recognizing the exterior manifestations of an internal defect out of the hands of the court and put it in the hands of those qualified to evaluate such symptoms.  

In 1949, Congress added sections 4244-4248 to the United States Criminal Code. This long overdue legislation follows the general pattern of procedure outlined in the state statutes, with provision for a preliminary examination by at least one psychiatrist upon suggestion of the prosecution, the defense, or the court, to be followed by a hearing in the event that indications of incompetency are reported. Section 4246 provides that a post-conviction finding of mental incompetency during trial shall operate to vacate the judgment and grant a new trial. Unfortunately, however, the new law does not provide for the determination of the prisoner's recovery and it thus falls short of complete uniformity. In spite of the specifications now imposed on the federal courts as contrasted with the liberality of the former procedure, the courts have held that the new legislation is simply declaratory of the common law, and its constitutionality has been affirmed.  

Unless provided by statute, the defendant has no right of

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appeal from the result of the collateral inquiry into his sanity.\textsuperscript{88} Neither the common law nor constitutional due process require that a defendant be given more than one hearing.\textsuperscript{87} Moreover, the order made at the insanity hearing is only interlocutory and not final, and thus it lacks one of the essential elements of appealability.\textsuperscript{85}

Where a statutory appeal is allowed, the error most frequently asserted is an abuse of discretion by the trial court in denying a sanity inquiry. The appellate courts, however, have found this discretion to be very broad, and have refused to find abuse in the absence of a strong showing,\textsuperscript{89} although a reversal is in order if an abuse of discretion clearly appears from the record.\textsuperscript{90}

### III. Post-Conviction Insanity

The most difficult problems arise when the effect which insanity should have on punishment is considered. While the trial of an insane man may be a mockery, and his conviction an injustice, the punishment of one who cannot appreciate his plight or save himself may well be an atrocity. Because of the special difficulties involved when the death sentence is imposed, post-conviction insanity in capital cases can best be treated separately from the situations in which some lesser penalty is exacted.

#### A. Capital Cases

At common law, it was regarded as fundamental that no insane person could be executed.\textsuperscript{91} If it was found that a condemned prisoner was so unsound that he could not appreciate the gravity of his situation or understand why he was being punished, he could not be put to death.\textsuperscript{92} Today, every American state sustains this policy, either by statutory direction or by judicial adoption.\textsuperscript{93}

\begin{itemize}
  \item People v. Bechtel, 297 Ill. 312, 130 N. E. 728 (1921); Freeman v. People, 4 Denio 9 (N.Y. 1847).
  \item See People v. Cornelius, 332 Ill. App. 271, 277, 74 N. E. 2d 900, 902 (2d Dist. 1947).
  \item See People v. Aparicio, 241 P. 2d 221, 223 (Cal. 1952); Robinson v. Commonwealth, 243 S. W. 2d 673, 674 (Ky. 1951). It has been held that a refusal to hear any evidence is not an abuse of discretion. United States v. Baldi, 192 F. 2d 540 (3d Cir. 1951), cert. granted, 20 U. S. L. Week 3251 (U. S. March 24, 1952).
  \item People v. Aparicio, 241 P. 2d 221 (Cal. 1952).
  \item 1 Hale's P. C. §35 (1847).
  \item See People v. Lawson, 178 Cal. 722, 727, 174 Pac. 885, 888 (1918); State v. Helm, 69 Ark. 167, 173, 61 S. W. 915, 917 (1901); see Weihofen, Insanity as a Defense in Criminal Law 386 (1933).
\end{itemize}
The Supreme Court has not made clear whether or not due process forbids the execution of an insane convict. In the leading case of Solesbee v. Balkom the majority did not reach this question. Solesbee was convicted of murder in Georgia and sentenced to death by electrocution. His post-sentence plea of insanity was disposed of pursuant to a Georgia statute by the governor on the recommendation of an examining board of three physicians. The Court held only that there was no violation of procedural due process. Justice Frankfurter in dissent insisted that substantive due process would not permit the execution of an insane person, and took the position that procedural due process required a fair and open hearing to determine the fundamental question of the defendant's mental capacity. Thus the only clear statement as to the existence of an underlying substantive right is that of a lone dissenter in a case decided on a question of procedure. Moreover, the analogy made to the power of reprieve by Justice Black, writing for the Court, supports an inference that a stay of execution because of insanity is purely an act of grace. However, the fact that both the majority and the dissent felt it necessary to test the constitutionality of the procedure suggests that there is a right which must be protected by procedural safeguards.

While the contention that the execution of a mental incompetent is cruel and unusual punishment within the terms of the Eighth Amendment has not been thoroughly considered by the Supreme Court, the rationales set forth in Louisiana v. Resweber can be logically extended to negate this argument. The prohibition was there said to apply to the method of punishment, rather than the amount of suffering which the prisoner must endure. The Court felt that in absence of a purpose to inflict unnecessary pain, there is no violation of this constitutional principle. Since the method is not an issue in the post-conviction insanity dilemma, there appears to be no basis for constitutional challenge on this ground.

Little, if any, support can be mustered from penological theories for the execution of a lunatic. Unfortunately, punishment today is still based primarily on a theory of revenge, but society cannot avenge itself in any sense by punishing one who can no longer

95. Id. at 14 et seq. But see People v. Riley, 37 Cal. 2d 510, 514, 235 P. 2d 381, 384 (1951).
understand pain. Again, the deterrent effect of taking the life of a madman is highly questionable, although it has been suggested that the prospect of being executed, whether rational or not, might well give pause to a potential offender.\textsuperscript{100}

The policy arguments in favor of withholding the substantive right are few. The strongest point that can be made is that "squeamishness" should not prevent the taking of a life which by hypothesis has been declared forfeit.\textsuperscript{101} Yet the courts and legislatures of every state have been unimpressed by such reasoning. On the other hand, the arguments in favor of the recognition of the right are numerous, though somewhat vulnerable. First, in view of the fact that convicts who are gravely ill will not be executed,\textsuperscript{102} it would seem even more repulsive to put to death one whose disease is mental rather than physical. Also, it is suggested that it is not humane to take the life of one who cannot help himself,\textsuperscript{103} though it is doubtful that such a person would experience more anguish than one who is fully conscious of his fate. A more substantial objection is that, but for the insanity, the prisoner might have been able to present some justification for postponing or preventing his execution.\textsuperscript{104} But this possibility becomes more remote when a reasonable period elapses between conviction and the onset of irrationality. Finally, it is apparent that one who is insane cannot prepare himself for life after death. This circumstance is probably the source of the common law rule,\textsuperscript{105} and it is a factor which must be considered whenever capital punishment is involved.

From a procedural viewpoint, the post-conviction insanity plea presents a particularly awkward problem. The interest in preserving substance conflicts with the desire to expedite administration. At common law the method of trying this plea was left to the discretion of the sentencing court.\textsuperscript{106} Legislative enactments have left this basic procedural principle intact. Although some statutes provide for a hearing in the event that a prima facie case of insanity is made out, most of the states still leave the question to the court's considered determination.\textsuperscript{107}

\textsuperscript{100} See 1 Stanford L. Rev. 134 (1948). This brief article represents a thoughtful study of the reasons behind the rule against executing the insane.

\textsuperscript{101} See Michaelson, Post-Conviction Due Process Regarding Insanity Claim Prior to Execution, 41 J. Crim. L. & Criminology 639, 643 (1951).

\textsuperscript{102} See Arnold, Symbols of Government 11-12 (1935).

\textsuperscript{103} Co. Third Inst. *6 (1797).

\textsuperscript{104} See 1 Chitty, Criminal Law *761 (1847).

\textsuperscript{105} See Comment, 23 So. Calif. L. Rev. 246, 252 (1950).

\textsuperscript{106} In re Smith, 25 N. M. 48, 176 Pac. 819 (1918); see Note, 49 A. L. R. 804 (1927).

\textsuperscript{107} See the compilation of state statutes in the Appendix to Justice Frankfurter's opinion in the Solesbee case, 339 U. S. 9, 26 (1950).
In the *Solesbee* case, the Supreme Court reduced the due process restrictions on post-conviction procedures to an absolute minimum. In holding constitutional the Georgia procedure giving the governor exclusive authority over insanity pending execution, the Court swept away all doubt as to whether a judicial hearing could be dispensed with. The Court had previously denied the existence of any right to confront or cross-examine witnesses in proceedings after trial, and had asserted that due process requires fewer safeguards after an offender’s guilt has been established than before. The *Solesbee* opinion makes it extremely doubtful that the due process clause has any effect at all on post-conviction procedures.

Justice Frankfurter, dissenting in the *Solesbee* case, is prepared to forego a full judicial hearing for the convicted criminal, but he believes that the accepted due process requirements of notice and opportunity to be heard should be observed and that the insanity plea calls for an inquiry which is “fair in relation to the issue for determination.” In addition, he very properly points out that if there is a constitutional right involved, administrative convenience cannot justify its denial. In short, Justice Frankfurter is fully aware that a right which is given no more procedural protection than that which the majority of the court would insist upon is an empty guarantee.

At this stage of the proceedings there is no further question of a right to a jury trial or a privilege against self-incrimination, since the issue of guilt has been decided. The post-sentence hearing, if one is provided, is not a criminal proceeding, but rather is collateral thereto, a special proceeding of civil nature to determine the prisoner’s mental status. Generally, no appeal is authorized or allowed from the post-conviction determination of insanity, although the suggestion has been made that the court’s order may be the kind

109. The doubt was created by language in *Phyle v. Duffy*, 334 U. S. 431 (1948), which appeared to modify the holding in *Nobles v. Georgia*, 168 U. S. 398 (1897), that a judicial hearing was not necessary.
112. *Id.* at 25. The experience in states in which a judicial hearing is prescribed by statute has demonstrated that the fear of a serious delay of justice is unfounded. See Drinan, *The State and Insane Condemned Criminals*, 12 *Jurist* 92, 95 (1952).
114. Weihofen, op. cit. supra note 92, at 395.
of "order in a special proceeding" made appealable by statute in a number of jurisdictions.\textsuperscript{116}

If one who becomes insane after conviction regains sufficient mental capacity to warrant his submission to the penalty imposed by law, he will be returned to the court and delivered up for execution.\textsuperscript{117} Again, the doctrines of the Solesbee case would negate any duty of the court to provide for a judicial determination of restoration.

B. Non-Capital Cases

Where the sentence imposed involves a prison term, the mental capacity of the prisoner is only material in deciding which of two institutions can most effectively rehabilitate him. In this situation, as contrasted with those considered above, it is usually the prisoner who is urging his sanity, but there is no constitutional right to go to a prison rather than to a mental hospital.

When a criminal is committed to a hospital for observation and treatment pursuant to statute, the period of commitment is considered as part of the term of incarceration, so that if the prisoner's mental health is restored, he need only serve the balance of his term in prison.\textsuperscript{118} However, if the term of the sentence should expire before competency has been regained, the prisoner will ordinarily be retained in confinement until such time as it becomes safe to return him to the community.\textsuperscript{119} The state is regarded as the guardian of all those committed to its custody, and it has authority to administer its charges as it sees fit within the ambit delineated by the Constitution.\textsuperscript{120} The disposition of a convict who is not subject to the death penalty is a matter of judicial or administrative discretion and is generally not a proper subject for judicial review.\textsuperscript{121}

CONCLUSION

It is well to remember that "medical insanity" alone is not enough to stay the impact of the criminal law on an offender. Mental disorder is only relevant in criminal prosecutions to the extent that it prevents the accused from distinguishing between right and wrong, from maintaining his defense, or from understand-

\textsuperscript{117} Weihofen, op. cit. supra note 92, at 391.
\textsuperscript{118} Weihofen and Overholser, Commitment of the Mentally Ill, 24 Tex. L. Rev. 307, 329 (1946).
\textsuperscript{119} Cf. Estabrook v. King, 119 F. 2d 607, 610 (8th Cir. 1941).
\textsuperscript{120} See Higgins v. McGrath, 98 F. Supp. 670, 674 (W.D. Mo. 1951).
ing the reason for his punishment. But it is apparent that the courts are not qualified to detect the existence of psychological handicaps. Consequently, it is gratifying to observe a definite trend toward the utilization of psychiatric skills in the disposition of offenders in the criminal courts of America.

The constitutional law of criminal insanity, particularly at the post-conviction stage, must remain somewhat conjectural, pending further clarification of the content of due process by the Supreme Court. It is to be hoped that the Court will not seek to postpone decision on a matter which affects an increasingly large number of criminal trials annally. Speculation has no place in the criminal law. In the words of Justice Frankfurter, "Where life is at stake one cannot be too careful. I's had better be dotted and t's crossed."^{122}