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DEATH, THE STATE, AND THE INSANE:
STAY OF EXECUTION†

Geoffrey C. Hazard, Jr.*
and David W. Louisell **

By the law of all common law jurisdictions, and, as far as we know, the law of all civilized nations, a person who is insane cannot be punished. This rule is well established, and its soundness in logic and policy is beyond the scope of the inquiry here. But the procedure for determining whether a prisoner is indeed insane presents troublesome problems. The purpose of this paper is to review the present procedure by which this determination is made and to explore the necessity for its change. Reference will be made chiefly to the law of California, but the problems posed under California law are representative of those arising generally.

I. THE SCOPE AND PURPOSE OF THE RULE
EXEMPTING THE INSANE FROM PUNISHMENT

It is familiar that mental illness in certain circumstances relieves an accused from criminal responsibility.1 Speaking very generally, the rationale of this rule is that imposition of criminal sanctions is not justified if the person against whom they would be applied was incapable of responsible action. It is also familiar that if a defendant is disabled by mental illness during the proceedings

†This article is based upon a study made at the request of the California Law Revision Commission and pursuant to contract between it and Professor David W. Louisell. Its title is: "A study to determine whether the law respecting post-conviction sanity hearings should be revised." The opinions, conclusions, and recommendations are entirely those of the authors and do not necessarily represent or reflect the opinions, conclusions, and recommendations of the Law Revision Commission.

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against him, the proceedings are abated.\textsuperscript{2} The rationale of this rule is that a defendant should not be put to trial when his mental condition prevents him from making an effective defense. The law, however, recognizes mental condition or "insanity" as affecting criminal liability in a third way, namely, by providing that a defendant who is insane may not be punished. As will be seen presently, the rationale of this rule is far from clear.

The second and third rules regarding insanity are stated in California Penal Code section 1367, as follows: "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane."

The statute appears to be broader than the common law rule. At common law no person could be \textit{executed} who was insane; but the common law rule made no mention of prison sentences.\textsuperscript{3} In point of fact, the statutory broadening of the exemption rule seems to have little practical effect because the claim of insanity is almost always asserted by defendants who have been sentenced to death.\textsuperscript{4} Apparently the terrors of bedlam exceed those of prison, though not those of hell. Indeed, so uniform is this experience that for practical purposes we can think of the rule in its common law form as an exemption from capital punishment.

Both the common law and the statute provide an exemption which lasts only as long as the convict remains insane. Once he

\textsuperscript{2} See \textit{Model Penal Code} §§ 4.04-4.07 (Tent. Draft No. 4, 1955); \textit{id.} pp. 194-195. The rule applies whether the defendant was insane at the time of the offense and remained insane up to the time when he was brought to trial, or was sane at the time of the offense but became insane prior to his trial. The test applied in California to determine whether the defendant should stand trial is whether he is "capable of understanding the nature and object of the proceedings against him and can conduct his defense in a rational manner." People v. Perry, 14 Cal.2d 387, 399, 94 P.2d 559, 565 (1939); People v. Field, 108 Cal. App.2d 496, 238 P.2d 1052 (1951). A substantially identical test is used elsewhere, Annot., 3 A.L.R. 94 (1919), and is proposed in \textit{Model Penal Code} § 4.04 (Tent. Draft No. 4, 1955). "No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such in capacity endures." \textit{Ibid.}

\textsuperscript{3} See \textit{Weihofen, Mental Disorder as a Criminal Defense} 464 (1954).

\textsuperscript{4} This of course does not imply that prison wardens typically escape the necessity of providing for the insane other than those under sentence of death. But apparently the initiative for transfer from prison to mental institutions rarely is exercised by prisoners under sentences for life or years, or those acting on their behalf. The problem is rather one of the necessities of prison administration, with the initiative being exercised by the warden. In other words, among insane prisoners as among the insane generally, the impulse for self-commitment is a relatively rare phenomenon. The Medical Facility at Vacaville under the Department of Corrections is the California institution designed to accommodate the transfer of insane prisoners from other institutions. See Cal. Pen. Code §§ 6100-06.
regains his sanity he again becomes subject to punishment and normal routine calls for setting a new execution date.\(^5\) Therefore, in the determination both of post-conviction insanity and restoration to sanity, there is at stake the ultimate issue of life and death, and the pressure imposed on the procedural structure is accordingly at the extremity. Such, then, is the scope of the rule exempting an insane prisoner from punishment.

When we seek the purpose of the rule we are met with diverse explanations of varying persuasiveness. The very multiplicity of explanations 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.\(^6\) It is nevertheless necessary to explore the purpose of the exemption, for only when its importance is correctly gauged can we decide what degree of procedural thoroughness should accompany application of the rule.

The traditional explanations of the rule are found in the writings of the old common law commentators. These sources are conveniently collected in Mr. Justice Frankfurter's dissenting opinion in Solesbee v. Balkcom.\(^7\) No other explanations seem to have been offered by criminal law writers. Blackstone and Hale explained the rule by saying that if the defendant is sane he might urge some reason why the sentence should not be carried out.\(^8\) Although there may be some substance to this suggestion, it does not seem weighty. The same reasoning would be sufficient to postpone—perhaps indefinitely—the execution of a sane man, for if it be assumed that intelligent reflection will disclose reasons for stay of execution, then time for reflection should be allowed the sane as well. It must be remembered that, by hypothesis, the defendant is assertedly insane at the time scheduled for execution but has been sane throughout the proceedings against him up to and including the pronouncement of sentence. Thus, the only justification for allowing a postpone-

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\(^5\) See *In re Phyle*, 30 Cal.2d 838, 186 P.2d 134 (1947); [Welti, op. cit. supra note 3, at 468-69.]

\(^6\) Compare [Holmes, The Common Law 5 (1881).] *A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.* [Ibid.]

\(^7\) 339 U.S. 9, 17-19 (1950). This is the leading case on the constitutional requirements for the procedure by which the exemption rule is applied. It is discussed below in that connection.

\(^8\) 4 Blackstone, Commentaries 395*-96* (13th ed. 1800); 1 Hale, Pleas of the Crown 34-35 (1736).
ment of execution because insanity then supervenes is to suppose that a reason not previously considered will suddenly come to mind—a possibility which seems so small as to be more argumentative than persuasive. While it is perhaps impossible to characterize any factor as _de minimis_ when set against human life, the reality of this explanation for the rule is dubious.⁹

Blackstone offered an additional reason for the rule, namely that the prisoner's insanity is itself sufficient punishment.¹⁰ This is a completely untenable basis for the exemption rule since, by the rule's own terms, when the insanity is cured the prisoner—far from having served out his punishment—is forthwith taken to the execution chamber.

Coke offered a different explanation for the rule. He stated that the rule is one of humanity, a refusal to take the life of the unfortunate prisoner.¹¹ Coke's theory may be interpreted as stopping at this point and going no further, a notion which seems to underlie all modern defenses of the exemption rule. Taken in this form, however, the explanation will not survive analysis. On the contrary, it is nothing less than an oblique attack on the death penalty itself, for most of the objections to executing an insane man are the same as, but less persuasive than, the objections to executing a sane man. As Mr. Justice Traynor put it:

> Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for sane men, a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses?¹²

However, Coke's theory seems to have a further implication than merely the objection to taking human life. Coke has it that taking the human life of an insane person does not serve as an example to others.¹³ Just what Coke meant by this is not completely clear, but one cogent explanation is suggested by Sir John Hawles when he says that the King is not benefited by the death of one of his subjects unless that death serves to deter others from com-

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¹⁰ 4 BLACKSTONE, COMMENTARIES 395*-96* (13 ed. 1800). The notion is frequently expressed in the Latin, "furiosus solo furore punitur." The same maxim appears in Coke's work.
¹¹ COKE, THIRD INSTITUTE 6 (1797).
¹² Phyle v. Duffy, 34 Cal.2d 144, 159, 208 P.2d 668, 676-77 (1949) (concurring opinion). It seems worth noting that Mr. Justice Frankfurter, who has been an insistent advocate of a right to hearing on the claim of insanity, is opposed to capital punishment itself. See FRANKFURTER, OF LAWS AND MEN 77, 81 (1956).
¹³ Coke expresses it in the Latin, "ut poena ad paucos, metus ad omnes perveniat." COKE, THIRD INSTITUTE 6 (1797).
mitting the same crime. In other words, Coke can be taken as suggesting that there is no deterrent value in executing the insane person so that his life may be spared without weakening the deterrent effect of the death penalty.

This explanation closely resembles the rationale underlying the imposition of lesser penalties on attempts than on offenses successfully completed. First, the public, though angered by the prisoner's crime, takes pity on his present insane condition and hence probably will not tolerate executing him. Since penal sanctions cannot far outrun public opinion, this is a major consideration supporting the rule. Secondly, the offender cannot, at the time he is about to commit the crime, foresee that after capture, conviction and sentence, he will became insane. On the contrary, he either supposes he will not be caught or is indifferent to the consequences if he is. Hence, it does not materially dilute the deterrent effect of the death penalty to withhold it if the prisoner becomes insane. Since there is no deterrent effect in executing him, life would be taken unnecessarily.

This basis for the rule is satisfactory as long as we suppose that the defendant becomes permanently insane, but such is not always the case and, indeed, may be the exception. Rather, there remains the possibility that recovery will follow, and when it does, so follows the execution. It may be that the only sound reason for imposing death at this point is to assure that insanity will not be feigned in the first place. It might also be said that the restoration of the prisoner to sanity also restores him to a status such that his execution has the same deterrent effect as if he had been sane throughout. This latter reason appears to be at least partially un-

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15. See Michael and Wechsler, A Rationale of the Law of Homicide (pts. 1-2), 37 Colum. L. Rev. 701, 1261 (1937). "In the first place, popular indignation is inevitably aroused by the actual occurrence of a wrong, with the result that death and other very severe penalties are more likely to be tolerated when homicide behavior has resulted fatally than when it has not. In the second place, the deterrent efficacy of a body of criminal law is not greatly lessened by making the discrimination. Men who may act in order to kill will hope for and contemplate success rather than failure. Consequently, if the prospect of being punished severely if they succeed will not deter them from acting, the prospect of being punished just as severely if they fail is unlikely to do so... However, ... discriminations of this sort... make for inequality in the treatment of offenders... [but this] inequality may... be preferable to an unnecessary sacrifice of actual offenders for the sake of deterrence." Id. at 1295, 1297; cf. Model Penal Code Tent. pp. 178-79 (Tent. Draft No. 10, 1960).

16. This may well be an "inverted" humanitarianism, as Justice Traynor says, but it still seems to be a correct statement of public sentiment.
satisfactory, however, because the perceived irony of execution upon restoration to sanity would seem to vitiate the impact of the execution itself. In any event, the fact that many who become insane will recover and all who recover will be executed means that the rule has only a limited effect to avoid unnecessary deaths. Viewed in this light, the rule exempting the insane from capital punishment—like the rule that attempted crimes are to be punished less severely than completed offenses—does not rest, as does the rule requiring sanity at trial, on any claim to fair process put forth on behalf of the prisoner. The reason for withholding the ultimate sanction from the insane prisoner is that his execution is unnecessary to the accomplishment of the end of deterrence. So considered, the rule of exemption does not necessarily carry with it a demand that it be accurately and fully applied to every prisoner claiming its benefit. The purpose of the inquiry is not to make sure that a defendant’s right is vindicated, for no right of his is involved. The inquiry need only satisfy society that it is not overlooking an opportunity to withhold the death penalty.

There is another basis on which the exemption rule is traditionally explained, and that assumes retribution to be one objective of punishment. In this connection, “retribution” does not mean vengeance. Although the desire for vengeance doubtless does much to explain why the death penalty exists, it is immaterial for vengeance whether the defendant is sane or not; the important thing is to exterminate the wrongdoer. But “retribution” is frequently used in a sense different from vengeance, and when so used it is relevant to the exemption rule. This is the theory that each wrong

17 Stated this way, the rationale for withholding the death penalty from an insane prisoner appears to imply the callous if not blood-thirsty use of the prisoner’s life as a means to the achievement of society’s general purpose to deter serious crime. This seems the only candid explanation, however, and is one which of course raises squarely the defensibility of capital punishment itself.

18 The conclusion stated in the text, that in American society the recognizable claim to avoidance of the death penalty is really the public’s and not the prisoner’s, while perhaps startling, is easier to accept in view of the paucity of reasons offered in support of the prisoner’s case. Despite his intense interest in the problem and his enormous acuity, Mr. Justice Frankfurter could come up with no more forceful arguments than those of the old commentators and the historical argument that the rule had always been so. He sought recourse in an unsubstantiated and generalized contention that the due process clause prohibits a state from taking the life of an insane person. See Solesbee v. Balkcom, 339 U.S. 9, 19-21 (1950). But quaere, whether at root his position, despite the general terms in which it is couched, is not essentially the theological one. Thus in dissenting in Caritativo v. California, 357 U.S. 549, 559 (1958), he stated that it was better for a state to put up with unworthy claims of exemption than to “have on its conscience a single execution that would be barbaric because the victim was in fact, though he had no opportunity to show it, mentally unfit to meet his destiny.” Ibid. (Emphasis added.)
must be offset by a punitive act of the same quality. Presumably killing an insane person does not have the same moral quality as killing a sane one. Hence, it might be concluded that it is improper to exact the death sentence when the prisoner is insane, for then a punishment of lesser value is being imposed. The retributive theory is also stated in another way, namely that the prisoner's death is an expiation for his crime. Put into modern psychological terms, this theory justifies the death penalty as a vicarious punishment for crimes committed vicariously; punishment gives the law-abiding a release. For the psychological explanation to have basis, however, the public must be able to identify with the prisoner, and this they cannot do if he is insane. But, the rationale based on the retributive theory, in its several variations, lasts only so long as the prisoner remains insane. Once he recovers his sanity, the reason for the rule disappears.

Another reason for the rule of exemption is essentially theological, namely that a person should not be put to death while insane because in that condition he is unable to make his peace with God. This thinking seems at least implicit in the writings of St. Thomas Aquinas. The same point is memorably put by Shakespeare where he has Hamlet overtake his uncle while at prayer, and decide not to work his vengeance then and send his uncle to heaven, remembering that his father had been murdered "with all his crimes broad blown":

Now might I do it pat, now he is praying;  
And now I'll do't: and so he goes to heaven;  
And so am I revenged. That would be scannd;  
A villain kills my father; and for that,  
I, his sole son, do this same villain send  
To heaven.  
O, this is hire and salary, not revenge.  
He took my father grossly, full of bread,

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19 See ZILBOORo G, THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT (1954), reviewed in Louisell, 79 THE SCIENTIFIC MONTHLY 332 (1954); ZILBOORo, op. cit. supra, at 76. Probably in the psychoanalytic school there are those who would put the proposition as baldly as this: we suspend execution while the prisoner is insane because the public would not be appeased by such an execution (or even that the public would not enjoy it). One of that school directed the authors' attention to Musselwhite v. State, 215 Miss. 363, 367, 60 So.2d 807, 809 (1952), where the court, discussing stay of execution of the insane, said inter alia: "[T]here is agreement among the examining physicians that at the time of the hearing the petitioner had lost awareness of his precarious situation. Amid the darkened mists of mental collapse, there is no light against which the shadows of death may be cast. It is revealed that if he were taken to the electric chair, he would not quail or take account of its significance."

20 See Sir John Hawles, Remarks on the Trial of Mr. Charles Bateman, 11 STATE TRIALS 474, 477 (Howell ed. 1816).

21 See AQUINAS, SUMMA THEOLOGICA, First Part, Treatise on the Angels, ques. 64, art. 2, objection, reply to second objection; AQUINAS, SUMMA CONTRA GENTILES, bk. 3, ch. 146.
With all his crime broad blown, as flush as May;
And how his audit stands who knows save heaven?
But in our circumstance and course of thought,
'Tis heavy with him: and am I then revenged,
To take him in the purging of his soul,
When he is fit and season'd for his passage?
No.
Up, sword, and know thou a more horrid hent:
When he is drunk asleep, or in his rage,
Or in the incestuous pleasure of his bed;
At game, a-swearing, or about some act
That has no relish of salvation in't;
Then trip him, that his heels may kick at heaven
And that his soul may be as damn'd and black
As hell whereto it goes. My mother stays:
This physic but prolongs thy sickly days.22

This ground of exemption was much debated in England when
capital punishment was being reconsidered there, but no clear-cut
answer was forthcoming. On the one hand, it was argued that the
insane must be restored to sanity in order to make his peace; on
the other, it was urged by Archbishop William Temple that "It is
quite impossible to believe that eternal destiny depends in any degree
on the frame of mind you were in at the particular moment [of
death] rather than on the general tenor of the life."23 This accentuates the difficulty, in a society as theologically pluralistic as ours,
of appraising the significance of this ground as a reason for the rule
of exemption. Moreover, granting the validity of the ground, its
relationship to the procedural problem is perhaps so complex as to
be unmanageable. A human determination of sanity or insanity,
even after the most searching inquiry with moderu psychiatric
techniques available, hardly rises to the level of moral certainty—
many would call it only a prayerful guess. Whether capacity is
such as to permit true repentance is a question that ultimately is
for God alone.

There seems to be no other tenable explanations for the exemp-
tion rule.24 The most acceptable justification for the rule in Ameri-

22 SHAKESPEARE, HAMLET, PRINCE OF DENMARK, act III, sc. iii, lines 72-96.
23 The story is told in Gowers, A LIFE FOR A LIFE? 44, 113 (1956). Quaere,
whether a right to exemption from execution while insane, on behalf of
one shown to be theologically committed while sane to the necessity of racion-
ality at the hour of death so as to be able to make his peace, might ultimately
be held to inhere in the constitutional guarantee of the free exercise of reli-
flag salute unconstitutional when violative of child's religiously predicated conscience). In Musselwhite v. State, 215 Miss. 363, 371, 60 So.2d 807, 811
(1952), in discussing stay of execution of the insane, the court said: "The
death warrant itself is a part of the judicial process. It is likewise a part of
due process that there be available to him [prisoner under death sen-
tence] as a rational person avenues toward executive clemency, or even
spiritual consolation."
24 Recognized purposes of punishment, other than those mentioned in the text,
include reformation and incapacitation. Reformation is irrelevant in the
present context. When sane the prisoner will be executed; when insane he
can society therefore is simply that it is unnecessary to put the insane prisoner to death. The reason for putting him to death when he recovers is to prevent feigned insanity as a means of escape from the death penalty which society has felt it necessary to impose. Inquiries beyond this point, to reiterate, involve attacks upon capital punishment itself. It seems evident that the uneasiness manifested in applying the insanity exemption is uneasiness over the death penalty, which is so plainly put in issue in these insanity proceedings. To the proceedings themselves we now turn.

II. THE PROCEDURE FOR TRYING THE CLAIM OF EXEMPTION

The common law had no established procedure for trying a claim that the defendant had become insane after conviction. The issue was raised by a suggestion to the court, presumably by simple motion. If the court thought the suggestion had enough merit to warrant further inquiry, it could hold a preliminary hearing to determine whether a prima facie case of insanity was made out. The judge could then impanel a jury to try the issue. On the other hand, it was apparently within his discretion to try the issue himself. As summed up in Nobles v. Georgia:\[25\]

\[B\]y the common law, if, after conviction and sentence, a suggestion of insanity was made, not that the judge to whom it was made should, as a matter of right, proceed to summon a jury and have another trial, but that he should take such action as, in his discretion, he deemed best.\[26\]

The common law rule is still in effect in some states,\[27\] but in many others it has been supplemented or superseded by a statutory procedure of various sorts.\[28\] The statutory procedures vary in their provisions.\[29\] The variations occur in respect of both of the principal procedural issues involved, namely who may raise the issue of the prisoner's insanity and who shall decide the issue after it has been raised. The first of these two issues is by far the more significant, and

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25 168 U.S. 398 (1897).
26 Id. at 407. For other statements of the common law rule, see Annot., 49 A.L.R. 804 (1927); WEIHOFEN, op. cit. supra note 3, at 465.
29 See WEIHOFEN, op. cit. supra note 3, at 465-68. For the English procedure, which involves an inquiry on the initiative of the Home Secretary, see ROYAL COMMISSION ON CAPITAL PUNISHMENT (1949-1953) pp. 124-129 (1953).
involves two steps of inquiry: who is a proper party to raise the issue and, if such a party raises the issue, is he entitled as a matter of right to a hearing on his contention.

At common law, as we have seen, any person could raise the issue by suggesting to the court that the prisoner had become insane. Such is the rule by statute in many states. In some states, defendant's counsel or his next friend may raise the question. In practice, all these devices seem to be the same, for the only person who normally will approach the court with a suggestion of defendant's insanity is his attorney, some member of his family or a friend. For convenience, we may say that in these jurisdictions the defendant has the right to raise the issue.

In the majority of states, the issue may be raised only by the sheriff or warden having custody of the prisoner. In most states it appears to be unsettled whether mandamus will lie against a warden who is alleged to have wrongfully refused to initiate the inquiry. In one state, it has been held that mandamus would lie for this purpose, but the showing required was such that, for practical purposes, the applicant for mandamus can compel a hearing only by making in his application papers a prima facie case of insanity.\(^{30}\)

The second step is to inquire whether the person raising the issue is entitled as a matter of right to a full hearing on the merits of the issue. Under the statutes providing that the warden is the proper person to raise the issue, the trial is held as a matter of course. However, under the statutes providing that defendant can raise the issue, it appears that nowhere is there a right to a trial as a matter of course. On the contrary, in these jurisdictions a trial is held only if the defendant accompanies his suggestion of insanity with prima facie evidence of that fact. In practical effect, therefore, the issue is tried only if the judge is shown reason to believe that the prisoner is insane.\(^{31}\)

The second aspect of the hearing procedure is the mode of trial. In the jurisdictions where the inquiry is initiated by the warden, the trial is frequently conducted to a specially summoned jury in an inquest at which the warden presides. In other jurisdictions, the

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\(^{30}\) See Shank v. Todhunter, 189 Ark. 881, 75 S.W.2d 382 (1934).

\(^{31}\) This result has been reached even where the statutory language rather plainly attempted to give the prisoner a right to a trial. See Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951). For cases applying statutes which grant a plenary hearing only if the trial judge is satisfied that there is good cause to make the inquiry, see e.g., Jackson v. United States, 25 F.2d 549 (D.C. Cir. 1928). Cf. State v. Allen, 204 La. 513, 15 So.2d 870 (1943) (applying the statutory procedure for determining sanity at the time of trial to the case where insanity was claimed after conviction).
WARDEN MERELY APPLIES TO THE APPROPRIATE TRIAL COURT AND THE COURT CONDUCTS THE HEARING. IN JURISDICTIONS WHERE THE INQUIRY IS INITIATED BY SUGGESTION TO THE COURT, THE JUDGE PRESIDES. THE ISSUE MAY BE TRIED TO A JURY OR TO THE COURT; SOME STATES REQUIRE JURY TRIAL, SOME PERMIT IT, OTHERS ARE SILENT ON THE SUBJECT. EVEN IN STATES WHERE A JURY TRIAL IS NOT REQUIRED, IT APPEARS TO BE THE PRACTICE TO HAVE THE ISSUE TRIED TO A JURY.\footnote{2}

IT IS EVIDENT FROM THE FOREGOING THAT NO STATE CONFEYS A RIGHT ON THE PRISONER TO HAVE A TRIAL OF THE ISSUE OF HIS PRESENT SANITY. RATHER, THE DECISION WHETHER THERE WILL BE A TRIAL IS VESTED EITHER IN THE WARDEN OR IN THE TRIAL JUDGE.

IN CALIFORNIA, THE PROCEDURE FOR DETERMINING A PRISONER'S PRESENT INSANITY IS SET FORTH IN CALIFORNIA PENAL CODE SECTIONS 3700 TO 3704. SECTION 3700 PROVIDES THAT THE PROCEDURE CONTAINED IN THE ENSUING SECTIONS IS EXCLUSIVE.\footnote{3} SECTION 3701 PROVIDES THAT IF THE WARDEN HAS "GOOD REASON TO BELIEVE" THAT THE PRISONER IS INSANE, HE SHALL CAUSE A PROCEEDING OF INQUIRY TO BE COMMENCED. THE COURT THEN SUMMONS A JURY AND CONDUCTS THE TRIAL. A VERDICT BY THREE-FOURTHS OF THE JURY IS SUFFICIENT TO DETERMINE THE ISSUE.\footnote{4} IF THE JURY FINDS THAT DEFENDANT IS INSANE, HE IS TAKEN TO THE APPROPRIATE MENTAL HOSPITAL; IF FOUND SANE, HE IS GIVEN OVER TO THE WARDEN FOR EXECUTION.\footnote{5}

The reason judges prefer not to try the issue is not necessarily the consequence of a belief that the jury is more competent to decide the question. Perhaps judges prefer, understandably, to shift responsibility for the decision to the collective shoulders of the jury.\footnote{33}

Whether the exclusion of other procedures is constitutionally valid has been much mooted in the courts. This problem is considered below in the discussion of the constitutional problems involved.\footnote{34}

\footnote{2} The reason judges prefer not to try the issue is not necessarily the consequence of a belief that the jury is more competent to decide the question. Perhaps judges prefer, understandably, to shift responsibility for the decision to the collective shoulders of the jury.

\footnote{3} Whether the exclusion of other procedures is constitutionally valid has been much mooted in the courts. This problem is considered below in the discussion of the constitutional problems involved.

\footnote{34} CAL. PEN. CODE § 3701 reads as follows: "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file . . . a petition . . . asking that the question of his sanity be inquired into . . ." On its face, this provision suggests that the relation between the warden's custody and the appearance of "good reason" is one of time, i.e., that the warden must act because the "good reason" arises at the time the prisoner is in his custody. Hence, the statute literally seems to mean that "good reason" is not what the warden thinks is good reason, but what a court would think is good reason, at the time the prisoner is in the warden's hands. This is perhaps a theoretical quibble, but in a close case it might make a difference whether the question was: "Does the warden think there is good reason?", rather than, "Do I, the judge, think there is good reason?"

Whatever the apparent meaning of the statute, however, it seems fairly clear that McCracken v. Teets, 41 Cal.2d 648, 262 P.2d 561 (1953), and Caritativo v. Teets, 47 Cal.2d 304, 303 P.2d 339 (1956), interpreted it as meaning that the warden must have good cause to believe defendant to be insane. In effect, therefore, the test is one of the warden's good faith, not the objective significance of the facts claimed to constitute the "good reason."\footnote{5}

See People v. Riley, 37 Cal. 2d 510, 235 P.2d 381 (1951).\footnote{55}

\footnote{55} See People v. Riley, 37 Cal. 2d 510, 235 P.2d 381 (1951).
California Penal Code section 3702 has a provision which has caused some difficulties. This section requires the district attorney of the county where the prison is located (Marin County) to attend the proceedings. It then goes on to provide that the district attorney can subpoena witnesses "in the same manner as for witnesses to attend before a grand jury." The meaning and purpose of this language are not clear. The California Supreme Court has taken it as implying that the proceeding is ex parte, rather like the kind of inquest made by a grand jury. As it said in People v. Riley:37

\[T\]he prescribed inquiry does not purport to be a true adversary proceeding surrounded by all the safeguards and requirements of a common-law jury trial. . . . No provision is made for the assignment of counsel or notice of hearing to the defendant, but only the district attorney is required to attend the hearing. Pen. Code, sec. 3702. Likewise, it is the district attorney who may produce witnesses . . . .

Such provisions—wherein no reference is made to any right of the defendant to be represented by counsel, to cross-examine witnesses, or to offer evidence—indicate a . . . procedure . . . akin to an ex parte inquiry . . . .38

With all due respect to the supreme court, this seems a great deal to read into section 3702. All that section says is that the district attorney must attend and that he may subpoena witnesses. To be sure, this manner of issuing subpoenas is like that in grand jury proceedings, but it does not follow at all that other aspects of the proceeding also resemble a grand jury proceeding. Bearing in mind that the problem is one of statutory interpretation, it would seem that there is little in the statutory language and apparently no legislative history to support the court's interpretation.

An interpretation at least equally plausible is that the hearing is a special proceeding39 and as such affords the prisoner all the rights he has in an ordinary civil case. Among these are the right to reasonable notice, the right to counsel (though perhaps not the right to publicly compensated counsel, as in a criminal case), the right to produce witnesses, by subpoena if necessary, and the right to examine and cross-examine witnesses. Of course, the structure of our civil procedure statutes is such that the foregoing procedural

38 Id. at 515, 235 P.2d at 384.
39 People v. Lawson, 178 Cal. 722, 174 Pac. 885 (1918), had stated generally that the insanity proceeding was a special proceeding. From this it could be easily contended that the prisoner has the usual incidents of a civil trial, viz., right to counsel, right to reasonable notice, right to cross-examine, etc. However, in People v. Riley, 37 Cal.2d 510, 235 P.2d 381 (1951), the court apparently overruled all these possibilities. Apparently this was done to buttress the court's rejection of the prisoner's claim of a right to a trial on his sanity. But, as suggested in the text, it is one thing to say that prisoner has no right to have a trial; it is something else again to say that, if he is to have a trial, it will nevertheless be merely an ex parte hearing. This is to confuse the showing needed to get a trial with the trial itself.
rights are inseparably connected with the right of appeal. It may be suggested that the real reason for the language in the *Riley* case was not a desire to deprive the prisoner of an effective hearing but to forestall time-consuming appeals. This is quite another problem, which could well be remedied by legislation.

Apart from the understandable desire to foreclose dilatory appeals, the court's approach in *People v. Riley* seems poor statutory interpretation and poor public policy. Perhaps the warden should be given the only key to the courthouse, but if he uses the key, there is no reason at all why the ensuing trial should not be a full and fair one. At any rate, the present interpretation of Penal Code sections 3700-3704 is that the hearing is ex parte only. As indicated, no appeal lies.

On the issue of restoration to sanity the procedural protections afforded the prisoner are substantially greater. Whether a prisoner, found insane in the manner described above, has been restored to sanity is determined by the procedure set forth in Penal Code section 3704. In this hearing, defendant is required to be given written notice of the hearing and counsel must be appointed for him. The issue of restoration to sanity is tried to the court without a jury. If restoration is found, the prisoner is delivered up for execution; otherwise he is returned to the mental institution.

This, in brief, is the California procedure for trying the claim of exemption. One anomaly is that the statutory procedure seems to apply only to cases where the defendant is sentenced to death, for section 3701 of the Penal Code refers only to that situation. It has been noted above that the claim of insanity by prisoners under sentences of less than death is largely academic, because in point

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40 One may speculate on what the legislature intended in providing that the district attorney may subpoena witnesses. It is possible that they reasoned this way: The state is not a party; only parties may subpoena witnesses; therefore, without special provision the state's interest cannot be protected by compulsory process for witnesses; therefore, we should make such special provision. The most accessible, though perhaps not the most suitable, model for such a provision is to be found in the grand jury practice.

41 Prior to 1949, the statute provided that the fact of restoration is established merely by the certificate of the superintendent of the mental hospital in which the defendant is confined. It was under this prior procedure that the prolonged Phyle litigation arose. After conviction Phyle had been found insane by a jury and committed to a state mental hospital. There, he confessed that he had feigned his insanity. The superintendent promptly certified him to be sane. Phyle and his family fought this determination for the next several years. See *In re Phyle*, 30 Cal.2d 838, 186 P.2d 134 (1947), *cert. dismissed*, 334 U.S. 431 (1948); *Phyle v. Duffy*, 34 Cal.2d 144, 208 P.2d 668 (1949), *cert. denied*, 338 U.S. 895 (1949); Application of Phyle, 95 F. Supp. 555 (N.D. Cal. 1951). See generally, Comment, *Execution of Insane Persons*, 23 So. Cal. L. Rev. 246 (1950).
of fact they rarely seem to urge the claim as a matter of legal right. Should such a claim be raised, however, no doubt the proper thing to do would be to follow the common law procedure.

III. THE TEST OF INSANITY USED IN THE EXEMPTION CLAIM

It will be noticed that there has been no discussion of the test of insanity used in connection with the exemption claim. On this subject the common law was exceedingly vague and the California statute is silent. Both have referred to the problem as simply one of determining "insanity" without serious concern about definitions. The sensitivity to the definitional problem developed in the recurring debate over the M'Naghten rule's soundness makes it appropriate that attention be paid to the definition used for purposes of the exemption claim. The meager authority indicates that the common law test of insanity is whether the defendant is aware of the fact that he has been convicted and that he is to be executed. Sometimes this is stated as whether he is "aware of the proceedings against him." This is strikingly similar to the test used in connection with the claim of insanity at the time of trial, and it is difficult not to suspect that the test for the latter was simply carried over into the exemption context. In any event, it is not at all clear that this is an appropriate test.

The only considered discussion of the test that should be used appears in a comment in the *Southern California Law Review*, which reads as follows:

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42 See note 4 supra.

44 CAL. PEN. CODE § 1367. CAL. CIV. CODE § 22.2 provides that the common law shall be the rule of decision "so far as it is not repugnant to . . . the . . . laws of this State." The common law remedy in the death penalty case seems an apt analogy on which to invoke section 22.2. There also is authority that a court has inherent power in inquiry into insanity in the death penalty case, a power which would seem available in the non-capital cases as well. See, e.g., State v. Davis, 6 Wash. 2d 696, 108 P.2d 641 (1940).

45 Note that California Penal Code § 1367 runs the two together without any indication that a separate test of insanity has been either intended or considered. See also WEIHOPEN, op. cit. supra note 3, at 430-31, where the author equates the problem of insanity at time of trial with that of insanity at time of execution. It would seem that a test couched in terms of the prisoner's "awareness" should also embrace the concepts of ability to consult with counsel and to communicate important information.

If . . . punishment is an act of vengeance, then the prisoner's ability to appreciate his impending fate would seem to be the standard. . . . If the policy [underlying the exemption] is based on the right of the defendant to make his peace with God, then a realization of his original guilt should be added to the test. If the reason is that he should have an opportunity to suggest items in extenuation or make arguments for executive clemency, then the standard should probably involve intelligence factors as well as moral awareness.7

Implicit in this analysis is that the test of insanity to be used should depend on the purpose of punishment. The purpose of the exemption and its relation to the objectives of punishment have already been explored above. It will be recalled that the conclusion reached there was that the exemption could not be successfully linked to any of the bases of punishment, but is explainable only as a means of avoiding the unnecessary taking of life. If this is true, then the appropriate test of insanity to be used is one which is broad enough to allow maximum exemptions and yet narrow enough to prevent feigning of insanity. Such a test, it would appear, would be simply whether the defendant's condition is such that, by ordinary standards, he would be involuntarily committable to an institution. This standard can hardly be thought too broad, for it is the basis we presently use for involuntary treatment of mental illness. Its familiarity to the courts and psychiatrists should reduce to a minimum the opportunities for deception. Finally, since it stays within the realm of medical discourse, it does not involve the conceptual and practical problems which arise when, as in M'Naghten, an attempt is made to define insanity in a way that is significant legally but discordant with prevailing medical thought.8

There seem to be no serious difficulties arising from application of such a test. The matter appears to be wholly within the legislature's discretion, for, as we shall see, such constitutional problems as there are have been procedural and not substantive. To those problems we now give consideration.

47 Id. at 256.
48 It is difficult to know how a psychiatrist would go about applying the test stated by the Oklahoma court, supra note 44. It is also difficult to know how a psychiatrist would have any less trouble with the common law test, "understanding the proceedings against him," than he now does with the M'Naghten rule. The law would probably be well advised to avoid the M'Naghten sort of thicket, if at all possible.

The test used in England is the one suggested in the text, namely whether the defendant is certifiable as insane. See Royal Commission on Capital Punishment (1949-1953) 101, 124 (1953).

Compare Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (1955); The test is whether defendant's "capacity to use his customary self-control, judgment and discretion had . . . been so lessened that it was necessary or advisable for him to be under care." Id. at 29, 117 A.2d at 102.
IV. CONSTITUTIONAL REQUIREMENTS IN HEARINGS ON EXEMPTION CLAIMS

The constitutional problem involved in the exemption rule is whether the due process clause imposes any obligation on the states to grant a hearing on a prisoner's claim of insanity, and, if so, what kind of hearing. The question was posed for the first time a half century ago in *Nobles v. Georgia*.\(^4^9\) There, the defendant had been convicted of murder and sentenced to death. The Georgia statute provided that the insanity issue was determined by a jury inquest conducted by and on the initiative of the warden or sheriff having custody of the defendant. Defendant asserted a right to have her claim heard by a jury.

The Supreme Court upheld the state court's dismissal of defendant's petition for a hearing. The Court said that a jury trial was unnecessary. Whether its decision is any broader than this has been disputed. The reasoning used makes it clear that the state need do no more than impose responsibility on some appropriate official to conduct an inquiry into defendant's sanity when it seems to be necessary or appropriate. This result appears to be the necessary implication of the *reductio* argument used by the Court, as follows:

If it were true that at common law a suggestion of insanity after sentence, created on the part of the convict an absolute right to a trial of this issue by a judge and jury, then (as a finding that insanity did not exist at one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the will of a convict to suffer any punishment whatsoever, 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.\(^5^0\)

It will be seen that the force of this argument is quite unaffected by the nature of the hearing conducted, whether it be jury trial, trial to the court alone or administrative determination. The argument is directed against the right to a hearing of any kind, and it is not unduly latitudinarian to read the *Nobles* case as deciding that there is indeed no such right.

Whatever the scope of the *Nobles* decision, it apparently stifled constitutional objections to exemption procedures for fifty years. In the meantime, California adopted its present procedure for trying the issue. It is worthy of note that from the statute's adoption in

\(^{4^9}\) 168 U.S. 398 (1897).

\(^{5^0}\) Id. at 405-06.
1905 to 1947, the warden's discretion had gone unchallenged. In 1947, the Phyle litigation got under way. For procedural reasons Phyle never succeeded in getting the United States Supreme Court to decide his claim that he had a right to a hearing on the issue of his present sanity. The decisive test of the constitutional issue came up shortly afterward, however, in the case of Solesbee v. Balkcom.

The Solesbee case was a habeas corpus proceeding on behalf of a convicted Georgia murderer claiming present insanity. Under the then prevailing Georgia procedure, that issue was determined ex parte by the Governor of the state. It was contended that the prisoner had a right to have his sanity determined by a "judicial or administrative tribunal after notice and hearing in which he could be represented by counsel, cross-examine witnesses and offer evidence." With only Mr. Justice Frankfurter dissenting, the Supreme Court rejected this contention, stating that the mode of procedural effectuation of exemption for insanity was a matter of grace, not of right, and that accordingly the state was under no obligation to provide a hearing. The court said that the Nobles case stands for the proposition that "the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard."

The Solesbee case seemed to have been dispositive of any objec-

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51 See Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94, 131 (1958). See also People v. Sloper, 198 Cal. 601, 246 Pac. 802 (1926) (the courts have no jurisdiction to pass on the insanity issue except in a proceeding initiated by the warden pursuant to Penal Code sections 3700-04). For the statutory history prior to 1905, see In re Phyle, 30 Cal.2d 838, 186 P.2d 134, 139 (1947).

52 See note 41 supra. After Phyle had been returned from the mental hospital to prison, he brought habeas corpus claiming that he had a right to a hearing on his restoration to sanity, that returning him to prison without such a hearing was a denial of due process and therefore that his detention in prison was invalid. The California Supreme Court rejected this claim on the ground that the courts had no authority to inquire into the prisoner's sanity except in a proceeding initiated by the warden. It accordingly dismissed the petition. In re Phyle, 30 Cal.2d 838, 186 P.2d 134 (1947).

Phyle appealed to the Supreme Court of the United States, but that court dismissed because it was advised that Phyle should have presented his claim by means of mandamus rather than habeas corpus. Phyle v. Duffy, 334 U.S. 431 (1948). Mandamus was thereupon brought on Phyle's behalf. The California Supreme Court treated the question as properly presented in this manner and, on the merits, affirmed the trial judge's determination that there was no "good reason" to suppose Phyle to be insane and hence there should be no plenary trial of the issue. Phyle v. Duffy, 34 Cal.2d 144, 208 P.2d 668 (1949). The United States Supreme Court denied certiorari. 338 U.S. 895 (1949). The disposition by the Supreme Court was such, however, as clearly to imply that the prisoner had a constitutional right to a hearing on his claim. See 47 Mich. L. Rev. 707 (1949).


54 Id. at 10.

55 Id. at 13.
tions to the California procedure. That procedure was nevertheless challenged shortly thereafter in Caritativo v. Teets. In that case, the California Supreme Court held that, in the light of Penal Code section 3700, the courts had no jurisdiction to inquire into the prisoner's insanity except in a proceeding initiated by the warden pursuant to Penal Code sections 3701-3704. It expressly disapproved suggestions to the contrary in Phyle v. Duffy. In a per curiam opinion, the United States Supreme Court affirmed, citing the Solesbee case, but this time, three justices dissented. Mr. Justice Harlan concurred in an opinion in which he treated the California statute as imposing on the warden "a mandatory duty to make a continuing check on the mental condition of condemned prisoners and to notify the district attorney whenever he finds grounds for belief that a prisoner has become insane." The exercise of this duty, said Mr. Justice Harlan, had to be "responsible and [in] good-faith.

In dissent, Mr. Justice Frankfurter urged that the warden's good faith was impugned by the fact that he had refused to allow an outside psychiatrist to examine the prisoner and had refused to allow counsel to inspect the prison's psychiatric records. Mr. Justice Frankfurter did not urge that a judicial hearing should be required nor that the warden was necessarily an inappropriate officer to make the preliminary determination of whether a plenary hearing should be held. But he said:

I do insist on the mandatory requirement that some procedure be established for assuring that the warden give ear to a claim that the circumstances warrant his submission of the issue of sanity to a determination in accordance with the procedure set forth in the California statutes.

He went on to reiterate his point, that the due process clause gives the prisoner a right to be heard by the warden on the issue whether there is "good cause" to believe him to be insane.

The foregoing is the present posture of the constitutional law on the problem. In view of divisions in the Supreme Court and the charged character of the issue involved, it cannot be said with assurance that the constitutional issue has been put to rest. But taking due account of the difficulties of forecasting constitutional decisions, it would appear that California's present procedure will survive any foreseeable challenge. Of course, any procedure involving

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56 47 Cal.2d 304, 303 P.2d 339 (1956).
57 34 Cal.2d 144, 208 P.2d 668 (1949). See notes 41 and 52 supra.
59 357 U.S. at 550.
60 Id. at 551.
61 Id. at 557.
greater procedural protection to the prisoner would also satisfy the requirements of due process. It is, however, difficult to know what procedure would satisfy Mr. Justice Frankfurter, and yet also avoid interminable delay. This, as the Supreme Court recognized in the Nobles case, is the real objection to broadening the procedural remedies available to a prisoner claiming the insanity exemption. This practical problem deserves elaboration.

V. THE PRACTICAL DILEMMA INVOLVED IN LIBERALIZING THE PROCEDURE

The recent broadening of the constitutional protections afforded criminal defendants is well known. Equally well known is the almost limitless resourcefulness of prisoners in resurrecting (and sometimes simply erecting) new reasons why their imprisonment is a deprivation of due process. Because the courts, and especially the United States Supreme Court, are properly reluctant to close the door to a prisoner claiming his rights have been violated, the prosecution is rarely able to say that all possible objections to a conviction have been put to rest. So the recent habeas corpus cases demonstrate that the fear of interminable litigation in insanity claims is not an idle one.

But the case of the claimed insanity exemption is more difficult than the typical habeas corpus case. However long the habeas corpus struggle may last, it normally turns on the issues presented by the original conviction. With perhaps a rare exception, no new events occur to create new issues, so there is the theoretical and real possibility that some day the litigation will come to an end. This is

62 In the California Supreme Court's decision in the Caritativo case, Mr. Justice Schauer concurred in the judgment, but stated that he believed the prisoner could raise the issue of his insanity by means of habeas corpus. The import of Mr. Justice Schauer's opinion is that the legislature has no right to foreclose such an inquiry because the California Constitution provides that the privilege of the writ may not be suspended. But this assumes that the constitutional guarantee of the writ is as broad as the practice under it. Put another way, this assumes that our constitution guarantees a hearing of all the various types of issues which have been heard under habeas corpus. But it has been demonstrated that a common law habeas corpus did not lie to question the imprisonment of a man convicted by a court of record. And it has been forcefully urged that this historical content of the writ is all that the constitution guarantees. See Collings, Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?, 40 CALIF. L. REV. 335 (1952). See also In re Bell, 19 Cal.2d 488, 122 P.2d 22 (1942). As a matter of policy, of course, it may be wise generally to permit a broad scope of inquiry under habeas corpus, but this is another problem. See Sunal v. Large, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting).

not true, however, in the case of the insanity exemption. By definition, the exemption applies at the time of execution. Obviously, the determination of sanity has to be made before execution. Therefore, the determination of sanity can never be made as of the time that it becomes legally relevant. Hence, the legal issue required to be decided—insanity at the precise moment of execution—literally can never be determined.

The practical problem thus posed cannot be avoided; it is inherent in the statement of the legal rule. Yet no revision of the legal rule is feasible, for a rule that stipulated “No person shall be executed who is insane 10 days before the date of his execution” would probably be meaningless and certainly purposeless, as it would only change the date of encounter with the dilemma. This practical difficulty has been repeatedly recognized by the courts and has been summed up as follows: “Some unreviewable discretion must ultimately be permitted the executing officer.”

None of the judges who have held out for a right to some sort of hearing on the claim of insanity seem to have faced up to this difficulty. Mr. Justice Frankfurter has stated that “claims obviously frivolous need of course not be heard,” yet he also tells us that without a hearing it cannot be said that a claim is frivolous. Perhaps Mr. Justice Frankfurter would concede that no new hearing need be given to a prisoner whose claim has just been rejected. But “just” rejected may mean, with appellate review, six months to two years before, and it surely cannot be said that insanity could not supervene in that interval. Hence, if we are to avoid indefinite procedural regression, we must fall back either on unfettered administrative discretion, or on a type of control and review thereof different from that which normally prevails in criminal and civil legal administration.

66 Caritativo v. California, 357 U.S. 549, 558 (1958) (dissenting opinion). Mr. Justice Frankfurter treats the problem as though it were one of undue delay, apparently without recognizing that the problem is not undue delay but indefinite delay. He also says that “The protection of a constitutional right to life ought not to be subordinated to the fear that some lawyers will be wanting in the observance of their professional responsibilities.” Ibid. But the prisoner can act as his own attorney and, as has been so fully demonstrated, do very nicely at it. And if the prisoner has a right to counsel, he has a right to counsel willing to serve.
67 Strictly speaking, of course, the insanity can supervene if there is, as there must be, any interval at all between determination of sanity and execution. The point thus holds theoretically no matter how speedy the procedure. It is not clear how short the interval must be to be treated as de minimis.
VI. Conclusion

To recognize candidly the dilemma inherent in procedural effectuation of the rule that the insane shall not be executed is not to say that California is doing as well as it should and can do. Nor is compliance with due process—assuming that the Supreme Court would continue to hold that California's procedure does comply—per se the ideal for which we should strive. A draft of a proposal to replace the existing statutory scheme is set forth in the Appendix. We have tried to provide procedural protection both commensurate with our society's aversion to execution of the insane and consistent with the need to avoid interminable delay.

The essence of our proposal is to recognize the obligation in the warden to avoid execution of the insane; to require him to have an examination made of the prisoner; to accord the prisoner or his representative a right to have his experts participate; and to enforce these procedural requirements by mandate. Further, the warden's determination of sanity can be set aside on mandate but only if it is not supported by substantial evidence. A jury trial may once be had on demand of the prisoner, provided a showing is made that a triable issue exists; but at the trial the issue is simply whether the warden's determination of sanity was based on substantial evidence. Neither court nor jury is to arrogate the deciding power of the warden, but only to make sure that he exercises it in accordance with prescribed procedure and on the basis of substantial evidence.

This seems to us about the best that can be done.

Appendix

Note: In order to simplify, we set forth below our proposal not in terms of the amending statute itself, but in terms of the California Penal Code sections as they would exist were our proposal adopted. What follows would be achieved by slightly amending existing section 3700; repealing existing sections 3701, 3702 and 3703; substantially amending section 3704; and adding new sections 3701.1, 3701.2, 3701.3 and 3701.4.

Section 3700.

No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom the defendant is delivered for execution, as provided

in the seven succeeding sections,* unless an appeal is taken.

Section 3701.1.

(a) The warden to whom a defendant under judgment of death has been delivered for execution shall make an inquiry into the mental condition of the defendant. Promptly after receipt of the defendant, and in any event no later than 30 days prior to the date set for execution, the warden shall have him examined by one or more psychiatrists designated by the warden. Not later than 15 days prior to the date set for execution, the psychiatrist or psychiatrists making the examination shall make a written report of their findings to the warden. The warden may require supplementary examinations of the defendant at any time prior to execution. The report of any such supplementary examination made more than five days prior to the date set for execution shall be in writing.

(b) The defendant or any person on his behalf may deliver to the warden not later than 15 days prior to the date set for execution a written demand that the prisoner's mental condition be examined by not more than three psychiatrists designated by or on behalf of the defendant. The demand shall contain the names of the examining psychiatrists and the time, not later than 15 days prior to the date set for execution, at which it is requested that the examination be conducted. The warden shall grant such request, but may require that the examination be conducted at some reasonable time other than that designated. The examination shall be conducted at such place and for such reasonable period as the warden may require. The examining psychiatrists shall, not later than 10 days prior to the date set for execution, deliver to the warden a written report of their findings.

(c) Copies of the reports of examinations made pursuant to subdivisions (a) and (b) of this section shall be made available, upon reasonable demand, to the defendant and anyone acting in his behalf.

Section 3701.2.

(a) The warden shall receive the reports mentioned in section 3701.1 and, in addition, shall receive any further evidence concerning the defendant's sanity which may be submitted to him by or on behalf of the defendant not later than 10 days prior to the date set for execution. The warden shall give due consideration to such reports and such evidence, if any, and shall determine whether the defendant is insane.

*The seven sections referred to include those that follow and those pertaining to suspected pregnancy, not relevant to this study.
(b) If the warden determines that the defendant is insane, he shall make a written finding to that effect. He shall thereupon suspend the execution and transmit a copy of his finding to the Governor, and deliver the defendant, together with a copy of his finding, to the medical superintendent of an appropriate state facility for the insane. If the warden determines that the defendant is not insane, he shall make a written finding to that effect. The finding shall be made not later than five days prior to the date set for execution. A copy of the finding shall promptly be given to the defendant and notice that the finding has been made shall be given to any person who has acted in behalf of the defendant in regard to the determination of his sanity. The warden's finding shall be subject to judicial review only as provided in section 3701.3.

Section 3701.3.

(a) If the warden determines that the defendant is not insane, the defendant or someone acting on his behalf may obtain a writ of mandate from the Superior Court in and for the county in which the prison is situated requiring the warden to suspend execution by showing to the Court:

1. That the warden has not followed the procedure prescribed in sections 3701.1 and 3701.2 or that the reports and other evidence, if any, submitted to the warden establish that the warden's determination of sanity is not supported by substantial evidence; and

2. That the defendant and those acting on his behalf acted with due diligence and dispatch in presenting the question of the defendant's sanity.

(b) The district attorney of the county in which the prison is located shall represent the warden in any such proceeding. The defendant shall be entitled to be represented by counsel.

(c) If the trial court finds that the warden has failed to comply with the procedure prescribed in sections 3701.1 and 3701.2, it shall issue a writ of mandate directing the warden to suspend execution and to proceed with a proper determination, or redetermination as the case may be, of defendant's sanity.

(d) If the trial court finds that the warden's determination of sanity is not supported by substantial evidence, the court shall issue a writ of mandate directing the warden to suspend execution, and directing that the defendant be taken to a state hospital for the insane, and there kept in safe confinement until his reason is restored.

Upon demand of the defendant, or upon order of the trial court entered on its own initiative, the issue of whether the warden's de-
termination of sanity is supported by substantial evidence, shall be tried to a jury of 12 persons, summoned and impaneled from the regular jury list of the county in which the prison is situated; but the defendant shall be entitled to have only one jury trial of the issue. The district attorney, and the defendant and those acting on his behalf, shall have compulsory process for the attendance of witnesses. The warden's determination shall not be set aside under this subsection (d) except upon a finding that it is not supported by substantial evidence, and when the trial is by jury the verdict so finding must be concurred in by not less than three-fourths of the jury. The verdict of the jury must be entered upon the minutes.

(e) Unless the writ of mandate is required by reason of the provisions of this section, the court shall deny the application for the writ.

(f) No appeal shall lie from, nor any other appellate review be obtainable of, an order denying the application for the writ of mandate unless the judge hearing the application for the writ states in his order of denial that a question of law or fact is presented of such substance that an appeal is justified, or unless the Supreme Court of this state by order grants an appellate hearing. In such event, the court may order an appropriate suspension of execution pending determination of the appeal.

Section 3701.4.

For the purpose of determining whether a person under judgment of death is insane such that he may not be executed, as provided in sections 1367 and 3701.1 to 3701.3, "insane" means mentally ill as that term is defined in section 5040 of the Welfare and Institutions Code.

Section 3704.

When a defendant who has been delivered to a state hospital for the insane, as provided in section 3701.2 or section 3701.3, recovers his sanity the superintendent of such hospital shall certify that fact to the judge of the superior court in and for the county in which is located the prison to which the defendant was originally delivered for execution, who must thereupon fix a date upon which, after ten days' written notice to the defendant and the district attorney of the county from which the defendant was originally sentenced and the district attorney of the county in which is located the prison to which the defendant was originally delivered, a hearing shall be had before said judge sitting without a jury to determine whether or not the defendant has in fact recovered his sanity. If the defendant appears without counsel, the court shall appoint counsel to
represent him at said hearing. If the judge should determine that the defendant has recovered his sanity he must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution of the judgment, and the warden shall thereupon return the defendant to the state prison pending the execution of the judgment. If, however, the judge should determine that the defendant has not recovered his sanity he shall direct the return of the defendant to a state hospital for the insane, to be there kept in safe confinement until his sanity is restored.