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# ***“SYNTHETIC SANITY”: THE ETHICS AND LEGALITY OF USING PSYCHOTROPIC MEDICATIONS TO RENDER DEATH ROW INMATES COMPETENT FOR EXECUTION***

*Kacie McCoy Daugherty\**

## **INTRODUCTION**

Louisiana death row inmate Michael Owen Perry, who was convicted of killing five family members, is a diagnosed schizophrenic.<sup>1</sup> Mr. Perry once stated that “pop singer Olivia Newton-John is a goddess living under Lake Arthur.”<sup>2</sup> On another occasion, he shaved his eyebrows, with the intention of getting more oxygen to his brain.<sup>3</sup> Mr. Perry was ordered by a Louisiana District Court judge to take the drug Haldol to render him sane enough to understand that he was going to be executed.<sup>4</sup> The Louisiana Supreme Court subsequently overruled the District Court’s order, leaving Mr. Perry medically untreated and still severely psychotic.<sup>5</sup> He remains on death row, but is not likely to be executed because he is unlikely to regain competency without the aid of psychotropic medications.<sup>6</sup>

Horace Edward Kelly, a death row inmate in California, believed “he

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1. Schizophrenia is defined as a disorder characterized by two or more of the following symptoms, each present for a significant portion of time during a one month period : (1) delusions; (2) hallucinations; (3) disorganized speech; (4) grossly disorganized or catatonic behavior; (5) negative symptoms, i.e. flat affect, alogia, or avolition. AMERICAN PSYCHIATRIC ASS’N *Diagnostic and Statistical Manual of Mental Disorders IV-TR*. 312 (4 th ed. 2000)[hereinafter *Diagnostic and Statistical Manual of Mental Disorders IV-TR*].

2. *Competency of Killer questioned in Arkansas, Drugs Make him Sane, Eligible for Execution*, THE DALLAS MORNING NEWS, Mar. 22, 1998, at 2.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

could talk to animals and at times believed he was an animal, ate dog food, ate meals in a tree where he sat and howled.”<sup>7</sup> Mr. Kelly is still involved in a competency trial to determine whether he is competent to be executed.<sup>8</sup> If found incompetent, he will be sent to a mental hospital where doctors will face the ethical dilemma of whether or not to forcibly treat him with psychotropic medications.<sup>9</sup>

Claude Eric Maturana, an Arizona death row inmate, was described as speaking “so much gibberish” that his attorney could not communicate with him.<sup>10</sup> Mr. Maturana’s doctors are providing him with daily medications, which maintain his condition, but they refuse to participate in the restoration of his competency so that he may be executed.<sup>11</sup>

These three men represent a specific population of death row inmates: those who suffer from debilitating mental illnesses, which may render them incompetent to understand their fate on death row. These men were all sentenced to die after being determined competent to stand trial and sentencing. They became incompetent after sentencing, while serving time on death row.

Mental incompetence may now be reversible through the use of psychotropic medications.<sup>12</sup> The restoration of competency through artificial means in order to execute a death row inmate is the controversial issue addressed in this Comment. The United States Supreme Court in *Ford v. Wainright*<sup>13</sup> held that an individual may not be executed if he or she is deemed incompetent. The Court did not define competency. Four years later, the court held in *Washington v. Harper*<sup>14</sup> that an inmate could be involuntarily medicated in compliance with limits set forth by the

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7. Maria L. Ganga, *Inmate Poses Ethic Problem for Doctors*, L.A. TIMES, Apr. 20, 1998, at 2-3.

8. *Id.* at 1.

9. This ethical dilemma faced by physicians and psychiatrists will be discussed in more detail later in the comment. See *infra*, Section I.D.

10. Kim Cobb, *Arizona Seeks a ‘Hired Gun’ to Treat Killer/ Inmate’s Mental Illness pits Law against Medical Ethics*, HOUSTON CHRON., Sept. 25, 1999, at 2.

11. David H. Schwartz, *Doctors, lawyers clash over death-row case issue in Arizona: Should inmate’s mental competency be restored so he may be Executed*, CHRISTIAN SCIENCE MON., Aug. 19, 1999, at 1.

12. Psychotropic drugs are defined as any medication including sedatives, tranquilizers, hypnotics, and antipsychotic drugs. Thomas G. Guntheil & Paul S. Appelbaum, “Mind Control,” “Synthetic Sanity,” “Artificial Competence,” and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFSTRA L. REV. 77, 79 (1983).

13. *Ford v. Wainright*, 477 U.S. 399 (1986).

14. *Washington v. Harper*, 494 U.S. 210 (1990).

Court. Again, the Court did not focus on the definition of competency. Until the Supreme Court clarifies whether competency achieved through medication is sufficient to fulfill the requirements of *Ford*, the legal and medical fields will continue to grapple with the issue. Forcible medication would be used solely for the purpose of executing death row inmates within the boundaries of the Eighth Amendment of the United States Constitution.<sup>15</sup>

This Comment examines the role that medical ethics plays in determining whether artificial competence, restored through the use of psychotropic medication treatments is sufficient to fulfill the rule of *Ford*. First, this Comment examines the background of this debate by discussing the three most relevant cases: *Ford*, *Washington* and *Perry v. Louisiana*.<sup>16</sup> Next this Comment analyzes the present dilemma of whether, in light of Supreme Court precedent, death row inmates may be forced to take psychotropic medications in order to be executed. The Comment then discusses the role that psychiatrists play in the execution process and the implications of that participation in light of the Hippocratic Oath, as well as American Psychiatric Association Ethical Guidelines.<sup>17</sup> Finally, this Comment examines the views of the medical and legal communities concerning this dilemma, absent Supreme Court guidance, and proposes a compromise between the medical and legal communities.

## I. PRIOR HISTORY

### A. *Ford v. Wainright*

*Ford* serves as the backdrop to the dilemma now facing courts, attorneys and doctors.<sup>18</sup> The United States Supreme Court, in an opinion written by Justice Marshall, held that the Eighth Amendment prohibited States from inflicting death on an inmate who is insane.<sup>19</sup> This holding affirmed the common law practice, which had been followed since the thirteenth century.<sup>20</sup> While at common law the "insane" could not be put

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15. The 8th Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

16. *Perry v. Louisiana*, 543 So. 2d 487 (La. 1989).

17. Hippocrates, *STEDMAN'S MEDICAL DICTIONARY* 647 (4th Unabridged Lawyer's ed. 1996) (hereinafter "*STEDMAN'S*").

18. *Ford*, 477 U.S. 399.

19. *See generally, id.*

20. "For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the

to death, the definition of "insane" was unclear.<sup>21</sup> The Court stated that for purposes of the Eighth Amendment, it would examine whether the prisoner was aware of his pending execution and the reason he was being put to death.<sup>22</sup> There are several rationales for the Court's holding.<sup>23</sup> The first and most persuasive argument is that the execution of the insane offends our nation's general notions of humanity and dignity.<sup>24</sup>

The second rationale is based on the theory of retribution. According to this theory, a heinous crime deserves an equally heinous punishment. A death sentence for certain types of murder or other serious crimes achieves society's wish to make the criminal suffer for what he or she has done. This outcome is not achieved if the prisoner does not understand that he or she is condemned to die.<sup>25</sup> There is no suffering for what he or she has done because he or she may not comprehend the punishment that he or she is about to endure.<sup>26</sup>

A third rationale, found in religion, is that a prisoner who is unable to comprehend that he is going to die cannot make his peace with God and prepare for his death.<sup>27</sup> Our country's traditional emphasis on religious values and practices have made this rationale a root value of our society.

A more modern rationale is that the execution of the incompetent does not serve as a deterrent.<sup>28</sup> The deterrence theory holds that killing an

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practice. Today we keep faith with our common-law heritage in holding that it does." *See id.*

21. Very often the term insane is used interchangeably with incompetent. However, the definition of competency will be discussed later in the Comment and the difference from insanity will be more clearly explained.

22. *Ford*, 477 U.S. at 399.

23. These various justifications will only be touched on briefly in this Comment, but they provide an interesting look into the interactive role of medicine and their view of capital punishment in general as well as society's rationale in support of and against the death penalty.

24. *Ford*, 477 U.S. at 407; Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 384 (1962).

25. Hazard & Louisell, *supra* note 24, at 386.

26. It is important to note that although these inmates may not be "suffering" in the sense that society would wish, the suffering that they endure on a daily basis as the result of their mental illness is very real and very painful.

27. Hazard & Louisell, *supra* note 24, at 387.

28. Roberta M. Harding, "End Game": *Competency and the Execution of Condemned Inmates-A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 111 (1994); Rhonda K. Jenkins, *Fit to Die: Drug-Induced Competency for the Purpose of Execution*. 20 S. ILL. U. L. J. 149 (1995).

incompetent person will not effectively deter others from committing the same crime. This rationale is best summarized in the following statement: "[U]nless that death serves to deter others from committing the same crime . . . 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."<sup>29</sup> Sir Edward Coke vehemently supported this rationale and stated that "by intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of [extreme] inhumanity and cruelty, and can be no example to others."<sup>30</sup> These rationales were set forth in *Ford*, supporting the holding that the incompetent should not be executed.

A final rationale is the evolutionary nature of that which is considered decent. In *Trop v. Dulles*, the U.S. Supreme Court stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>31</sup> The *Trop* Court explained that as society changes, so do the views of what it finds acceptable. The Court examined the idea that, despite a historical acceptance of execution in our nation, there could come a day when society evolved to the point of finding such punishment unacceptable. Furthermore, this would also include the likelihood that the execution of certain classes of individuals or the use of certain methods of execution could be found unacceptable.<sup>32</sup> This reasoning extends to the present holding of *Ford*, which prohibits the execution of the incompetent.

### B. *Washington v. Harper*

The holding of *Ford* was complicated by a subsequent U.S. Supreme Court case, *Washington*.<sup>33</sup> In *Washington*, the Court held that a prisoner can be medicated involuntarily if the inmate has a serious mental illness and "is dangerous to himself or others and the treatment is in his medical interest."<sup>34</sup> In this case the Court was examining a prison policy that governed procedures prior to the involuntary medication of prisoners.<sup>35</sup> The Court evaluated whether the procedures complied with both the

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29. Hazard & Louisell, *supra* note 24, at 384-385.

30. *Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (citing 3 EDWARD COKE, INSTITUTES 6 (6th ed. 1680)).

31. 356 U.S. 86 (1958).

32. *See id.*

33. *Washington v. Harper*, 494 U.S. 210 (1990).

34. *Id.*

35. *Id.*

substantive and procedural requirements of the Due Process Clause of the Fourteenth Amendment.<sup>36</sup> The Court followed its previous holding in *Turner v. Safely*,<sup>37</sup> stating that in order to uphold the prison's policy there would have to be a showing of "reasonableness" with regard to the policy.<sup>38</sup>

The Court based its finding of "reasonableness" on three factors.<sup>39</sup> The first factor was that "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."<sup>40</sup> Second, the Court considered "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally."<sup>41</sup> The third factor was "the absence of ready alternatives."<sup>42</sup> This last consideration exhibited that the lack of alternative means for controlling the prisoner's behavior, aside from the proposed regulation, would result in evidence of reasonableness on the part of the prison regulation.<sup>43</sup>

In *Washington*, the governmental interest was to protect the other inmates, guards and the prisoner himself from the actions he might take as a result of his mental illness.<sup>44</sup> The Court found that this was a legitimate governmental interest and that it comported with the other requirements of reasonableness set forth above.<sup>45</sup> Although the Court found that the prisoner had a liberty interest in remaining free from involuntary medication, this interest was outweighed by the government's interest in protecting the prison population, as well as the prisoner himself.<sup>46</sup>

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36. U.S. CONST. amend. XIV.

37. 482 U.S. 78 (1987).

38. *Washington*, 494 U.S. at 223 (citing *Turner v. Safely*, 482 U.S. 78 (1987)). *Turner* considered various factors to determine the reasonableness of a challenged prison regulation.

39. *Turner*, 482 U.S. at 78-79. Other factors were considered in *Turner*, but only three were relevant in *Washington*.

40. *Washington*, 494 U.S. at 224 (citing *Turner*, 482 U.S. at 89; quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

41. *Turner*, 482 U.S. at 90.

42. *Id.* at 90-91.

43. This is not to say that the prison is responsible for coming up with every possible alternative to the regulation. Nor does the prison have to eliminate all alternatives before establishing reasonableness. This factor is merely a part of what can contribute to the evidence of reasonableness, necessary to be proven by the prison. *Id.*

44. 494 U.S. at 226.

45. *Id.* at 228.

46. *Id.*

The public policy rationales inherent in *Washington* ensure that prison officials can operate their institutions without limits on their ability to maintain safety in the prison setting.<sup>47</sup> It is important to note, however, that the Court emphasized that the administration of such drugs to inmates must be in their "best medical interest."<sup>48</sup> The Court stated that "the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with anti-psychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest."<sup>49</sup>

*Washington* involved the administration of psychotropic medications to inmates who were not condemned to die.<sup>50</sup> As a result, the Court did not address whether its holding could be extended to allow for the forcible medication of condemned prisoners. Such an extension could result in the allowance of involuntary medication of inmates for the specific purpose of returning them to competency in order to execute them.<sup>51</sup> Although this issue was not addressed by the U.S. Supreme Court, it has been addressed by the Louisiana Supreme Court, in *Perry*.<sup>52</sup>

### C. *Perry v. Louisiana*

Michael Owen Perry was condemned to die for murdering his mother, father and three other family members.<sup>53</sup> Perry was found in a D.C. hotel room with seven television sets. Upon each set he had drawn eyes and written the name of one of his seven victims.<sup>54</sup> He was diagnosed as a paranoid schizophrenic prior to the murders and had exhibited a long history of schizophrenic behaviors, including an obsession with the singer Olivia Newton John.<sup>55</sup> This diagnosis raised questions about Mr. Perry's

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47. Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 381 (1994).

48. 494 U.S. at 210, 227 (1990).

49. *Id.*

50. This is the primary difference that distinguishes *Washington* from *Perry*.

51. The Supreme Court did not touch on this issue. If the court ruled that competency could be sufficient in the eyes of *Ford*, even if attained artificially, many prisoners who are mentally ill and incompetent would be killed as the result of a technicality achieved through modern science.

52. 543 So. 2d 487 (La. 1989).

53. *State v. Perry*, 610 So. 2d. 746, 748 (La. 1992).

54. *Id.* at 747.

55. *Diagnostic and Statistical Manual of Mental Disorders IV-TR*, *supra* note 1, at 314. Paranoid schizophrenia is a type of schizophrenia in which the following criteria are met: (A) Preoccupation with one or more delusions or frequent auditory hallucinations and (B) None of the following is prominent:

competency to be executed within the boundaries of the Eighth Amendment.

The Louisiana Supreme Court faced the question that had not been addressed in *Washington*.<sup>56</sup> The Court considered two issues. The first was whether the state may forcibly medicate a prisoner in order to restore his competency for execution.<sup>57</sup> The second was whether chemically-induced competency is sufficient to fulfill the requirements of *Ford*.<sup>58</sup> The Louisiana Supreme Court chose to address only the first issue.<sup>59</sup> It ruled that an inmate could not be forced to take psychotropic medications exclusively for the purpose of execution.<sup>60</sup> It found that Mr. Perry had been medicated for no other reason than to prepare him for execution, in direct contradiction of *Washington's* requirement that the forcible medication of inmates must be in their "best medical interest."<sup>61</sup> Furthermore, the Court in *Washington* explained in dicta that the administration of psychotropic medications must be for the purpose of treatment, and not for alternate rationales such as punishment.<sup>62</sup>

The court in *Perry* recognized that legitimate and sufficient governmental interest existed to override Perry's liberty interest in avoiding forced medication.<sup>63</sup> Specifically, the court stated that the "state's interest in carrying out the death penalty did not justify the intrusion of medication into Perry's mind and body."<sup>64</sup> The court upheld the liberty interest of the inmate, resulting in the protection of prisoners who are not competent to be executed. The ruling attempted to limit the scope of *Washington*, thus protecting incompetent inmates from being executed in violation of the Eighth Amendment with the aid of modern medications.

One problem remains in the wake of *Perry*. The Louisiana Supreme Court did not rule on the issue of sufficiency of chemically induced

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disorganized speech, disorganized or catatonic behavior, or flat or inappropriate affect.

56. See *Washington v. Harper*, 494 U.S. 210 (1990).

57. Kristen Wenstrup Crosby, *State v. Perry: Louisiana's Cure-to-Kill Scheme Forces Death-Row Inmates to Choose Between A Life Sentence of Untreated Insanity and Execution*, 77 MINN. L. REV. 1193, 1195 (1993).

58. *Id.*

59. *Id.*

60. *Perry*, 610 So. 2d. at 771 (La. 1992).

61. 494 U.S. 210 (1990).

62. *Id.*

63. *Perry*, 610 So. 2d. 746.

64. *Id.*

competency within the boundaries of *Ford*.<sup>65</sup> Accordingly, the holding in *Perry* only applies to those inmates who are medicated with no other prison or governmental interest than to restore competency for execution.<sup>66</sup> This leaves open the issue whether inmates may be treated when there is another governmental interest present in addition to that of executing the inmate. For example, this situation could occur when an inmate poses a threat to himself or to the rest of the prison population. The question would then become whether that inmate's liberty interest still overrides the government's interest. Since this issue is left untouched by *Perry*, another court could read *Ford* broadly, and find that a state could forcibly medicate an inmate on death row if that medication is reasonably related to a legitimate state interest in punishing prisoners and the treatment serves the medical interests of the inmate.<sup>67</sup>

#### *D. Technical Dilemmas Faced by the Medical Community*

Despite the shortcomings of *Perry*, it is presently the only case law protecting the liberty interest of death row inmates. Against the backdrop of *Ford*, *Washington* and *Perry*, the medical field must now look to the current dilemmas that define this controversial issue. The primary issue, outside of the legal realm, is the ethical dilemma facing psychiatrists and physicians who are bound by the Hippocratic Oath, which states:

I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment the following Oath . . . I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice, which may cause his death . . . I will preserve the purity of my life and my art . . . In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing.<sup>68</sup>

This oath indicates that doctors face an ethical dilemma when deciding whether to assist in the diagnosis and treatment of inmates whom they know are being treated to restore them to competency for execution. The difficult task psychiatrists face in defining competency further complicates this issue. Ultimately, the decision concerning competency rests with the forensic psychiatrists who are in the precarious position of acting as

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65. Crosby, *supra* note 57, at 1195.

66. *Id.* at 1195.

67. *Id.* at 1210.

68. Hippocrates, *supra* note 17.

agents of the state, while they are still bound by the oath they took to protect their patients.<sup>69</sup>

The role of the forensic psychiatrist is often one of both doctor and agent of the state.<sup>70</sup> The forensic psychiatrist is responsible for evaluating inmates at various stages of the judicial process, each stage presenting the doctor with a different task.<sup>71</sup> Psychiatrists are often called upon to determine whether defendants are competent to stand trial.<sup>72</sup> They also are responsible for determining whether convicts are competent to be executed. The latter role will be discussed in detail in the remainder of this Comment.<sup>73</sup>

In order to understand the role that forensic psychiatrists play, it is important to consider some of the complexities of their tasks. One of the most perplexing difficulties facing these doctors, as well as the courts, is the definition of competency.<sup>74</sup> It is important to recognize that competency for execution is not the same as competency to stand trial. Competency for execution describes one's mental capacity at the time of execution and not at the time of the crime, or at the time of the trial.<sup>75</sup>

The definition of competency established under *Ford* is one of many attempts to determine whether an individual is competent to die and

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69. The question has been raised whether forensic psychiatrists are actually acting in a medical capacity, or whether they are merely acting as agents of the state. If it is found that they are not acting in a medical capacity, then they are no longer bound by the ethical guidelines of the Hippocratic Oath. Alfred M. Freedman M.D. and Abraham L. Halpern, M.D., *The Erosion of Ethics and Morality in Medicine: Physician Participation in Legal Executions in the United States*. 41 N.Y. L. SCH. L. REV. 169 (1996).

70. Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 78 (1986).

71. *Id.* at 70.

72. *Id.*

73. The role of psychiatrists in determining competency to stand trial is outside the scope of this Comment. An analogy has been made between the two roles psychiatrists play and the ethics involved. However, the analogy is flawed, in part due to the fact that the finality of death that results from the latter role presents a much more precarious ethical choice on the part of the psychiatrist who deems an inmate competent to be put to death.

74. BLACK'S LAW DICTIONARY (6th ed. 1990). Competent is defined as "duly qualified; answering all requirements; having sufficient capacity, ability or authority; possessing the requisite physical, mental, natural or legal qualifications; able; adequate; suitable; sufficient." *Id.*

75. Byers, *supra* note 47 (quoting Robert F. Shcopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LA. L. REV. 995, 1001 (1991)).

whether he is protected under the Eighth Amendment.<sup>76</sup> The Court in *Ford* found that an inmate was competent to be executed in accordance with the Eighth Amendment if "he is aware of his impending execution and understands the reason for imposition of the punishment."<sup>77</sup> This was essentially the same definition as the common law definition of sanity.<sup>78</sup>

States have employed numerous other definitions of sanity or insanity, varying from the common law approach to a combination of the *Ford* test and other additions.<sup>79</sup> Some states have adopted a standard that requires that the prisoner recognize the nature of his sentence and why it is so, and that he has the capacity to understand any facts that could render the sentence unjust. This standard ensures that he is able to defend himself or obtain aid in his defense.<sup>80</sup> From the disparity among the states' definitions of insanity and competency, there arises a problem of continuity in diagnoses.<sup>81</sup>

In an attempt to create continuity across state lines, giving psychiatrists more guidance in their evaluations of inmates, the American Bar Association (ABA) set forth a two-prong test for establishing competency for execution.<sup>82</sup> This test presents the evaluator with an either-or scenario. If the inmate fits into either of the categories of the two-prong test he is deemed incompetent and therefore unfit for execution.<sup>83</sup> The first prong is cognitive and reflects the *Ford* test.<sup>84</sup> It states that an inmate is incompetent to be executed if "as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment,

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76. *Ford v. Wainwright*, 477 U.S. at 399.

77. Jenkins, *supra* note 28, at 167.

78. *Id.* It is only natural that the Court would adopt the common law definition, since the holding of the Court in *Ford* based its holding on the practice at common law.

79. Byers, *supra* note 47 (quoting Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 54 (1986)).

80. Ward, *supra* note 70, at 60-61.

81. Since doctors are basing their clinical judgments on the given state's definition of competency or insanity, there is a great range of diagnoses and outcomes across state lines. This raises issues of whether inmates' liberty interests are being protected in the best manner.

82. Jenkins, *supra* note 28, at 167.

83. It is unclear whether he is unable to be executed altogether, or whether a stay will be granted until the time the prisoner regains competency. States have approached this issue in different ways.

84. *Singleton v. State*, 437 S.E.2d. 53, 55-56 (S.C. 1993); Jenkins *supra* note 28 at 168.

or the nature of the punishment.”<sup>85</sup>

The second prong is the “assistance prong.”<sup>86</sup> It states that an inmate is incompetent if “as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact that might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.”<sup>87</sup>

The ABA standards would, if followed, afford mentally ill death row inmates an increased amount of protection for two reasons. First, there would be an increase in uniformity across states and psychiatrists with regard to diagnosis and treatment. Second, the addition of the “assistance prong” would force a more stringent review of capacity than the broadly read standard of the *Ford* Court.<sup>88</sup> Although this ABA standard provides states with a uniform definition,<sup>89</sup> the Supreme Court has not determined whether chemically-induced competency fits within the accepted definitions of competency. Until it does, the issue remains a subjective one for the forensic psychiatrist determining an inmate’s mental status.<sup>90</sup>

## II. LEGAL AND MEDICAL ETHICAL DILEMMAS

Forensic psychiatrists face technical challenges in evaluating prisoners facing death because they are working with inconsistent definitions of competency and insanity. Furthermore, the definitions established under the common law and by the ABA often deal with legal requirements

85. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.6 (b) (1987).

86. Jenkins, *supra* note 28, at 168.

87. ABA, *supra* note 85.

88. Jenkins, *supra* note 28, at 168.

89. Two commentators have proposed a number of questions, which may be used in determining competency:

(1) Does the prisoner know he is in a state or federal prison? (2) Does he understand that he is incarcerated because he was convicted of a particular crime? (3) Does he understand that he was sentenced to death because of his conviction and this sentence is about to be carried out? (4) Does the prisoner know . . . his attorney’s name? (5) Is he aware that the attorney serves as his advocate in the legal system?

Mark A. Small & Randy K. Otto, *Evaluations of Competency to be Executed*, 18 CRIM JUST. & BEHAV. 146, 147, 156-57 n.2 (1991).

90. The other problem that arises as a result of this subjectivity, is the inconsistent application of the death penalty. This result can have numerous effects on the criminal justice system, including a decreased lack of confidence in the system. This, along with the infringement on liberty interests of those inmates who may be victims of the subjective nature of system, remains an area of concern until the Supreme Court settles the issue.

alone, and ignore medical rationales.<sup>91</sup> What is often overlooked, by the legal community, is the fact that forensic psychiatrists are doctors. They take an oath, which obliges them to act in the best interest of their patients<sup>92</sup> and above all "to do no harm and take no life."<sup>93</sup> This complicates their participation in the treatment of inmates who will ultimately be executed as a result of such treatment. When a psychiatrist evaluates a death row inmate, finds him incompetent and proceeds to treat him with psychotropic medications, against the inmate's will, the psychiatrist becomes a "but-for cause" of that inmate's death. If the psychiatrist did not prescribe the medications, the inmate would not become "competent" and therefore could not be executed under the Eighth Amendment.<sup>94</sup> This constitutes an ethical violation within the medical community.

#### *A. The Role of the Psychiatrist in Capital Cases*

The role that psychiatrists play in capital punishment is twofold. First, they must evaluate inmates to determine whether they are competent to be executed.<sup>95</sup> Second, if they determine that the inmate is legally incompetent, they must decide whether to treat the mental incompetence with psychotropic medication.<sup>96</sup>

Psychotropic medications are drugs that affect a patient's thinking and ability to communicate.<sup>97</sup> These drugs have been used as the primary method of combating mental illness since the 1950s.<sup>98</sup> They diminish symptoms of mental illness by altering the chemical balance in the brain, resulting in a clearer thought process.<sup>99</sup>

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91. Medical doctors are trying to make evaluations about a patient's mental health, a medical condition. Often the definitions that are adapted by lawyers and judges focus entirely on legalisms to maintain constitutionality. While this a necessary aspect of the definition of competency, the result may be a definition, which is not as workable in a medical setting.

92. Hippocrates, *supra* note 68, at 716-17.

93. Rochelle G. Salguero, *Medical Ethic and Competency to Be Executed*, 96 YALE L.J. 167, 168 (1986).

94. U.S. CONST. amend. VIII.

95. Byers, *supra* note 47, at 382.

96. *Id.* at 383.

97. These drugs can include sedatives, hypnotics, antipsychotics, and tranquilizers. Gutheil & Appelbaum, *supra* note 12, at 79.

98. Nancy S. Horton, *Restoration of Competency for Execution: Furiosus Solo Furore Punitur*, 44 S.W. L. J. 1191, 1204 (1990).

99. Byers, *supra* note 47, at 376-77 (citing *Washington v. Harper*, 494 U.S. at 214.).

The subsets of psychotropic medications that are most often used on death row inmates are antipsychotics. Two factors explain this choice of treatment. First, most of the mentally ill inmates on death row suffer from psychosis<sup>100</sup> or some form of schizophrenia.<sup>101</sup> Second, these disorders are treated with great success by antipsychotic medications, such as Haldol, Thorazine, and Mellaril.<sup>102</sup> These drugs benefit enormously those persons suffering from mental illness, because the drugs eliminate the need for extensive use of mechanical restraints or seclusion as a method of controlling patients.<sup>103</sup>

However, these drugs do not offer a cure to patients. It is well-recognized in the medical field that although the drugs treat the symptoms of mental illness quite effectively, they do not cure the underlying illness.<sup>104</sup> Since anti-psychotic drugs offer only temporary treatment for symptoms of the disorder and not a cure, it is important to consider whether inmates treated with these medications are actually competent or whether they are merely "synthetically sane" or "chemically competent." These terms describe the treatment of inmates, who are facing death.<sup>105</sup> Drugs provide mentally ill inmates with a cognitive clarity that they are not capable of achieving without the medication. The question remains, however, whether this newfound clarity and rationality constitutes competency under the Eighth Amendment.<sup>106</sup>

Ethical dilemmas are always complicated due to their theoretical nature. Everyone faces various ethical choices in life, but doctors and lawyers are challenged by serious ethical issues on a daily basis. As a part of their profession, they swear to uphold oaths to act in accordance with ethical guidelines set forth by their respective occupations. Doctors take the Hippocratic Oath and swear to never "prescribe a deadly drug" and to "preserve the purity of life."<sup>107</sup> When treating an inmate who has been

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100. Psychotic disorders generally involve problems with perception, thinking and cognitive processes. The patient will often suffer from hallucination and/or delusions. Michelle K. Banchand, Note, *Antipsychotic Drugs and the Incompetent Defendant: A Perspective on the Treatment and Prosecution of Incompetent Defendants*, 47 WASH. & LEE L. REV. 1059, 1060-61 (1990).

101. Horton, *supra* note 98, at 1204.

102. *Id.*

103. *Id.*

104. Byers, *supra* note 47, at 377.

105. See generally Guntheil & Appelbaum, *supra* note 12.

106. This issue was discussed in more detail previously, however, it is a natural question that arises from the discussion of medicating inmates that are facing death, as soon as they are restored to competency.

107. Hippocrates, *supra* note 68, at 716-17.

condemned to die, physicians are concerned that they will be participating in the execution process.<sup>108</sup> Many commentators have addressed this issue and declared that the participation of psychiatrists in treating these prisoners is not unethical because they are serving justice.<sup>109</sup>

Many doctors have responded to this argument by stating that they are not aiding justice because the sentence has already been handed down.<sup>110</sup> The medical community has made its response clear through the ethics guidelines set forth by the American Psychiatric Association (APA)<sup>111</sup> and the American Medical Association (AMA).<sup>112</sup> These organizations have denounced the participation of doctors in the diagnosis and treatment of inmates condemned to death.<sup>113</sup> The medical community is frustrated by attempts of the legal community to compel physicians to treat these inmates. They argue that the practice of treating these condemned inmates is contrary to the goals of medicine, and that psychiatrists should not participate in the execution of these inmates.

#### *B. Policy of the Medical Community Regarding the Treatment of Condemned Inmates*

What is the official policy of the medical community? The answer is found in a variety of documents within the medical field. The disapproval of this practice by psychiatrists is rooted in the Hippocratic Oath as well as in the guidelines set forth by the AMA.<sup>114</sup>

The changing ethical standards in the practice of medicine and psychiatry are exemplified a 1995 AMA report, Council on Ethical and Judicial Affairs (CEJA).<sup>115</sup> The CEJA report was compiled with input

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108. Byers, *supra* note 47, at 384.

109. *Id.* at 385.

110. Robert D. Miller, *Evaluation of the Treatment to Competency to be Executed: A National Survey and an Analysis*, 16 J. PSYCHIATRY & L. 67, 74 (Spring 1988) (citing Paul S. Appelbaum, et al., Resolved: It is Unethical for Psychiatrists to Diagnose or Treat Condemned Persons in Order to Determine Their Competency to Be Executed, debate presented at the Annual Scientific Meeting of the American Psychiatric Association, Chicago, May 13, 1987).

111. A national organization comprised of approximately 35,000 physicians. *Paradon: Healing to Execute; Insane Man to Get Louisiana Rehearing*, ATLANTA J. & CONST., Mar. 17, 1991, at A1.

112. A private organization comprised of approximately greater than 280,000 doctors and medical students. *Id.*

113. *Id.*

114. Council Report: Physician Participation in Capital Punishment, 270 JAMA 365, 368 (1993).

115. *Id.*

from both the AMA and the APA.<sup>116</sup> The APA, however, did not have much input in the final draft of the report, which ultimately became policy.<sup>117</sup> This explains why the AMA-CEJA report does not reflect the general consensus of the APA and specifically, those psychiatrists who are ultimately responsible for performing the evaluations on these inmates.

A previous AMA-CEJA report prohibited the participation of physicians "in any aspect of capital punishment."<sup>118</sup> This prohibition was a result of the opinion within the medical field that doctors were committed to the protection of their patients and that they must not do any harm to them.<sup>119</sup> This prohibition extended to doctors who were asked to save the lives of suicidal inmates just so they could be executed.<sup>120</sup> The question was raised, however, whether this prohibition extended to psychiatrists who were asked to treat individuals with psychotropic medications in order to allow them to be executed.

The answer to this question is found in other documents, such as the AMA's Code of Medical Ethics: Current Opinions,<sup>121</sup> which states that "a physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."<sup>122</sup> Another example of the APA's disapproval of this practice is found in a document issued by its Board of Trustees. This document states that "the physician's serving the state as an executioner, either directly or indirectly, is a perversion of medical ethics and of his or her role as healer and comforter."<sup>123</sup> Finally, every edition of the APA's *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*<sup>124</sup> includes a section stating that "a psychiatrist should not be a

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116. Although this document did have input from the APA, it was not reviewed by the APA Board of Trustees or the APA assembly. Paul S. Appelbaum, M.D., *The Council on Psychiatry and Law*, 151 Am. J. Psychiatry 323 (1994).

117. *Id.*

118. See generally Appelbaum, *supra* note 116.

119. Physicians are committed to the ethical guideline of *ethos primum non nocere* or "first, do not harm." *Id.* at 365.

120. *Condemned Inmate Overdoses, Is Revived and Then Executed*, MAMARONECK DAILY TIMES (N.Y.), Aug. 8, 1995, at 3A.

121. Council on Ethical & Judicial Affairs, American Med. Ass'n, Code of Medical Ethics: Current Opinions § 2.06 (1992).

122. *Id.*

123. Freedman & Halpern, *supra* note 69, at 174.

124. AMERICAN PSYCHIATRIC ASS'N, PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY (1995).

participant in a legally authorized execution."<sup>125</sup> These documents clearly demonstrate the disapproval of the psychiatric community regarding psychiatric participation in treating inmates condemned to death.

Why, then, does the 1995 CEJA report ignore all of these views and state that it is ethical for psychiatrists to participate in the treatment of death row inmates for the purpose of restoring them to competence for execution?<sup>126</sup> One reason is that the report provides for a psychiatrist's exemption, which greatly limits his or her participation.<sup>127</sup> The psychiatrist's role in the treatment of condemned inmates is limited to passive participation. The doctors were only to treat the inmates in a manner that controlled their illness but did not restore them to legal competency.<sup>128</sup> Restoring competency would deliver inmates to death and would constitute active participation in the execution of the condemned prisoner.

This compromise, however, was not adequate to deal with the contradictory nature of the AMA-CEJA report and the standards of the APA, so further drafting incorporated the opinions of the APA.<sup>129</sup> The result of the redrafting was a new CEJA report, approved by the AMA, which still did not treat the issue of psychiatric participation in any detail.<sup>130</sup> The failure of the CEJA report to take the views of the APA in account is of great concern to those in the medical field who are facing this dilemma. The report departs greatly from the historical principles that have been followed by the medical community.<sup>131</sup> Additionally, the report omitted any mention of the *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*, which states the clear policy of the APA that psychiatrists should not participate in capital punishment. The regulation of this issue should be established by a group of professionals practicing in the field. The new CEJA report does nothing more than represent a widening schism of ethical standards within the medical community.<sup>132</sup>

Furthermore, this report promotes the view that the doctor is the agent

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125. *Id.*

126. CEJA REPORT, *supra* note 114, at 1-2.

127. This was a result of the concerns that were voiced by the APA. Applebaum, *supra* note 116.

128. CEJA REPORT, *supra* note 114, at 368.

129. Freedman & Halpern, *supra* note 69, at 177.

130. *Id.*

131. *Id.* at 178.

132. *Id.* at 169.

of the state and ignores the fact that doctors are doctors first.<sup>133</sup> In the context of treating condemned inmates to restore competency, a doctor cannot act as an agent of the state and still maintain his ethical duty as a doctor to preserve life. This presupposes that forensic psychiatrists are able to separate their roles as doctors and act in a non-medical capacity when performing evaluations on behalf of the state.<sup>134</sup> This is not a reasonable expectation. Doctors, whether physicians or forensic psychiatrists, are trained to treat medical problems. Naturally, they are to act in the best interest of their patients' medical needs. This is not a role that a doctor can relinquish when faced with treating an inmate who could lose his life as a result of the doctor's evaluation.

The view that forensic psychiatrists are acting outside the scope of a medical role<sup>135</sup> is an attempt to bypass the ethical guidelines that would result in the protection of inmates suffering from mental illnesses. It would also result in further inconsistency in applying the death penalty. There would be an increased number of inmates put to death while still suffering from mental illness. Ultimately, more inmates would be put to death in violation of the Eighth Amendment.<sup>136</sup>

Organizations such as the American College of Physicians, Human Rights Watch, Physicians for Human Rights, and the National Coalition to Abolish the Death Penalty agree with the argument set forth above. These organizations do not accept claims that forensic psychiatrists are not acting in a medical role. They state "this claim ignores the reality that forensic practitioners . . . are physicians in the eyes of the public, the courts, and even their examinees."<sup>137</sup> This is a standard behind which doctors stand. The medical community argues that the preservation of life, which it swears to uphold, in the Hippocratic Oath must come first. The legal community supports the opposing view, that the furtherance of justice requires the cooperation of doctors to treat these individuals, both for the inmate's well-being and for the fulfillment of the sentence under the law. This debate continues to flourish, creating the need for a compromise between the medical and legal communities.

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133. CEJA REPORT, *supra* note 114, at 368.

134. Paul S. Appelbaum, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*, 13 INT'L J.L. & PSYCHIATRY 249, 252-54 (1990).

135. *Id.* at 252-54.

136. U.S. CONST. amend. VIII.

137. AMERICAN COLLEGE OF PHYSICIANS et. al., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 44 (1994).

### III. A PROPOSED SOLUTION

It is argued by professionals that, although the ethical guidelines are blurring, there are no alternatives other than psychotropic medication to dealing with these inmates.<sup>138</sup> It has been proposed that inmates who are found incompetent should have their death sentences commuted to life imprisonment.<sup>139</sup> Others contend that the inmates should be treated only to prevent them from presenting a danger to themselves or other people, but not to make them competent for purposes of being executed.<sup>140</sup> Finally, others believe that inmates should have the right to refuse treatment, but if they do regain competency, they may be executed at that time.<sup>141</sup> Of these alternatives, the first has been enacted by statute.

Maryland has legislated that at the time an inmate is found incompetent for execution, his or her death sentence is commuted to life imprisonment.<sup>142</sup> This statute allows for the execution of an inmate who is found competent, whether he or she is only competent through chemical means, or naturally.<sup>143</sup> However, the statute provides that if the prisoner is found to be incompetent, the sentence must be commuted to life imprisonment, at which time the inmate may no longer be involuntarily medicated.<sup>144</sup> Maryland's statute strikes a compromise, which allows for the protection of the inmate's rights while still assuring that those individuals who are deemed competent, whether artificially or naturally, are put to death in compliance with the sentence handed down by the courts.<sup>145</sup>

### CONCLUSION

The dilemma of death row inmates developing mental illness and becoming incompetent is not disappearing, but will continue to increase.<sup>146</sup>

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138. The alternative will only be touched on briefly, but further discussion of this topic would provide for an increased understanding of how to manage these inmates.

139. Horton, *supra* note 98, at 1225.

140. *Id.*

141. *Id.*

142. "An inmate is not incompetent merely because his or her competence is dependent upon continuing treatment, including the user of medication." Md. Ann. Code art. 27, § 75A(a)(2)(ii) (1987 & Supp. 1989).

143. See Horton, *supra* note 98, at 1218.

144. *Id.*

145. *Id.* at 1219.

146. There are cases facing the courts which deal with this exact issue, including the case of Claude Eric Maturana, a death row inmate whose doctors at

This increase will likely result from improvements in the ability to treat and reverse illness through the use of medications.

In addition, these inmates are at the mercy of the prison and justice systems, which are attempting to decide for them whether they should receive psychotropic medications to treat their disorders. The systems making these decisions are not always putting prisoners on these drugs for their "best medical interest"<sup>147</sup> as is required, but often they are medicating these inmates in order to render them competent to be executed.

Since the U.S. Supreme Court has not addressed the issue,<sup>148</sup> the legal and medical communities are left to struggle with not only the legal ramifications of medicating inmates against their will, and ultimately putting them to death as a result of such medications, but with the ethical ramifications.<sup>149</sup> It is important to hold doctors and psychiatrists to the oaths that they take<sup>150</sup> and the guidelines they swear to live by.<sup>151</sup> In addition, psychotropic medications do not cure mental illnesses but merely treat the symptoms and create a "mask of sanity."<sup>152</sup> Courts must recognize that more is required to protect the Eighth Amendment rights of those inmates who suffer from mental illness.

The introduction of this Comment spoke of the dilemma the state of Arizona is presently facing with regard to Claude Eric Maturana.<sup>153</sup> Mr. Maturana was sentenced to die for the murder of a sixteen year-old boy.<sup>154</sup> Mr. Maturana was diagnosed with schizophrenia and is barely able to communicate with his attorney.<sup>155</sup> He was sent to the Arizona State Hospital to be restored to competence but the hospital staff has refused to treat him, stating that it would be a violation of medical ethics.<sup>156</sup> The Arizona attorney general's office has threatened to hold the doctors at the hospital in contempt if they do not comply and treat Mr. Maturana. The hospital's Chief of Staff, Jack Silver, stated that "if it gets to that point, . . .

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the Arizona State Hospital are refusing to treat him, on the grounds that they feel it is unethical to participate in legalized executions.

147. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

148. *Ford v. Wainwright*, 477 U.S. 399,399 (1986).

149. *Freedman & Halpern*, *supra* note 69.

150. *STEDMAN'S*, *supra* note 17.

151. *CEJA REPORT*, *supra* note 114, at 368.

152. *Horton*, *supra* note 98, at 1204.

153. *Cobb*, *supra* note 10, at 2.

154. *Id.*

155. *Id.*

156. *Id.*

the question becomes: Do ethics supersede law or does law supersede ethics?”<sup>157</sup> This is the question that ultimately remains until the Supreme Court rules on the issue. Even after that, the question may still remain. One must ask, however, whether we as a society are prepared to force doctors to violate their codes of ethics and participate in the killing of individuals who may not even understand their fate as prisoners condemned to death.

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157. *Id.*

