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## Pushing Execution Over the Constitutional Line: Forcible Medication of Condemned Inmates and the Eight and Fourteenth Amendments

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# PUSHING EXECUTION OVER THE CONSTITUTIONAL LINE: FORCIBLE MEDICATION OF CONDEMNED INMATES AND THE EIGHTH AND FOURTEENTH AMENDMENTS

**Abstract:** The U.S. Supreme Court has declared it unconstitutional to execute death row inmates who are too insane to understand the fact of their pending execution and the reasons behind it. The Court has not specified, however, what mechanisms a state may constitutionally employ to render such an inmate sane enough to execute. This Note addresses whether states may forcibly administer antipsychotic drugs to insane death row inmates in order to restore their competence for execution. It concludes that states violate both the Eighth and Fourteenth Amendments when execution is preceded by forcible medication with antipsychotic drugs. First, as soon as an execution date is set, a forcible medication program ceases to meet the constitutional requirement that it be “medically appropriate” because it no longer comports with the ethical standards of the medical profession, and it subverts treatment into a degrading punishment unique to incompetent death row inmates. Second, this scheme violates inmates’ rights to due process because the state’s interest in execution does not outweigh both an inmate’s privacy interest and the state’s own interest in preserving the integrity of the medical community when execution will be replaced by a life sentence without the possibility of parole.

## INTRODUCTION

On average, inmates on death row in the United States spend over ten years awaiting execution, and some have remained on death row for over twenty years.<sup>1</sup> Condemned inmates are generally isolated from others, excluded from prison educational and employment programs, and severely restricted in visitation and exercise privileges.<sup>2</sup> Added to this isolation, the lives of those on death row are continually overshadow-

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<sup>1</sup> See *Time on Death Row*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/time-death-row> (last visited Sept. 19, 2010).

<sup>2</sup> *Id.* Inmates may spend up to twenty-three hours each day alone in their cells. *Id.*

owed by the questions of if and when execution will take place.<sup>3</sup> Given these conditions, it is not uncommon for death row inmates, determined competent at the time they committed their crime and throughout criminal proceedings, to become incompetent by reason of insanity while on death row.<sup>4</sup>

Over twenty years ago, the U.S. Supreme Court formally declared that it was unconstitutionally cruel and unusual to execute defendants who were too insane to understand the fact of their pending execution and the reasons behind it.<sup>5</sup> This holding was based on a long-standing prohibition against this practice in the common law system inherited

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<sup>3</sup> *Id.*; see *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439, 475–76 (1989). In this landmark judgment, the European Court of Human Rights established that extradition of a young German national to the United States to face charges of capital murder violated Article 3 of the European Convention on Human Rights guaranteeing the right against inhuman and degrading treatment. *Id.* at 478. Though Article 3 was not interpreted as generally prohibiting the death penalty, the court found that certain circumstances relating to a death sentence could give rise to a violation of Article 3. *Id.* at 474. In the court's view, those circumstances were present in Virginia's death penalty scheme due to the average length of time (six to eight years) inmates spent subject to the stress of the death row environment:

However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death . . . .

. . . .  
 . . . [H]aving regard to the very long period of time spent on death row in such extreme conditions, with the ever-present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3.

*Id.* at 475–76, 478.

<sup>4</sup> See *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) (“In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.”); Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 371 (1994) (discussing how the “problem” of condemned prisoners becoming incompetent prior to execution seems to be “an inherent product of a judicial system which tells an individual he should die for his crime, places him in an isolated and restricted environment, and allows for considerable delay before the sentence is ever carried out”). Although precise statistics are unavailable, it is estimated that five to ten percent of people on death row have a serious mental illness. *Position Statement 54: Death Penalty and People with Mental Illness*, MENTAL HEALTH AM. (June 11, 2006), <http://www.nmha.org/go/position-statements/54>.

<sup>5</sup> See *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

from England,<sup>6</sup> understood to be incorporated by the Framers into the Eighth Amendment at the time of its enactment.<sup>7</sup> Currently, however, this long-standing tradition against executing the insane is complicated by modern advances in psychiatry and psychotropic medication, which have enabled the insane to be rendered competent for execution in ways never contemplated by the Framers.<sup>8</sup> This conflict between tradition and modern science engenders novel Eighth Amendment and due process issues, as well as professional and ethical dilemmas for the medical personnel treating condemned inmates to ready them for execution.<sup>9</sup>

States retain broad discretion in determining when an individual is incompetent for execution.<sup>10</sup> Once a defendant has been determined to be incompetent, state legislation generally calls for a stay of execution until that individual regains his or her sanity.<sup>11</sup> To facilitate this re-

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<sup>6</sup> See *id.* at 406–08. The Court demonstrated how the practice was condemned by common law in 1789 as there was no authority condoning execution of the insane at English common law. See *id.* at 406–07 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*24–25 (“idiots” and “lunatics” shall not be executed)).

<sup>7</sup> See *id.* at 408–10; see also Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 147 (2004) (noting that both the drafters of the English cruel and unusual punishments clause and drafters of the American clause were guided by the same common-law understanding).

<sup>8</sup> See, e.g., *Singleton v. Norris*, 319 F.3d 1018, 1026–27 (8th Cir. 2003) (holding state could constitutionally execute death row inmate rendered competent through forcible medication). Charles Singleton, who during his twenty-five years on death row manifested paranoid schizophrenia, was executed by lethal injection by the state of Arkansas on January 6, 2004 while on antipsychotic medication that controlled his psychotic symptoms. Alan A. Stone, *Condemned Prisoner Treated and Executed*, PSYCHIATRIC TIMES, Mar. 1, 2004, at 1.

<sup>9</sup> See *Thompson v. Bell*, 580 F.3d 423, 439–41 (6th Cir. 2009); *Singleton*, 319 F.3d at 1023–27; *State v. Perry*, 610 So. 2d 746, 755, 761 (La. 1992).

<sup>10</sup> See *Panetti v. Quarterman*, 551 U.S. 930, 960–61 (2007); *Ford*, 477 U.S. at 416–17.

<sup>11</sup> See, e.g., ARK. CODE ANN. § 16-90-506 (2006) (“If the individual is found incompetent due to mental illness, [to understand the nature and reasons for that punishment,] the Governor shall order that appropriate mental health treatment be provided. The Director of the Department of Correction may order a reevaluation of the competency of the individual as circumstances may warrant.”); CAL. PENAL CODE § 3704 (West 2000) (requiring warden to stay execution if condemned is “insane” until court determines “defendant has recovered his sanity”); FLA. STAT. ANN. § 922.07 (West 2001) (requiring that execution shall be stayed “if the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him or her,” and reinstated when condemned “has been restored to sanity”); KAN. STAT. ANN. § 22-4006 (2007) (requiring that, if judge determines condemned is “insane,” execution shall be suspended; if anytime thereafter judge has “sufficient reason to believe that the convict has become sane, the judge again shall determine the sanity of the convict . . . . Proceedings pursuant to this section may continue to be held at such times as the district judge orders until it is determined either that such convict is sane or incurably insane.”); MISS. CODE ANN. § 99-19-57 (West 2008 & Supp. 2009) (providing that court shall suspend

covery proactively, may a state forcibly administer antipsychotic drugs? Legislation is not specific on this point,<sup>12</sup> and the few courts to decide the issue have reached different conclusions.<sup>13</sup> Is it appropriate to leave discretion in this matter to state legislatures, or, conversely, are states constitutionally obligated to mitigate a death sentence to a sentence of life imprisonment when an inmate's competence hinges on a state-imposed medication regimen?<sup>14</sup>

Consideration of the constitutionality of forcibly medicating a condemned inmate must begin from awareness and understanding of the particularly intrusive character of antipsychotic medication.<sup>15</sup> An-

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execution if condemned "is a person with mental illness," and that if during commitment, "the appropriate official at the state hospital considers the offender to be sane under this subsection . . . [t]he court then shall conduct a hearing on the sanity of the offender"); NEB. REV. STAT. ANN. § 29-2537 (LexisNexis 2009) (requiring that, if a commission finds the convict mentally incompetent, the judge shall suspend his or her execution until the commission, meeting annually, subsequently finds the convicted person competent); N.H. REV. STAT. ANN. § 4:24 (2003) ("The governor, with the advice of the council, may respite from time to time, for stated periods, the execution of a sentence of death upon a convict . . . if it appears to their satisfaction that the convict has become insane . . ."); OR. REV. STAT. § 137.463 (2009) ("Notwithstanding any other provision in this section, if the court finds that the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the sentence of death or its implications, the court may not issue a death warrant until such time as the court, after appropriate inquiries, finds that the defendant is able to comprehend the reasons for the sentence of death and its implications."); S.D. CODIFIED LAWS §§ 23A-27A-22, -24 (Supp. 2010) (requiring that, if condemned "does not appear to be mentally competent to be executed," warden "shall notify the Governor, the secretary of corrections, and the sentencing court"; if sentencing court finds condemned is not "mentally competent to be executed," execution shall be suspended until condemned "is mentally competent to be executed" with the sentencing court reviewing the condemned's "mental condition at least once every six months during the period that the execution of sentence is suspended").

<sup>12</sup> See *supra* note 11 and accompanying text. Maryland is the only state that elaborates on this point. See MD. CODE ANN., CORR. SERVS. § 3-904(a)(2)-(d)(1) (LexisNexis 2008 & Supp. 2009). Maryland provides, "An inmate is not incompetent . . . merely because the inmate's competence depends on continuing treatment, including the use of medication." *Id.* § 3-904(b). Maryland also provides that when an inmate is found incompetent, the sentence of death shall be replaced by a sentence of life imprisonment without the possibility of parole. See *id.* § 3-904(h).

<sup>13</sup> See, e.g., *Singleton*, 319 F.3d at 1026, 1027 (holding that otherwise valid forcible medication regimen does not become unconstitutional under the Eighth or Fourteenth Amendments once execution date is set); *Perry*, 610 So. 2d at 761, 771 (holding that forcibly medicating to execute violates state constitutional right to privacy and prohibition against cruel and unusual punishment); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993) (holding that forcibly medicating to execute violates state constitutional right of privacy).

<sup>14</sup> See *infra* notes 165-264 and accompanying text.

<sup>15</sup> See *Washington v. Harper*, 494 U.S. 210, 229-30 (1990) (describing the Court's understanding of the intrusive character of antipsychotic medication, particularly in the context of forcible administration); see also NAT'L INST. OF MENTAL HEALTH, MENTAL HEALTH MEDICATIONS 2-3 (rev. ed. 2008), available at <http://www.nimh.nih.gov/health/publications/men->

tipsychotic medication is intended to alter the chemical balance in a patient's brain, spurring changes in his or her cognitive process.<sup>16</sup> This process often results in undesirable physical intrusions on a patient's body, as antipsychotic medication often gives rise to serious, even fatal, side effects.<sup>17</sup> Furthermore, those individuals whose only hope for successful treatment rests on antipsychotic medication are seriously ill individuals.<sup>18</sup> For example, schizophrenia is a "chronic, severe and disabling brain disorder" that results in hallucinations, delusions, thought disorders, and movement disorders.<sup>19</sup> A combination of antipsychotic medication and psychosocial treatment can help many of those afflicted manage their symptoms so they can function, but most will have to cope with symptoms throughout their lives.<sup>20</sup>

This Note discusses the constitutional issues that arise when states forcibly medicate incompetent condemned inmates to render them competent for execution.<sup>21</sup> Based on the general Eighth Amendment prohibition against cruel methods of execution, the particular exemption of the insane from the death penalty, and circumstances in which the U.S. Supreme Court has ruled that states are authorized to forcibly medicate prisoners, this Note concludes that states violate both the Eighth and Fourteenth Amendments when executing a prisoner whose

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tal-health-medications/nimh-mental-health-medications.pdf (discussing side effects related to antipsychotic medication, including effects that cause health and metabolic complications as well as effects related to physical movement).

<sup>16</sup> *Harper*, 494 U.S. at 229.

<sup>17</sup> *Id.* at 229–30. The Court described possible side effects of antipsychotic medication, including acute dystonia (a severe involuntary spasm of the upper body, tongue, throat or eyes), akathisia (motor restlessness, often characterized by the inability to sit still), neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction) and tardive dyskinesia (a sometimes irreversible neurological disorder characterized by involuntary, uncontrollable movements or various muscles, especially those around the face). *Id.*

<sup>18</sup> See NAT'L INSTIT. OF MENTAL HEALTH, SCHIZOPHRENIA 1–3 (rev. ed. 2009), available at <http://www.nimh.nih.gov/health/publications/schizophrenia/schizophrenia-booklet-2009.pdf>.

<sup>19</sup> NAT'L INSTIT. OF MENTAL HEALTH, *supra* note 18, at 1–3.

People with the disorder may hear voices other people don't hear. They may believe other people are reading their minds, controlling their thoughts, or plotting to harm them. This can terrify people with the illness and make them withdrawn or extremely agitated.

People with schizophrenia may not make sense when they talk. They may sit for hours without moving or talking. Sometimes people with schizophrenia seem perfectly fine until they talk about what they are really thinking.

*Id.* at 1.

<sup>20</sup> *Id.*

<sup>21</sup> See *infra* notes 165–264 and accompanying text.

competence hinges on a forced regimen of antipsychotic drugs.<sup>22</sup> First, as soon as an execution date is set, a forcible medication program ceases to meet the constitutional requirement that it be “medically appropriate” because it no longer comports with the ethical standards of the medical profession and it subverts treatment into a degrading punishment unique to incompetent death row inmates.<sup>23</sup> Second, this scheme ceases to meet the constitutional requirement that it further a sufficiently important government interest because the state’s interest in execution does not outweigh both the inmate’s privacy interest and the state’s own interest in preserving the integrity of the medical community when execution will be replaced by a life sentence without the possibility of parole.<sup>24</sup> As such, execution preceded by forcible medication with antipsychotic drugs unduly violates a condemned inmate’s liberty interest and amounts to cruel and unusual punishment.<sup>25</sup>

Part I discusses the jurisprudence of cruel and unusual punishment under the Eighth Amendment, and the application of “evolving standards of decency.”<sup>26</sup> Part II particularly examines the Eighth Amendment prohibition against execution of the insane.<sup>27</sup> Part III summarizes U.S. Supreme Court precedent regarding circumstances in which a state may forcibly medicate inmates with antipsychotic drugs.<sup>28</sup> Part IV examines the approaches taken by the few state and federal appellate courts that have addressed the issue of whether it is constitutional to forcibly medicate a condemned inmate to restore competence for execution.<sup>29</sup> Part V argues that, although it is too prescriptive to suppose that antipsychotic medication would never be sufficient to restore competence for execution, a state nonetheless imposes unconstitutional punishment upon inmates when it seeks to forcibly medicate to facilitate execution, for such medication is not medically appropriate and does not further a sufficiently important government interest.<sup>30</sup>

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<sup>22</sup> See *infra* notes 187–264 and accompanying text.

<sup>23</sup> See *infra* notes 201–252 and accompanying text.

<sup>24</sup> See *infra* notes 253–264 and accompanying text.

<sup>25</sup> See *infra* notes 165–264 and accompanying text.

<sup>26</sup> See *infra* notes 31–46 and accompanying text.

<sup>27</sup> See *infra* notes 47–74 and accompanying text.

<sup>28</sup> See *infra* notes 75–106 and accompanying text.

<sup>29</sup> See *infra* notes 107–164 and accompanying text.

<sup>30</sup> See *infra* notes 165–264 and accompanying text.

## I. EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

### A. *Prohibition Against Torturous Punishment Involving Severe and Gratuitous Pain*

The Eighth Amendment's prohibition against cruel and unusual punishment guarantees that states will not inflict torturous punishment involving severe or gratuitous pain.<sup>31</sup> In the late 1800s, the U.S. Supreme Court stated that "punishments of torture" are forbidden under the Eighth Amendment, including punishments where the prisoner "was drawn or dragged to the place of execution, in treason," where the prisoner was "embowelled alive, beheaded, and quartered, in high treason," punishments including "public dissection in murder" and "burning alive in treason committed by a female,"<sup>32</sup> as well as "burning at the stake, crucifixion, or breaking on the wheel."<sup>33</sup> These forms of punishment, along with "all others in the same line of unnecessary cruelty," are surely forbidden.<sup>34</sup> From the Court's earliest cases, this interpretation of cruel and unusual punishment has been understood to apply not only to methods of punishment that inherently inflict severe physical pain, but also to those methods that inherently inflict severe mental pain.<sup>35</sup>

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<sup>31</sup> U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.").

<sup>32</sup> *Wilkerson*, 99 U.S. at 135.

<sup>33</sup> *In re Kemmler*, 136 U.S. 436, 446 (1890).

<sup>34</sup> See *Wilkerson*, 99 U.S. at 136; see also *Robinson v. California*, 370 U.S. 660, 667 (1962) (determining that imprisonment for narcotics addiction is excessive punishment); *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (determining that expatriation is excessive punishment); *Weems v. United States*, 217 U.S. 349, 380–81 (1910) (determining that twelve years in chains at hard and painful labor is excessive punishment).

<sup>35</sup> See *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring). Justice Brennan reaches his conclusion that the Eighth Amendment traditionally prohibits severe mental pain inherent in the infliction of a particular punishment by citing to *Weems*, 217 U.S. at 372, where the Court noted that there may "be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation," and to *Trop*, 356 U.S. at 101, where the Court prohibited denationalization as a punishment though "[t]here may be involved no physical mistreatment, no primitive torture" since "[t]here is instead the total destruction of the individual's status in organized society," and concluded that denationalization "is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 271, 274 n.15.



Drawing from the traditional prohibition against punishments of torture, cruelty in the context of execution has been articulated by the Court as follows: “Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there [is] something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>36</sup>

### B. *Evolving Standards of Decency and the Dignity of Man*

Over time, the Eighth Amendment’s protection has been extended beyond the traditional prohibition against punishments of torture to include punishments that are offensive to the “dignity of man, which is the basic concept underlying the Eighth Amendment.”<sup>37</sup> At a minimum, this means that a particular punishment must not be “excessive” in that it “involve[s] the unnecessary and wanton infliction of pain” or is “grossly out of proportion to the severity of the crime.”<sup>38</sup> Prohibiting excessive punishment assures that a prisoner will be treated as a member of the human race, and not as an object to be “toyed with and discarded” by the state.<sup>39</sup> Nevertheless, a punishment will not be invalidated merely because the state could employ a less severe method; rather, to be invalidated, the punishment itself must involve physical or mental pain that offends basic human attributes.<sup>40</sup>

There is no hard and fast rule to guide courts deciding whether a particular punishment is cruel and unusual, for the Eighth Amendment is interpreted flexibly and “must draw its meaning from the evolu-

<sup>36</sup> *Kemmler*, 136 U.S. at 447.

<sup>37</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citation omitted); *see also Furman*, 408 U.S. at 270 (Brennan, J., concurring) (“At bottom . . . the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.”); *Trop*, 356 U.S. at 100.

<sup>38</sup> *Gregg*, 428 U.S. at 173.

<sup>39</sup> *See Furman*, 408 U.S. at 272–73.

When we consider why [punishments inflicting torture] have been condemned . . . we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

*Id.*

<sup>40</sup> *See Gregg*, 428 U.S. at 182–83; *Furman*, 408 U.S. at 451 (Powell, J., dissenting); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *Kemmler*, 136 U.S. at 446–47.

ing standards of decency that mark the progress of a maturing society.<sup>41</sup> Evolving standards of decency may be found in state legislation, or other forms of objective evidence capable of reflecting the contemporary public attitude toward a particular sanction.<sup>42</sup> There is, however, a subjective component to these standards, which requires the Court's own judgment to be brought to bear when determining the acceptability of a particular punishment.<sup>43</sup>

In recent years, the Court has invoked evolving standards of decency to conclude that the imposition of the death penalty is disproportionate punishment as applied to certain crimes<sup>44</sup> or to certain classes of offenders.<sup>45</sup> A sentence of capital punishment is understood to be "limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them most deserving of execution."<sup>46</sup>

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<sup>41</sup> *Trop*, 356 U.S. at 100–01; *Weems*, 217 U.S. at 373 (noting that cruel and unusual punishment cannot be rigidly defined, because "[i]n the application of a constitution . . . our contemplation cannot be only of what has been but of what may be"). A progressing civilization is understood to be one that seeks to temper means of capital punishment to provide greater respect for human dignity. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2658 (2008) ("It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.").

<sup>42</sup> *Gregg*, 428 U.S. at 173, 174 n.19. The Court was aware of the tension between the legislative and executive functions when deciphering "evolving standards of decency": on the one hand, "legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values," while on the other hand the Eighth Amendment "was intended to safeguard individuals from the abuse of legislative power." *Id.* at 174 n.19. Some measure of judicial review is therefore necessary to guard against instances where state legislatures enact penal laws that, in the light of contemporary human knowledge, inflict cruel and unusual punishment. *Id.* at 174. The Court therefore concluded that the judicial role in enforcing the requirements of the Eighth Amendment must be limited but must be available because "the Eighth Amendment is a restraint upon the exercise of legislative power." *Id.* Nonetheless, the Court must remain mindful that "[it] may not act as judges as [it] might as legislators." *Id.* at 174–75.

<sup>43</sup> *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citing *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

<sup>44</sup> See, e.g., *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding a sentence of death for a murderer who did not intend to kill is grossly disproportionate and excessive punishment); *Coker*, 433 U.S. at 592 (holding a sentence of death for the crime of rape of an adult woman is grossly disproportionate and excessive punishment).

<sup>45</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that executing criminals under eighteen years of age at time of their capital crimes is cruel and unusual punishment prohibited by Eighth Amendment); *Atkins*, 536 U.S. at 321 (holding that executing mentally retarded criminals is cruel and unusual punishment prohibited by Eighth Amendment); *Ford v. Wainwright*, 477 U.S. 405, 409–10 (1986) (holding that executing the insane is cruel and unusual punishment prohibited by the Eighth Amendment).

<sup>46</sup> *Roper*, 543 U.S. at 568 (internal quotation omitted) (citing *Atkins*, 536 U.S. at 319).

## II. EIGHTH AMENDMENT PROHIBITION AGAINST EXECUTION OF THE INSANE

In 1986, in *Ford v. Wainwright*, a divided U.S. Supreme Court held that the Eighth Amendment prohibits states from executing a prisoner who is insane.<sup>47</sup> The plurality looked to both historical and contemporary values to support its conclusion.<sup>48</sup> First, as execution of the insane was condemned at common law in 1789, the Framers must have intended the Eighth Amendment to ban the practice as well.<sup>49</sup> Second, objective evidence of contemporary values found in state legislation indicated that the practice did not comport with contemporary notions of human dignity because no state permitted execution of the insane at the time.<sup>50</sup> The Court reasoned that states had prohibited the practice for the same reasons it had been prohibited at common law—because execution of the insane provided no retributive value<sup>51</sup> and offended fundamental notions of humanity.<sup>52</sup> Thus, the plurality concluded that, whether compelled by the desire “to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance,” execution of the insane was a punishment proscribed as unconstitutionally cruel and unusual.<sup>53</sup>

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<sup>47</sup> 477 U.S. 405, 409–10 (1986).

<sup>48</sup> *Id.* at 406–10.

<sup>49</sup> *Id.* at 405 (“There is now little room for doubt that the Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted.”).

<sup>50</sup> *Id.* at 408–09.

<sup>51</sup> *Id.* The Court noted that historically, execution of the insane was understood to serve no purpose because madness is its own punishment: *furiosus solo furore punitur*. *Id.* at 407–08. The Court also cited to the belief that “the community’s quest for ‘retribution’ — the need to offset a criminal act by a punishment of equivalent ‘moral quality’ — is not served by execution of an insane person, which has a ‘lesser value’ than that of the crime for which he is to be punished.” *Id.* at 408 (citing Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962)). The Court then concluded that “today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.” *Id.* at 409.

<sup>52</sup> *Id.* at 407. The Court recognized religious underpinnings as a basis for the inhumanity of executing the insane: “[I]t is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it.” *Id.* (citation and quotation omitted). The Court then concluded that “the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today.” *Id.* at 409.

<sup>53</sup> *Ford*, 477 U.S. at 410.

Although the plurality prohibited execution of the insane, it did not endeavor to answer the critical question of what constitutes insanity.<sup>54</sup> The only guidance provided on this definitional issue is Justice Powell's assertion, drawn from common law heritage and modern state practices, that those who are to be executed must be aware of the punishment they are about to suffer and why they are about to suffer it.<sup>55</sup> Justice Powell deemed this standard for sanity the appropriate constitutional baseline because it fulfilled both the retributive and humanitarian concerns identified by the plurality.<sup>56</sup> First, as long as a defendant can perceive the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied.<sup>57</sup> Second, as long as a defendant is aware that his death is approaching, he may prepare himself, mentally and spiritually, for death.<sup>58</sup>

The plurality opted to allow the states to set the procedural standards that would assure due process to inmates asserting competency claims.<sup>59</sup> Justice Powell specified that procedures must allow for an impartial decisionmaker and an opportunity for the inmate to present his

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<sup>54</sup> See *id.* at 416–17.

<sup>55</sup> *Id.* at 422 (Powell, J., concurring in part and concurring in the judgment).

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> *Id.* States have taken varied approaches to the definition of insanity: although some simply prohibit execution of 'insane' prisoners without defining insanity for this purpose, others attempt more precision by adopting the language used by Justice Powell in his concurring opinion. See Lyn Suzanne Entzeroth, *The Illusion of Insanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641, 646 n.33 (2009); see also Am. Bar Ass'n, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 673 (2006) ("[E]xecution should be precluded when a prisoner lacks the capacity (i) to make a rational decision regarding whether to pursue post-conviction proceedings, (ii) to assist counsel in post-conviction adjudication, or (iii) to appreciate the meaning or purpose of an impending execution.").

<sup>59</sup> *Ford*, 477 U.S. at 416–17. The Court held that Florida's procedures for determining sanity of a death row prisoner were constitutionally deficient because they did not afford a "full and fair hearing" on the critical issue of competence to be executed. *Id.* at 410–12. The Court left enforcement to the states, but noted that states must, at the very least, select procedures that provide for redress for those with substantial claims, and encourage accuracy in the fact-finding determination. *Id.* at 417. Similarly, in 2002 in *Atkins v. Virginia*, the Court again allowed states to implement procedures to enforce its holding that execution of the mentally retarded was unconstitutionally cruel and unusual:

Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."

*Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (citation omitted).

own expert psychiatric evidence, but that beyond such basic requirements, states have “substantial leeway” to determine constitutionally acceptable procedures.<sup>60</sup>

In reaching this determination, Justice Powell made three basic points.<sup>61</sup> First, he recognized the strong state interest in carrying out the punishment of one who has been validly convicted of a capital crime and sentenced to death.<sup>62</sup> In his view, the issue in this sort of claim is “not *whether*, but *when*” the inmate’s execution may take place.<sup>63</sup> Second, Justice Powell noted that an inmate who pleads incompetence for execution is not operating on a blank slate because he must have been judged competent to stand trial.<sup>64</sup> Thus, the state is entitled to presume that the inmate retains sanity, and may require substantial evidence of insanity to “trigger the hearing process.”<sup>65</sup> Third, Justice Powell observed that determining sanity is an essentially subjective judgment that depends primarily on “expert analysis in a discipline fraught with ‘subtleties and nuances.’”<sup>66</sup> Under such circumstances, an adver-

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<sup>60</sup> *Ford*, 477 U.S. at 427. As a result of the leeway offered, states have come up with varying procedures for defining and determining competence for execution. See Henry F. Fradella, *Competing Views on the Quagmire of Synthetically Restoring Competency to Be Executed*, 41 CRIM L. BULL. 447, 448 (2005) (“[T]he lack of uniformity in the approach to competency to be executed, coupled with the inherent ambiguities of clinical assessment has led the process of determining competency for execution to be called ‘a game of chance’ by some commentators.”); see also Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 60–61 (1985); Kristen Wenstrup Crosby, Comment, *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, 1199–1204 (1993); Rhonda K. Jenkins, Comment, *Fit to Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149, 167 (1995). See generally AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: MENTAL HEALTH 7-5.6, -5.7 (1989).

<sup>61</sup> *Ford*, 477 U.S. at 425.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* Justice Powell further elaborated on this point: “It is of course true that some defendants may lose their mental faculties and never regain them, and thus avoid execution altogether. My point is only that if petitioner is cured of his disease, the State is free to execute him.” *Id.* at 425 n.5.

<sup>64</sup> *Id.* at 425–26. The Court has articulated the standard for competence to stand trial as follows:

[I]t is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events . . . the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.

*Dusky v. United States*, 362 U.S. 402, 402 (1960) (citation and quotation omitted).

<sup>65</sup> *Ford*, 477 U.S. at 426.

<sup>66</sup> *Id.*

serial judicial proceeding would be less effective at making proper medical decisions than would an administrative council.<sup>67</sup>

Over twenty years after *Ford* was decided, the U.S. Supreme Court clarified Justice Powell's definition of sanity in *Panetti v. Quarterman* in 2007 by introducing a distinction between "mere awareness" and "rational understanding" of the reason for execution.<sup>68</sup> The Court held that only the latter could establish the requisite competence for execution under the principles of *Ford*.<sup>69</sup>

In so holding, the Court overruled a decision by the U.S. Court of Appeals for the Fifth Circuit, which had held that an inmate is necessarily competent for execution if he is aware that he committed the crime, that he will be executed, and that the reason the state has given for the execution is his commission of the crimes in question.<sup>70</sup> The Supreme Court determined this standard to be deficient insofar as it would treat a prisoner's delusions as irrelevant to questions of mental competence.<sup>71</sup>

Although the Court rejected the standard followed by the Fifth Circuit, it again declined to articulate a rule governing all competency determinations.<sup>72</sup> Rather, it remanded the case to the district court to determine the extent to which the delusions distorted the inmate's perceptions of reality.<sup>73</sup> In requiring consideration of this issue, the Court did not substantively alter the *Ford* standard but rather clarified how it should be understood.<sup>74</sup>

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<sup>67</sup> *Id.* ("Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real." (quoting *Parham v. J. R.*, 442 U.S. 584, 609 (1979))).

<sup>68</sup> *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007) ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.").

<sup>69</sup> *See id.* at 960.

<sup>70</sup> *Id.* at 956.

<sup>71</sup> *Id.* at 960. The Court reasoned that refusing to consider evidence of delusions was to "mistake *Ford's* holding and its logic" because "[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve no proper purpose." *Id.*

<sup>72</sup> *Id.* at 960–61.

<sup>73</sup> *Id.* at 961–62. On remand, the U.S. District Court for the Western District of Texas held that, despite the fact that "Panetti was mentally ill when he committed his crime and continues to be mentally ill today," he possessed "both a factual and rational understanding of his crime, his impending death, and the causal retributive connection between the two." *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*37 (W.D. Tex. Mar. 26, 2008). The district court concluded, "[I]f any mentally ill person is competent to be executed for his crimes, this record establishes it is Scott Panetti." *Id.*

<sup>74</sup> *See Panetti*, 551 U.S. at 962. *But see id.* at 978–80 (Thomas, J., dissenting) (arguing the majority is imposing a new constitutional standard for determining competence because

### III. RENDERING CRIMINAL DEFENDANTS COMPETENT THROUGH ANTIPSYCHOTIC DRUGS

Neither *Ford v. Wainwright* nor *Panetti v. Quarterman* broached the issue of whether inmates may be rendered competent for execution through forced administration of antipsychotic drugs.<sup>75</sup> Part III of this Note discusses the partial precedent that may be found in U.S. Supreme Court opinions holding forced administration of antipsychotic drugs a constitutionally acceptable means of rendering inmates competent for other purposes.<sup>76</sup>

#### A. *Washington v. Harper: Forcible Medication for Prison Safety*

In 1989, in *Washington v. Harper*, the U.S. Supreme Court considered a suit challenging a Washington state prison policy that authorized forcible medication of an insane inmate with antipsychotic drugs against his will and without a judicial hearing.<sup>77</sup> The Court recognized that an inmate “possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”<sup>78</sup> Nonetheless, the Court held that, given the exigencies of the prison environment, a state may medicate an inmate with a serious mental illness against his will “if the inmate is dangerous to himself or others, and the treatment is in the inmate’s medical interest.”<sup>79</sup> The Court further held that a prison regulation authorizing such forcible medication is constitutionally valid if reasonably related to legitimate penological interests.<sup>80</sup> Such a regulation need not require a

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nothing in the *Ford* opinion “addresses what to do when a prisoner knows the reason for his execution but does not ‘rationally understand’ it”).

<sup>75</sup> See generally *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 477 U.S. 405 (1986).

<sup>76</sup> See *infra* notes 77–106 and accompanying text.

<sup>77</sup> 494 U.S. 210, 217 (1990).

<sup>78</sup> *Id.* at 221–22; see also *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278–79 (1990) (concluding that the right to refuse unwanted medical treatment is so rooted in our history, tradition, and practice as to require special protection under the Fourteenth Amendment).

<sup>79</sup> *Harper*, 494 U.S. at 227.

<sup>80</sup> See *id.* at 224–25. The Court stated that it applies the same “reasonableness standard” to “all circumstances in which the needs of prison administration implicate constitutional rights.” *Id.* That reasonableness standard, first articulated in the Court’s 1987 decision in *Turner v. Safely*, considers the following factors: first, whether there is a rational connection between the prison regulation and the “legitimate government interest” it purports to serve; second, what “impact accommodation of the asserted constitutional right will have on guards and other inmates” and on prison resources generally; and third,

judicial hearing to comport with due process so long as the nonjudicial mechanisms employed contain sufficient procedural safeguards to appropriately balance the prisoner's significant liberty interest against the government's safety interest.<sup>81</sup>

The Court concluded that, although the individual and government interests at stake were both substantial,<sup>82</sup> the inmate was validly subjected to forcible medication pursuant to prison policy because the policy was reasonably related to legitimate penological interests and contained sufficient procedural safeguards to protect the inmate's liberty interests.<sup>83</sup> Specifically, the Court determined that the policy met the reasonability criterion because it applied exclusively to inmates who posed a significant danger to themselves or others due to their mental illness,<sup>84</sup> because it allowed only for medication that was medically appropriate,<sup>85</sup> and because alternatives suggested by the

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whether there are alternative, less intrusive means of achieving the stated objective. *Id.* (quotation omitted) (citing *Turner v. Safley*, 482 U.S. 78, 107 (1987)).

<sup>81</sup> *Id.* at 228. "The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Id.* at 229. How much due process is required in any given situation requires consideration of the factors articulated in the Court's 1976 decision in *Mathews v. Eldridge*: the Court must balance the individual's privacy interests with the government's interests and then assess whether the procedural protections in place adequately minimize the risk of erroneously depriving that individual of his or her liberty. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>82</sup> *Id.* at 222–23, 229, 233. As a general rule, the extent of an inmate's right under due process to avoid unwanted administration of antipsychotic drugs must always be defined in the context of the inmate's confinement. *Id.* at 222. The Court emphasized that the individual's liberty interest is especially significant in these circumstances since the purpose of antipsychotic drugs is to "alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive process." *Id.* at 229. Furthermore, "[w]hile the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." *Id.* Conversely, the Court emphasized that the government's interest is especially significant in these circumstances since "[t]here are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in the prison environment, which, 'by definition,' is made up of persons with a 'demonstrated proclivity for antisocial criminal, and often violent, conduct.'" *Id.* at 225 (citation omitted).

<sup>83</sup> *Id.* at 226, 233.

<sup>84</sup> *Id.* at 225–26. If an inmate's mental illness "is the root cause of the threat he poses to the inmate population," the state's interest in safety "necessarily encompasses an interest in providing him with medical treatment . . ." *Id.* Furthermore, the "proper use of [antipsychotic] drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior." *Id.* at 226.

<sup>85</sup> *Harper*, 494 U.S. at 222 ("[T]he fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement.").



prisoner were not sufficient to respond effectively to the state's concerns.<sup>86</sup>

Although the policy itself did not specify what constituted medically appropriate medication, the Court found this criterion met by the requirement that the decision to medicate be made by an inmate's treating physician.<sup>87</sup> The Court reasoned that it may assume that physicians, pursuant to the ethics of the medical profession, would prescribe a forcible regimen "only in those cases where appropriate by medical standards."<sup>88</sup> Piggybacking on this reasoning, the Court further determined that the prison policy provided adequate procedural protections to safeguard inmates' significant liberty interests even though it authorized medical professionals, rather than judges, to decide according to their clinical observations whether to medicate.<sup>89</sup> Indeed, the Court understood these liberty interests to be better served by allowing medical professionals such discretion because the decision to medicate is inherently a medical-psychiatric determination and medical diagnostics are not "the business of judges."<sup>90</sup>

B. *Riggins v. Nevada and Sell v. United States: Forcible Medication for Trial Competence*

Subsequently, in 1992, in *Riggins v. Nevada*, the U.S. Supreme Court applied the logic of *Harper* to situations in which the state wished to render a criminal defendant competent for trial.<sup>91</sup> The prisoner contended that his right to a "full and fair trial" had been compromised by the involuntary administration of antipsychotic drugs;<sup>92</sup> the Court agreed, emphasizing that the inmate's liberty interest is especially acute in a trial context because side effects can alter the prisoner's outward appearance and the substance of his testimony, as well as his ability to

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<sup>86</sup> *Id.* at 226–27 (rejecting both "court approval of treatment" and "physical restraints or seclusion" as adequate, less-intrusive alternative means to accomplish the state interest).

<sup>87</sup> *Id.* at 222 n.8.

<sup>88</sup> *Id.* In dissent, Justice Stevens emphasized that "[t]he provisions of the Policy [made] no reference to any expected benefit to the inmate's medical condition," and argued that the "Court's reliance on the Hippocratic Oath to save the constitutionality of [the Policy was] unavailing." *Id.* at 243, 244 n.11 (Stevens, J., dissenting).

<sup>89</sup> *Id.* at 231 (majority opinion).

<sup>90</sup> *Id.* at 231–32 (citing *Parham v. J. R.*, 442 U.S. 584, 607–09 (1979)).

<sup>91</sup> *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

<sup>92</sup> *Id.* at 133. Specifically, the inmate argued that artificial alteration of "his demeanor and mental state during trial" might compromise due process and that he had the right to show jurors his "true mental state" for his insanity defense at trial. *Id.* at 130.

follow the proceedings and communicate with counsel.<sup>93</sup> Accordingly, the Court held that a state may not forcibly administer antipsychotic drugs to a prisoner “absent a finding of overriding justification and a determination of medical appropriateness.”<sup>94</sup> According to the Court, the state could have satisfied due process if it had first proved the treatment to be medically appropriate and had then proved it to be either essential to prison safety or the only means by which to restore the prisoner’s competence for trial.<sup>95</sup> The state, however, had allowed involuntary medication “without making *any* determination of the need for this course or *any* finding about reasonable alternatives.”<sup>96</sup> This utter disregard of the prisoner’s significant liberty interest rendered the forcible regimen unconstitutional.<sup>97</sup>

In 2003, in *Sell v. United States*, the U.S. Supreme Court elaborated on the conditions upon which a criminal defendant may be forcibly medicated to restore competence to stand trial.<sup>98</sup> The Court held that the government may administer antipsychotic drugs to an unwilling mentally ill defendant facing serious criminal charges to render that defendant competent to stand trial, but only if the treatment is medically appropriate,<sup>99</sup> is “substantially unlikely” to result in side effects that could undermine the fairness of the trial,<sup>100</sup> and, taking account of less intrusive alternatives,<sup>101</sup> is necessary significantly to further governmental trial-related interests.<sup>102</sup> Finally, the Court noted that although the

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<sup>93</sup> *Id.* at 137.

<sup>94</sup> *Id.* at 135.

<sup>95</sup> *Id.* at 135–36 (“Constitutional power to bring an accused to trial is fundamental to a scheme of ordered liberty and prerequisite to social justice and peace.” (quoting *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring))).

<sup>96</sup> *Id.* at 136.

<sup>97</sup> *Riggins*, 504 U.S. at 136–37. The Court elaborated that though “trial prejudice can sometimes be justified by an essential state interest,” the record contained no specific finding that forcible medication was needed to accomplish any such interest in this particular case. *Id.* at 138.

<sup>98</sup> 539 U.S. 166, 179–82 (2003).

<sup>99</sup> *Id.* at 181 (holding that administration of drugs is medically appropriate if “in the patient’s best medical interest in light of his medical condition”).

<sup>100</sup> *Id.* (holding that administration of drugs must be “substantially likely to render the defendant competent to stand trial” and “substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair”).

<sup>101</sup> *Id.* (holding that a court must “find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results” and must “consider less intrusive means for administering the drugs, *e.g.*, a court order to the defendant backed by the contempt power, before considering more intrusive methods”).

<sup>102</sup> *Id.* at 180–81 (identifying the interest in bringing a criminal defendant to trial, and the concomitant interest in ensuring a fair trial).

government's interest in bringing a criminal defendant to trial is always important, the potential for lengthy future confinement of a defendant who refuses medication is a circumstance that may mitigate the need for prosecution.<sup>103</sup> Because the appellate court had not considered these conditions, its decision was vacated and remanded.<sup>104</sup>

A crucial aspect of the Court's holding is that a court need not even reach the question of whether forced medication is necessary for trial competence where forced medication is warranted for a separate and sufficient purpose, such as when an inmate is dangerous to himself or others, or when refusal to take drugs puts his own health at serious risk.<sup>105</sup> The Court justified this determination in part by characterizing a decision to forcibly medicate for health or safety reasons as far more "objective and manageable" for medical experts than a decision to forcibly medicate to restore trial competence, as the latter decision would necessarily entail balancing the "harms and benefits related to the more quintessentially legal questions of trial fairness and competence."<sup>106</sup>

#### IV. RENDERING DEATH ROW INMATES COMPETENT FOR EXECUTION THROUGH ANTIPSYCHOTIC DRUGS

It is unclear if the due process requirements of the U.S. Supreme Court's decisions in *Washington v. Harper* in 1990, *Riggins v. Nevada* in 1992, and *Sell v. United States* in 2003, can be validly applied in the context of restoring competence for execution.<sup>107</sup> It is also unclear if forcibly medicated condemned inmates may be executed without violating the Eighth Amendment principles articulated in *Ford v. Wainwright*.<sup>108</sup>

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<sup>103</sup> *Id.* at 180 ("The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property. In both instances the Government seeks to protect through application of the criminal law the basic human need for security."). Particularly, the Court noted that the likely prospect of further lengthy confinement reduces the likelihood of the defendant's committing future crimes. *Id.*

<sup>104</sup> *Sell*, 539 U.S. at 185–86. Particularly, the Court noted that the appellate court was obligated to consider how the side effects were likely to have undermined the fairness of the defendant's trial, especially since the defendant had already been confined for a lengthy period of time and his refusal to take antipsychotic medication would likely result in future lengthy confinement. *See id.*

<sup>105</sup> *Id.* at 181–82.

<sup>106</sup> *Id.* at 182.

<sup>107</sup> *See generally* *Sell v. United States*, 539 U.S. 166 (2003); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Washington v. Harper*, 494 U.S. 210 (1990).

<sup>108</sup> *See* 477 U.S. 399, 409–10 (1986); *infra* notes 109–164 and accompanying text.

The Louisiana Supreme Court was one of the first courts to examine the issue in 1992 in *State v. Perry*.<sup>109</sup> In *Perry*, the court held that the state could not forcibly administer antipsychotic drugs to an incompetent death row prisoner to carry out his death sentence while he was under the influence of such drugs.<sup>110</sup> The court limited its holding to antipsychotic medication forcibly administered solely for purposes of punishment<sup>111</sup> and resolved the case on state constitutional grounds.<sup>112</sup>

First, the court held that the state's medicate-to-execute plan violated the prisoner's state constitutional right to privacy and personhood.<sup>113</sup> Absent a compelling state interest, such forced medication would unjustifiably intrude upon the prisoner's "bodily integrity" by "chemically alter[ing] his mind and will," and by commandeering his basic right to make decisions concerning his own treatment.<sup>114</sup> A further complication inherent in such a regime is that treatment would be transformed into punishment because, when medication is administered contrary to the inmate's best medical interests, physicians are forced to violate the ethical standards embodied in the Hippocratic oath and destroy the "trustful, communicative doctor-patient relationship that is essential to psychiatric therapy."<sup>115</sup> The court noted that, as a state physician "cannot serve two masters," there was a substantial and

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<sup>109</sup> See 610 So. 2d 746, 749 (La. 1992).

<sup>110</sup> See *id.* at 771.

<sup>111</sup> See *id.* at 754; Crosby, *supra* note 60, at 1195 (noting that the *Perry* decision protects only those inmates whom "the state admits it wants to forcibly medicate solely to allow their execution," and that the state retains full authority to execute if it medicates forcibly "for other purposes or if the inmates voluntarily accept antipsychotic medication").

<sup>112</sup> *Perry*, 610 So. 2d at 751. The court noted that Louisiana's Constitution, in comparison to the federal constitution, was more stringent in protecting privacy interests and prohibiting cruel and unusual punishment. *Id.* at 755, 762.

<sup>113</sup> *Id.* at 755. The right of every individual to be secure in his person against "unreasonable searches, seizures, or invasions of privacy" is embodied in Article I of the Louisiana Constitution of 1974. LA. CONST. art. I, § 5.

<sup>114</sup> *Perry*, 610 So. 2d at 758.

<sup>115</sup> *Id.* at 752 (holding that, by acting "unethically and contrary to the goals of medical treatment," the physician is preventing "the prisoner from receiving adequate medical treatment for his mental illness"). The court proceeded to cite the Hippocratic oath, which reads:

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 . . .

*Id.* (quoting STEDMAN'S MEDICAL DICTIONARY 647 (4th unabr. lawyer's ed. 1976)).

troubling possibility that the doctor's duty to promote the well-being of his patient would come second to the doctor's duty to the state.<sup>116</sup>

Second, the court held that the medicate-to-execute scheme violated the state's ban on cruel, excessive, or unusual punishment:

The punishment is cruel because it imposes significantly more indignity, pain and suffering than ordinarily is necessary for the mere extinguishment of life, excessive because it imposes a severe penalty without furthering any of the valid social goals of punishment, and unusual because it subjects to the death penalty a class of offenders that has been exempt therefrom for centuries and adds novel burdens to the punishment of the insane which will not be suffered by sane capital offenders.<sup>117</sup>

Similarly to the Louisiana Supreme Court, the South Carolina Supreme Court held in 1993 in *Singleton v. State* that the state's constitutional right of privacy would be violated if the state were to forcibly medicate an otherwise incompetent inmate solely for purposes of punishment.<sup>118</sup> The court determined that both federal and state due process allow forcible medication only if the inmate is dangerous to himself or to others and if the medication is in the inmate's best medical interests.<sup>119</sup> According to the court, a serious complication inherent in the process of forcibly medicating to facilitate execution flowed from the medical profession's ethical standards pursuant to the Hippocratic Oath and the ethical codes adopted by the American Medical Association ("AMA") and the American Psychiatric Association ("APA").<sup>120</sup> Accordingly, the appropriate remedy in such a situation was for an incompetent death row inmate to seek a stay of execution.<sup>121</sup>

The U.S. Court of Appeals for the Eighth Circuit took a different approach in the 2003 case of *Singleton v. Norris*.<sup>122</sup> It held that a state

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<sup>116</sup> *Id.* at 752.

<sup>117</sup> *Id.* The right to be free from "cruel, excessive or unusual punishment" is embodied in Article I of the 1974 Louisiana Constitution. LA. CONST. art. I, § 20.

<sup>118</sup> 437 S.E.2d 53, 61 (S.C. 1993). A South Carolina citizen's right to privacy is found in Article 1 of the South Carolina Constitution. S.C. CONST. art. I, § 10.

<sup>119</sup> *Singleton*, 437 S.E.2d at 61. The South Carolina Supreme Court concluded that the U.S. Supreme Court's decisions in *Riggins* and *Harper* established "the federal due process analysis required in a forced medication case," and that the Louisiana Supreme Court's decision in *Perry* established the correct state due process analysis, as South Carolina's constitutional privacy provision was "strikingly similar" to that of Louisiana. *Id.* at 60, 60-61.

<sup>120</sup> *Id.* at 61.

<sup>121</sup> *Id.* at 61-62.

<sup>122</sup> See 319 F.3d 1018 (8th Cir. 2003).

does not violate the Eighth Amendment when it executes a death row inmate who regains competence through “appropriate medical care.”<sup>123</sup>

The inmate in *Singleton* presented two arguments to support his petition for a stay of execution.<sup>124</sup> First, he argued that an involuntary medication regimen that is valid under *Harper* during a stay of execution becomes invalid once an execution date is fixed, because at that point medication is no longer in the inmate’s best medical interest.<sup>125</sup> Second, he argued that antipsychotic medication can accomplish only “artificial competence,” meaning that while it may mask the symptoms of psychosis, it does not cure the underlying mental illness, for without medication the inmate would regress into psychosis.<sup>126</sup> Thus, according to the inmate, antipsychotic medication simply is not sufficient to render a patient *Ford*-competent for purposes of execution.<sup>127</sup>

The inmate’s first argument was premised on the notion that medication cannot logically be in the prisoner’s best medical interest if a consequence of that medication would be to render the inmate competent for the death penalty.<sup>128</sup> The Eighth Circuit rejected this premise by concluding that focus on the inmate’s *ultimate* medical interests was inappropriate.<sup>129</sup> It deemed medical appropriateness to have been established by the doctor’s conclusion that medication was effective in controlling the inmate’s psychotic symptoms, and by the inmate’s concession that he preferred medication and did not suffer serious side effects from it.<sup>130</sup> Competence for execution—though an “unwanted consequence” of medication—was not a constitutionally significant side effect because the inmate’s due process interests in life and liberty were already “foreclosed by a lawfully imposed sentence of execution and the *Harper* procedure.”<sup>131</sup> Consequently, a mandatory medication regi-

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<sup>123</sup> *Id.* at 1027. After twenty-five years on death row, Charles Singleton was executed on January 6, 2004, in Arkansas. *See supra* note 8.

<sup>124</sup> *Singleton*, 319 F.3d at 1023, 1026.

<sup>125</sup> *Id.* at 1023.

<sup>126</sup> *Id.* at 1025, 1026; *id.* at 1034 (Heaney, J., dissenting).

<sup>127</sup> *Id.* at 1026 (majority opinion). To be “*Ford*-competent,” death row inmates must be aware of the punishment they are about to suffer, and why they are about to suffer it. *See Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment); *supra* note 55 and accompanying text.

<sup>128</sup> *Singleton*, 319 F.3d at 1026.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See id.* The Court in *Harper* held that the state may medicate an inmate with serious mental illness against his will “if the inmate is dangerous to himself or others and the treatment is in the inmate’s medical interest.” *See* 494 U.S. at 227; *supra* notes 77–90 and accompanying text.

men valid under *Harper* did not lose its constitutionality simply because the inmate's execution date was set.<sup>132</sup>

The inmate's second argument was premised on the notion that antipsychotic medication is capable only of alleviating psychotic symptoms, not curing the underlying mental illness.<sup>133</sup> As the inmate relied on language from *Perry* to support his argument, the Eighth Circuit took care to distinguish the *Perry* holding.<sup>134</sup> First, *Perry* had been decided based on a provision in the Louisiana Constitution, which provided more expansive protections than the Eighth Amendment.<sup>135</sup> Second, the *Perry* court had accepted the view that a patient's "best medical interests" must be understood in the long-term, whereas the Eighth Circuit determined that an inmate's best medical interests ought to be determined without regard to whether his execution date had been set.<sup>136</sup> Third, in *Perry*, the antipsychotic medication had been administered solely for purposes of punishment ("curing-to-kill"), whereas Singleton had been administered antipsychotic medication that was medically appropriate.<sup>137</sup> When a state forcibly medicates inmates with medically appropriate antipsychotic drugs pursuant to its constitutional obligation to provide appropriate medical care to state prisoners, the Eighth Circuit judged it unnecessary to probe for any ulterior motive the state may have had for providing such medication.<sup>138</sup>

Rebutting the majority position, the dissent questioned the state's intrinsic ability ever to make an objective determination of what is "medically appropriate" for the inmate when it possesses a concomitant interest in carrying out that inmate's execution, as "[t]he State's vigor in pursuing [execution] may well lead it to obscure the true reasons for forcibly medicating an inmate into competence."<sup>139</sup> Construing the state's "true motivation" as impossible to discern, the dissent contended that the principles of *Harper* no longer support the forcible administration of medication once the inmate's execution date is set.<sup>140</sup>

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<sup>132</sup> *Singleton*, 319 F.3d at 1026.

<sup>133</sup> *See id.*

<sup>134</sup> *Id.* at 1026–27 (citing *Perry*, 610 So. 2d at 757, 765–66).

<sup>135</sup> *Id.* at 1026 (citing *Perry*, 610 So. 2d at 765–66).

<sup>136</sup> *Id.* (citing *Perry*, 610 So. 2d at 766).

<sup>137</sup> *Id.* at 1026–27 (citing *Perry*, 610 So. 2d at 757).

<sup>138</sup> *Singleton*, 319 F.3d at 1027. A state's constitutional obligation to provide medical care for those whom it is punishing by incarceration is identified by the U.S. Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

<sup>139</sup> *Singleton*, 319 F.3d at 1035 (Heaney, J., dissenting).

<sup>140</sup> *See id.* at 1036.

The dissent further accepted the inmate's argument that antipsychotic drugs can accomplish only "synthetic" or "artificial" sanity, and therefore can not render a condemned inmate *Ford*-competent.<sup>141</sup> Under this view, the majority erroneously equated receiving treatment with being cured, when in reality antipsychotic drugs are capable only of calming and repressing symptoms of psychosis that will ordinarily return once medication is discontinued.<sup>142</sup> The dissent understood this inherent limitation to be pertinent in Singleton's case, as the relatively frequent alterations in his medication regimen proved how treatment was incapable of consistently repressing his psychotic symptoms.<sup>143</sup> Thus, as is typical of most patients on antipsychotic medication, even in relatively stable periods Singleton was displaying only a temporary and unpredictable form of sanity.<sup>144</sup> Given the fickle nature of drug-induced sanity, the state would likely be unable to guarantee that the inmate was truly *Ford*-competent at the precise moment of execution.<sup>145</sup> Thus, *Ford's* prohibition on the execution of the insane should apply to medicated inmates with equal force as to unmedicated inmates, despite any seemingly beneficial effect provided by medication.<sup>146</sup>

A final concern raised by the dissent was that the physicians responsible for administering these forcible regimens would necessarily be compromised ethically: as the drugs' curative powers could perversely become the but-for cause of execution, the doctor who prescribes such drugs would assist in the inmate's execution in direct contravention of the ethical standards of both the AMA and the APA.<sup>147</sup>

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<sup>141</sup> *Id.* at 1034.

<sup>142</sup> *Id.* at 1033.

<sup>143</sup> *Id.* at 1034.

<sup>144</sup> *Id.*

<sup>145</sup> *Singleton*, 319 F.3d at 1034 (Heaney, J., dissenting) (citation and quotation omitted).

<sup>146</sup> *Id.*; *see id.* at 1030 ("I believe that to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what Justice Marshall called the barbarity of exacting mindless vengeance.") (citation and quotation omitted). The dissent also cited *Perry* to raise an alternative position—that forcing an inmate to take medication which will lead to his execution violates the Eighth Amendment prohibition of excessive punishments insofar as "forcibly medicated condemned inmates have to endure greater suffering than the typical condemned inmates." *Id.* at 1034 n.8 (citing *Perry*, 610 So. 2d at 766–68); *see also supra* note 117 and accompanying text.

<sup>147</sup> *See Singleton*, 319 F.3d at 1036 (Heaney, J., dissenting). Both organizations prohibit members from assisting in the execution of a condemned prisoner. *See* COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS E-2.06 (2010–2011), available at <http://www.ama-assn.org/ama1/pub/upload/mm/369/e206capitalpunish.pdf>; *The Death Penalty in the United States*, AM. PSYCHOLOGI-



The dissent concluded that doctors treating psychotic condemned prisoners will be put in the impossible position of either treating the prisoner—knowing such treatment may be the proximate cause of his execution—or leaving the prisoner untreated and condemned to an insanity “filled with disturbing delusions and hallucinations.”<sup>148</sup> According to the dissent, this ethical dilemma posed not only a policy issue but a legal issue, since the U.S. Supreme Court has explicitly recognized the significance of the state’s interest in preserving the integrity of the medical profession.<sup>149</sup> Given this concern along with all the others, the dissent concluded that the appropriate remedy in these situations is for the district court to enter a permanent stay of execution.<sup>150</sup>

The U.S. Court of Appeals for the Sixth Circuit echoed the *Singleton* dissent’s position in 2009 in *Thompson v. Bell*.<sup>151</sup> The court considered an inmate’s claim that his execution would be unconstitutional when he had been rendered “competent” through forced administration of antipsychotic medication.<sup>152</sup> Although the court did not definitively answer this constitutional question because it found that the inmate had not been forced to take antipsychotic drugs,<sup>153</sup> it nonetheless provided its views on the question in dicta.<sup>154</sup> It reasoned that the due process holdings in *Harper*, *Riggins*, and *Sell* supported the “logical inference” that, unless “absolutely necessary or medically appropriate,” a state that subjects a prisoner to involuntary medication acts contrary to the Eighth

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CAL ASS’N (August 2001), <http://www.apa.org/about/governance/council/policy/death-penalty.aspx>.

<sup>148</sup> *Singleton*, 319 F.3d at 1037 (Heaney, J., dissenting).

<sup>149</sup> *Id.* at 1037 (citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). In *Washington v. Glucksberg*, the U.S. Supreme Court held that the State of Washington’s ban on assisted suicide was rationally related to legitimate government interests. 521 U.S. at 728. One of those interests included the state’s “interest in protecting the integrity and ethics of the medical profession.” *Id.* at 731. The Court noted the fact that “the American Medical Association, like many other medical and physicians’ groups, ha[d] concluded that physician-assisted suicide [was] fundamentally incompatible with the physician’s role as healer.” *Id.* (quotation omitted). The Court also noted that physician-assisted suicide could “undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming.” *Id.*

<sup>150</sup> *Singleton*, 319 F.3d at 1037 (Heaney, J., dissenting).

<sup>151</sup> See *Thompson v. Bell*, 580 F.3d 423, 439–41 (6th Cir. 2009).

<sup>152</sup> *Id.* at 437.

<sup>153</sup> *Id.* at 441 & n.3 (expressing agreement with the Eighth Circuit’s holding in *Singleton*, 319 F.3d at 1027, that a “chemical competency claim arises only when the defendant is subject to a forced medication order and execution is imminent,” and deciding to “leave the question of whether executing the ‘chemically competent’ constitutes cruel and unusual punishment for another day”).

<sup>154</sup> *Id.* at 439–41.

Amendment's evolving standards of decency.<sup>155</sup> Drawing on the U.S. Supreme Court's analysis in *Sell*, the Sixth Circuit noted it might be unconstitutional to medicate a condemned prisoner "already destined for a lengthy confinement just to render the prisoner competent for legal proceedings."<sup>156</sup> The Sixth Circuit continued to note that executing the "chemically competent" could be just as cruel as executing the insane if antipsychotic drugs were insufficient to enable an understanding of the reason for the punishment.<sup>157</sup> In such a situation, the chemically competent prisoner, similar to an insane prisoner, would be robbed of the opportunity to prepare both mentally and spiritually for death.<sup>158</sup>

Dissenting on this issue, Judge Richard F. Suhrheinrich argued that the majority's view was inconsistent with U.S. Supreme Court precedent.<sup>159</sup> Instead, rendering an inmate competent for execution is simply a constitutional sum of its constitutional parts, given that the state is constitutionally obligated "to attend to a prisoner's serious medical needs,"<sup>160</sup> that the state may "involuntarily medicat[e] a prisoner if he is a danger to himself or others,"<sup>161</sup> that the state is permitted "to medicate a defendant to render him competent to stand trial,"<sup>162</sup> and that the state may execute a death sentence if the "prisoner is competent on the eve of his execution."<sup>163</sup> Understanding Supreme Court precedent in this manner, the dissent concluded that it is only logical that an involuntarily chemically competent prisoner may be executed.<sup>164</sup>

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<sup>155</sup> *Id.* at 440.

<sup>156</sup> *Id.* (citing *Sell*, 539 U.S. at 180).

<sup>157</sup> *Thompson*, 580 F.3d at 440.

<sup>158</sup> *Id.* (citing *Ford*, 477 U.S. at 419–20 (Powell, J., concurring)) ("If forced medication reduces a prisoner's delusions and controls his outward behavior, but does not improve his understanding of his impending death or his ability to prepare for it, it is quite possible that the prisoner cannot be executed under the principles of *Ford*."). The Sixth Circuit also expressed a concern that antipsychotic medication may only appear to make an otherwise incompetent prisoner competent. *See id.* at 440. The court quickly proceeded to qualify this statement, however, by adding that it was not stating that that "the execution of those rendered chemically competent 'likely' violates the Eighth Amendment," only that "it is *possible*, under some circumstances, that such an act would amount to a constitutional violation for the reasons discussed." *Id.* at 441 n.2.

<sup>159</sup> *Id.* at 445 (Suhrheinrich, J., concurring in part and dissenting in part).

<sup>160</sup> *Id.* at 448 (citing *Estelle*, 429 U.S. at 103).

<sup>161</sup> *Id.* (citing *Harper*, 494 U.S. at 223).

<sup>162</sup> *Id.* (citing *Sell*, 539 U.S. at 180–81).

<sup>163</sup> *Thompson*, 580 F.3d at 448 (internal citation omitted) (citing *Ford*, 477 U.S. at 422).

<sup>164</sup> *Id.* ("[I]f all of the predicate acts of carrying out a valid death sentence on a mentally ill inmate are either constitutionally required or permitted, and the death penalty itself is constitutional, the state's imposition of the death penalty to an inmate rendered competent via involuntary medication must also be constitutional.").

## V. CONSTITUTIONAL RAMIFICATIONS OF FORCIBLY MEDICATING TO FACILITATE EXECUTION

### A. *Chemical Competence and Ford-Competence Are Not Mutually Exclusive*

Some scholars argue that the Eighth Amendment mandates a categorical exemption from the death penalty for forcibly medicated death row inmates on the understanding that antipsychotic drugs are capable of calming and repressing symptoms of psychosis, but not of curing the underlying mental illness.<sup>165</sup> Considering such “artificial” or “synthetic” competence to fall below the standard articulated in the U.S. Supreme Court’s 1986 decision in *Ford v. Wainwright* and its 2007 decision in *Panetti v. Quarterman*, these scholars view execution of the forcibly medicated as intrinsically cruel and unusual, and argue that if there has once been a determination of incompetence, then there should be a permanent stay of execution.<sup>166</sup> This position, however, is legally problematic because it is simultaneously too prescriptive and based on a variable premise.<sup>167</sup>

The prohibition against execution of the insane described in *Ford* and *Panetti* does not require full-blown normalcy or rationality as understood by laypeople or the medical community.<sup>168</sup> Rather, it requires that the prisoner, on the eve of his execution, know of the fact of his pending execution and possess a rational understanding of why he is about to be executed.<sup>169</sup> Given even the current status of antipsychotic medication, it appears too prescriptive to suppose that no inmate could ever meet this standard through use of antipsychotic drugs and psychother-

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<sup>165</sup> See, e.g., Entzeroth, *supra* note 58, at 649 (noting that antipsychotic medication ameliorates symptoms by providing relief from delusions and hallucinations, but that medication is not a cure for the underlying illness and a patient’s symptoms will return once medication is discontinued); see also Byers, *supra* note 4, at 377 (noting consensus in medical community that antipsychotic drugs “provide only temporary relief”); Sarah F. DePanfilis, Singleton v. Norris: *Exploring the Insanity of Forcibly Medicating, Then Eliminating, the Insane*, 4 CONN. PUB. INT. L. J. 68, 75 (2004) (noting the same); Jenkins, *supra* note 60, at 169 (noting the same).

<sup>166</sup> See, e.g., Entzeroth, *supra* note 58, at 642 (“[T]he Eighth Amendment’s exemption of the insane from the death penalty [should] include persons whose sanity can only be restored through medication.”); Jennifer E. Lloyd, *Primum non nocere: Singleton v. Norris and the Ethical Dilemma of Medicating the Condemned*, 58 ARK. L. REV. 225, 249 (2005) (agreeing with the Louisiana and South Carolina supreme courts that commutation in appropriate cases is the best approach). See generally *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Ford v. Wainwright*, 447 U.S. 399 (1986).

<sup>167</sup> See *infra* notes 168–186 and accompanying text.

<sup>168</sup> See *Panetti*, 551 U.S. at 959–60; *Ford*, 477 U.S. at 422 (Powell, J., concurring).

<sup>169</sup> *Panetti*, 551 U.S. at 959; *Ford*, 477 U.S. at 422 (Powell, J., concurring).

apy.<sup>170</sup> Indeed, antipsychotic medication has been deemed capable of rendering an otherwise insane inmate competent to stand trial—a standard requiring that criminal defendants possess the capacity to understand the nature of the proceedings against them, to consult with counsel, and to assist in preparing their defense.<sup>171</sup> Such competence appears to be based on more rigorous cognitive standards than does competence for execution.<sup>172</sup> Furthermore, antipsychotic medication is proven to have widely different curative effects on different individuals.<sup>173</sup>

At the same time, it is legally suspect to decide a point of constitutional law purely on the present-day effectiveness or ineffectiveness of antipsychotic medications, a foundation that we can confidently assume is evolving, along with all of modern science.<sup>174</sup> Considering the drastic improvement in antipsychotic medication since its inception over fifty-

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<sup>170</sup> See Motion for Leave to File Brief & Brief for the American Psychiatric Ass'n & American Academy of Psychiatry and the Law as Amici Curiae Supporting Respondent at 13–14, *Sell v. United States*, 539 U.S. 166 (2003), (No. 02–5664), 2003 WL 176630 (“Antipsychotic medications are not only an accepted but often essential, irreplaceable treatment for psychotic illnesses, as most firmly established for schizophrenia, because the benefits of antipsychotic medications for patients with psychoses, compared to any other available means of treatment, are so palpably great compared with their generally manageable side effects.”).

<sup>171</sup> See *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>172</sup> Compare *Dusky*, 362 U.S. at 402 (competence to stand trial), with *Panetti*, 551 U.S. at 959–60 (competence to be executed), and *Ford*, 477 U.S. at 422 (Powell, J., concurring) (competence to be executed).

<sup>173</sup> NAT'L INST. OF MENTAL HEALTH, *supra* note 15, at 1. The National Institute of Mental Health offers a simplified summary of the varying effects antipsychotic medication can have on different individuals:

Medications treat the symptoms of mental disorders. They cannot cure the disorder, but they make people feel better so they can function. Medications work differently for different people. Some people get great results from medications and only need them for a short time. For example, a person with depression may feel much better after taking a medication for a few months, and may never need it again. People with disorders like schizophrenia or bipolar disorder, or people who have long-term or severe depression or anxiety may need to take medication for a much longer time. Some people get side effects from medications and other people don't. Doses can be small or large, depending on the medication and the person.

*Id.* Additionally, various factors can affect how these medications work in different patients, including the patient's: mental disorder; age, sex, and body size; physical illnesses; habits (like smoking and drinking); liver and kidney function; genetics; other medications and herbal/vitamin supplements; diet; and if medications are taken as prescribed. *Id.*

<sup>174</sup> See Douglas Mossman, *Unbuckling the “Chemical Straitjacket”: The Legal Significance of Recent Advances in the Pharmacological Treatment of Psychosis*, 39 SAN DIEGO L. REV. 1033, 1062–65 (2002) (discussing the history and evolution of antipsychotic drugs from 1955 to the present).

five years ago, it is more likely than not that the curative effects of antipsychotic medication will continue to be developed and improved.<sup>175</sup>

Nor is a categorically permanent stay of execution based upon the perceived shortcomings of antipsychotic medication supported by U.S. Supreme Court precedent.<sup>176</sup> The Court has indeed articulated only a baseline standard regarding when someone is sufficiently competent under the Eighth Amendment.<sup>177</sup> Justice Powell's judgment in *Ford*—that states should have “substantial leeway” to adjudicate claims of incompetence—remains in force.<sup>178</sup>

It is true that the insane are one of only three categories of defendants currently exempted from the death penalty under the Eighth Amendment, along with defendants under eighteen years of age at the time the crime was committed and mentally retarded defendants.<sup>179</sup> Nonetheless, insanity is distinguishable from youth or retardation, which are unvarying conditions: a defendant either was or was not

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<sup>175</sup> See *Riggins v. Nevada*, 504 U.S. 127, 145 (1992) (Kennedy, J., concurring in the judgment) (“The state of our knowledge of antipsychotic drugs and their side effects is evolving and may one day produce effective drugs that have only minimal side effects.”). The legal implications of this evolution must also evolve:

The arrival of novel agents . . . has allowed patients to receive antipsychotic medication with fewer side effects, a lower risk of neurological damage, and possibly better outcomes than the older drugs permitted. Thus, most patients who take antipsychotic drugs need no longer endure chemical straitjacketing to get relief from their delusions, hallucinations, and disordered thinking. Judges, legal scholars, and lawyers who deal with persons who take antipsychotic drugs now should experience an analogous process, one that unbuckles the *conceptual* straitjacket that frequently has prevented recognition of the need for and value of antipsychotic medications. Courts and legal scholars must evaluate antipsychotic drugs without being misled by distorted and increasingly outdated views found in existing case law and secondary legal sources.

Mossman, *supra* note 174, at 1043 (citation omitted).

<sup>176</sup> See *infra* notes 177–185 and accompanying text.

<sup>177</sup> See *Panetti*, 551 U.S. at 959; *Ford*, 447 U.S. at 422.

<sup>178</sup> See *Ford*, 477 U.S. at 427 (Powell, J., concurring). Though the Court has created a categorical exemption for the insane and mentally retarded, it has recognized that not all individuals who claim insanity or mental retardation will be so impaired as to fall within the category of defendants society is prepared to exempt from the death penalty. See *Atkins v. Virginia*, 536 U.S. 304, 317 (2002); *Ford*, 477 U.S. at 416–17. Thus, in both circumstances, it opted to allow the states to develop appropriate procedures to enforce the constitutional safeguard. See *Atkins*, 536 U.S. at 317; *Ford*, 477 U.S. at 416–17. By contrast, while recognizing that not all minors will possess the sort of immaturity that diminishes criminal culpability, the Court was willing to draw a categorical, admittedly arbitrary, line at eighteen years of age because it is “the point where society draws the line for many purposes between childhood and adulthood.” *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

<sup>179</sup> See *Roper*, 543 U.S. at 570–71 (exempting those under eighteen); *Atkins*, 536 U.S. at 321 (exempting mentally retarded); *Ford*, 477 U.S. at 409–10 (exempting insane).

eighteen years old at the time the crime was committed; a defendant either meets the quantitative definition of mental retardation or does not.<sup>180</sup> By contrast, incompetence is a clinically treatable condition.<sup>181</sup> An individual who was unquestionably competent at the time he or she committed the capital offense but who subsequently became incompetent while on death row often can, with treatment, cycle back out of incompetence again.<sup>182</sup>

This fact adds yet another layer of variability to the question of competence for execution, and joins with those previously cited to indicate that the level of competence achievable via antipsychotic drugs is not an appropriate basis for exemption; instead, upon this basis, competence would be better settled by a flexible approach allowing for individualized determinations than by an indiscriminate constitutional ban.<sup>183</sup> So long as states afford sufficient procedural processes to ensure that a condemned inmate possesses—and will continue to possess up to the eve of execution—the level of understanding required by *Ford*, an inmate who is merely “doped up” or has an especially turbulent history of reaction to antipsychotic drugs should not be deemed *Ford*-competent.<sup>184</sup> An inmate who is particularly lucid and stable, on the other hand, may meet the constitutional standard.<sup>185</sup>

In sum, a categorical Eighth Amendment ban against executing inmates involuntarily subjected to antipsychotic medication should not be grounded in the premise that current antipsychotic drugs cannot

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<sup>180</sup> See *Roper*, 543 U.S. at 570–71; *Atkins*, 536 U.S. at 308 n.3, 317 n.22. One cannot alter the age at which a crime was committed, and mental retardation is defined as “significantly sub-average general intellectual functioning” that manifests before the age of eighteen. See *Roper*, 543 U.S. at 570–71; *Atkins*, 536 U.S. at 308 n.3. Mental retardation is usually defined in part by one’s quantitative intelligence quotient score. See *Atkins*, 536 U.S. at 308–09 nn.3–5.

<sup>181</sup> See Mossman, *supra* note 174, at 1153. Cf. Bruce J. Winick, *The Supreme Court’s Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 788–89 (2009) (“Certain mental illnesses bear some striking similarities to both mental retardation and juvenile status. Severe mental illness *at the time of the offense* may significantly diminish the offender’s blameworthiness and amenability to deterrence in ways not unlike mental retardation and juvenile status.” (emphasis added)).

<sup>182</sup> See Mossman, *supra* note 174, at 1153.

<sup>183</sup> See *Roper*, 543 U.S. at 601 (O’Connor, J., dissenting) (advocating the need for individualized determination of culpability since differences in maturity between seventeen-year-olds and young adults are not proven to be so universal and significant as “to justify a bright-line prophylactic rule against capital punishment of the former”).

<sup>184</sup> See *Ford*, 477 U.S. at 416–17.

<sup>185</sup> See *id.*

achieve genuine competence in accordance with the principles of *Ford* and *Panetti*.<sup>186</sup>

B. *Facilitating Execution via Forced Administration of Antipsychotic  
Drugs Constitutes Punishment That Violates the Eighth and  
Fourteenth Amendments*

A more persuasive argument for exempting the chemically competent from the death penalty will focus not on the level of competence achievable through antipsychotic drugs, but on the nature of the punishment the state in fact exacts by forcibly medicating and then executing an otherwise incompetent inmate.<sup>187</sup> In contrast to inmates who retain sanity while on death row, those who become incompetent must endure many more intrusions on their liberty and dignity in the process of being put to death by the state.<sup>188</sup> These necessary and added elements to the punishment of death beg the question whether the state is still engaged in the “mere extinguishment of life,”<sup>189</sup> or if, instead, it is unduly infringing upon inmates’ constitutional rights in its “insistence on its pound of flesh.”<sup>190</sup> Does forcible medication to achieve competence amount to cruel and unusual punishment?<sup>191</sup> Is it indeed necessary to further the varied government interests involved in exacting punishment for crimes?<sup>192</sup>

Because the 2003 decision *Sell v. United States* represents the culmination to date of the U.S. Supreme Court’s holdings regarding forcible medication of prison inmates, states should apply that partial precedent and adhere to its basic requirements when seeking to forcibly restore competence for execution.<sup>193</sup> Upon closer examination, however, it be-

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<sup>186</sup> See *Panetti*, 551 U.S. at 959–60; *Ford*, 447 U.S. at 422 (Powell, J., concurring); see also Steven K. Erickson et al., *Legal Fallacies of Antipsychotic Drugs*, 35 J. AM. ACAD. PSYCHIATRY & L. 235, 241 (2007).

<sup>187</sup> See *State v. Perry*, 610 So. 2d 746, 768 (La. 1992); Jenkins, *supra* note 60, at 177; Lloyd, *supra* note 166, at 243–44.

<sup>188</sup> See *Perry*, 610 So. 2d at 768.

<sup>189</sup> See *In re Kemmler*, 136 U.S. 436, 447 (1890); see also *supra* notes 31–46 and accompanying text.

<sup>190</sup> See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring) (quotation omitted) (concluding that unless the Court detects a violation of principles of justice “[r]ooted in the traditions and conscience of our people,” it is obligated to refrain from interfering with State executions, “no matter how strong one’s personal feeling of revulsion against a State’s insistence on its pound of flesh.”).

<sup>191</sup> See *infra* notes 201–264 and accompanying text.

<sup>192</sup> See *infra* notes 253–264 and accompanying text.

<sup>193</sup> See 539 U.S. at 177–82. Not only is this the most recent Supreme Court opinion on the issue of forcible medication of inmates, but the Court also specifically summarizes and

comes clear that for two reasons the requirements established in *Sell* cannot logically be met in this latter scenario.<sup>194</sup> First, *Sell* requires that treatment be “medically appropriate,” but in cases of execution, medical appropriateness is impossible to achieve: as soon as an inmate is scheduled for execution, forcible medication by definition ceases to be an ethical form of treatment and simply becomes a component of capital punishment to be inflicted by the state.<sup>195</sup> Second, in contrast to the government interest in bringing a defendant to trial stressed by the Court in *Sell*, the government interest in execution is intrinsically weaker than a combination of the inmate’s privacy interest<sup>196</sup> and the state’s own interest in preserving the integrity of the medical community.<sup>197</sup> Substituting life in prison without the possibility of parole for execution is precisely the sort of lengthy future confinement the Court in *Sell* reasoned can mitigate the need for prosecution.<sup>198</sup>

The inapplicability of the *Sell* due process requirements to cases of execution renders the state’s punishment inherently excessive, in violation of the Eighth Amendment.<sup>199</sup> Subverting the curative mission of the medical profession to facilitate execution transforms medication from a source of healing into a source of punishment that inflicts acute psychological distress and suffering; at the same time, the lack of a sufficiently important government interest renders this punishment unnecessary.<sup>200</sup>

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synthesizes the holdings of its 1990 decision in *Washington v. Harper* and its 1992 decision in *Riggins v. Nevada* into the standards it ultimately articulates. *See id.* at 177–79.

<sup>194</sup> *See id.* at 177–82; *see also infra* notes 195–198 and accompanying text.

<sup>195</sup> *See Sell*, 539 U.S. at 181; *Perry*, 610 So.2d at 753 (internal citation and quotation omitted) (“When a medical procedure is done at the request of the patient and for his benefit, it is a treatment. When the identical medical procedure is done against a person’s interest or will, it is either a battery, if lacking legal sanction, or a punishment, if imposed by legal authority.”). For an interesting discussion of the difference between therapy and punishment, see Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 815–18 (1982).

<sup>196</sup> *See Sell*, 539 U.S. at 180–81; *Riggins*, 504 U.S. at 134 (citing *Harper*, 494 U.S. at 229–30).

<sup>197</sup> *See Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (identifying the state’s “interest in protecting the integrity and ethics of the medical profession,” and discussing the manner in which authorized physician-assisted suicide could undermine the trust essential to the doctor-patient relationship “by blurring the time-honored line between healing and harming”).

<sup>198</sup> *See Sell*, 539 U.S. at 180.

<sup>199</sup> *See Gregg*, 428 U.S. at 173.

<sup>200</sup> *See Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 99–101 (1958).



## 1. Medical Appropriateness

In the 2003 decision *Singleton v. Norris*, the Eighth Circuit concluded that a “mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under the 1989 U.S. Supreme Court decision *Washington v. Harper* when an execution date is set.”<sup>201</sup> This holding essentially proposes that the medical appropriateness of an inmate’s treatment program is a constant—that it can be determined on the basis of the patient’s medical condition alone, in a vacuum, without consideration of any outside circumstances.<sup>202</sup> Although on the surface the holding appears to be consistent with the Court’s language in *Sell* that medically appropriate treatment means treatment that is in the “patient’s best medical interests *in light of his medical condition*,”<sup>203</sup> setting the execution date does invariably result in significant alterations to the punishment inflicted by the state that cannot be dismissed as legally irrelevant.<sup>204</sup> First, the forcible medication program will no longer accord with the ethical standards of the medical profession.<sup>205</sup> Second, the forcible medication program, turned to use as a means by which the state may inflict capital punishment, has the perverse effect of inflicting acute psychological strain upon the condemned inmate.<sup>206</sup> As a result of these alterations, a forcible medication regimen automatically loses its medical appropriateness, and a state that persists in enforcing such a regimen to facilitate execution does so in violation of the Eighth and Fourteenth Amendments.<sup>207</sup>

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<sup>201</sup> *Singleton*, 319 F.3d at 1026.

<sup>202</sup> *See id.*

<sup>203</sup> *Sell*, 539 U.S. at 181 (emphasis added); *see* Amir Vonsover, *No Reason for Exemption: Singleton v. Norris and Involuntary Medication of Mentally Ill Capital Murderers for the Purpose of Execution*, 7 U. PA. J. CONST. L. 311, 339 (2004) (arguing that “[t]he phrase ‘medical condition,’ by its plain language, does not take into account effects on competency to be executed (or to stand trial),” but refers only to an inmate’s “diagnosable mental illnesses” and whether medication is appropriate to treat those mental illnesses).

<sup>204</sup> *See Perry*, 610 So. 2d at 768; AM. MED. ASS’N, *supra* note 147, at E-2.06; *see also infra* notes 205–252 and accompanying text.

<sup>205</sup> *See* AM. MED. ASS’N, *supra* note 147, at E-2.06 (“When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner for the purpose of restoring competence unless a commutation order is issued before treatment begins.”).

<sup>206</sup> *See Perry*, 610 So. 2d at 768.

<sup>207</sup> *See id.*; AM. MED. ASS’N, *supra* note 147, at E-2.06; *see also infra* notes 208–252 and accompanying text.

a. *An Unethical Forcible Medication Regimen Is Not Medically Appropriate Under Sell, Riggins, and Harper*

Constitutional doctrine relevant to the issue of forcibly medicating condemned inmates to restore competence, including the Eighth Amendment prohibition against execution of the insane and the due process requirement that a forcible medication regimen be medically appropriate, has made it impossible for states to accomplish execution of incompetent death row inmates without direct participation from physicians, the only experts capable of assessing, diagnosing, and treating the psychosis of these inmates.<sup>208</sup> Physicians, however, are bound by the Hippocratic oath, and the medical community is all but unanimous in the view that it is professionally unethical to participate in execution procedures.<sup>209</sup> The tension between constitutional principles and medical ethics also surfaces in the administration of lethal injection, a complex procedure that can be botched without the participation of

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<sup>208</sup> See Nancy S. Horton, Comment, *Restoration of Competency for Execution: Furiosus Solo Furor* Punitur, 44 Sw. L.J. 1191, 1212–13 (1990) (explaining that a psychiatrist, who must evaluate, diagnose, medically treat, and report to judicial factfinder when inmate has regained competency has, in effect, “actively sign[ed] the defendant’s death warrant by initiating the execution procedure”).

<sup>209</sup> See STEDMAN’S MEDICAL DICTIONARY (27th ed. 2000); see also AM. MED. ASS’N, *supra* note 147, at E-2.06 (“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.”); AM. COLL. OF PHYSICIANS, ETHICS MANUAL (5th ed. 2005), available at [http://www.acponline.org/running\\_practice/ethics/manual/ethicman5th.htm#govt](http://www.acponline.org/running_practice/ethics/manual/ethicman5th.htm#govt) (“Participation by physicians in the execution of prisoners except to certify death is unethical.”); *Nurses’ Role in Capital Punishment*, AM. NURSES ASS’N (Jan. 28, 2010), <http://www.nursingworld.org/MainMenuCategories/HealthcareandPolicyIssues/ANAPositionStatements/EthicsandHumanRights.aspx> (“Participation in executions, either directly or indirectly, is viewed as contrary to the fundamental goals and ethical traditions of the nursing profession.”); *Policy Statement Policy No. 200125, Participation of Health Professionals in Capital Punishment*, AM. PUB. HEALTH ASS’N (Jan. 1, 2001), <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=264> (“Health professional participation in executions or pre-execution procedures is a serious violation of ethical codes and should be grounds for active disciplinary proceedings including expulsion from society membership and license revocation.”); *Statement on Physician Nonparticipation in Legally Authorized Executions*, AM. SOC’Y OF ANESTHESIOLOGISTS (Oct. 18, 2006), <http://www.asahq.org/publicationsAndServices/standards/41.pdf> (“Although lethal injection mimics certain technical aspects of the practice of anesthesia, capital punishment in any form is not the practice of medicine[;] [b]ecause of ancient and modern principles of medical ethics, legal execution should not necessitate participation by an anesthesiologist or any other physician.”); World Med. Ass’n Gen. Assembly, *Resolution on Physician Participation in Capital Punishment*, WORLD MED. ASS’N (Oct. 2008), <http://www.wma.net/en/30publications/10policies/c1/index.html> (“[I]t is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process, including its planning and the instruction and/or training of persons to perform executions.”).

medical professionals.<sup>210</sup> In a medicating-to-execute context, the tension is exacerbated because diagnosis, medication, and treatment cannot be accomplished by trained technicians, but require the expertise and professional judgment of medical doctors.<sup>211</sup> Additionally, when “treatment” is distorted into punishment, the patient-doctor relationship is perverted and trust shattered.<sup>212</sup> Lastly, and perhaps most importantly, the very requirement that treatment be medically appropriate depends upon medical expertise and professional ethics.<sup>213</sup> If the consensus in the medical community is that forcible medication regimens are no longer medically appropriate once an execution date has been set, the legal community is obligated to defer to this professional judgment.<sup>214</sup>

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<sup>210</sup> See AM. COLL. OF PHYSICIANS ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 3 (1994) (noting that lawmakers and corrections officials attempting to create the “appearance of humane, sterile or painless executions . . . look to physicians to apply their medical skills for this purpose” in contravention of physicians’ commitment to work for the benefit of their patients); Ty Alper, *The Role of State Medical Boards in Regulating Physician Participation in Executions*, 95 J. MED. LICENSURE & DISCIPLINE 1, 1 (2009) (noting that “legal challenges to states’ lethal injection practices” as well as recent incidents of botched executions “have contributed to an increased call for the involvement in executions of trained medical professionals, namely physicians”); Kenneth Baum, “*To Comfort Always*”: *Physician Participation in Executions*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 47, 50 (2001) (noting that as capital punishment becomes increasingly medicalized, the tension escalates between medical practice acts that allow physicians to be subjected to professional discipline for participation in execution and most death penalty statutes, which mainly “provide for or even require physician participation in executions”).

<sup>211</sup> See Jenkins, *supra* note 60, at 172. Dissimilar to medical professionals who participate in lethal injection, psychiatrists treating incompetent death row inmates must be far more proactive and interactive, which more fully implicates the ethics of the medical profession and the nature of the doctor-patient relationship:

The role of the psychiatrist involves evaluating competency for execution, prescribing and administering psychoactive drugs to render one sane for execution, and overseeing a condemned prisoner’s progress on such medication to ascertain when the inmate is “competent” for execution. When other medical doctors take part in capital punishment proceedings the inmate is usually competent and his approaching death is usually a foregone conclusion. The doctor’s services are only needed to manage the medical aspects of the execution. The competency determination, however, employs the psychiatrist’s services in a manner involving a high degree of professional discretion and judgment and ultimately means life or death for the inmate. Thus, the psychiatrist is an active participant in the process.

*Id.*

<sup>212</sup> See AM. COLL. OF PHYSICIANS ET AL., *supra* note 210, at 41; Daniel N. Lerman, Note, *Second Opinion: Inconsistent Deference to Medical Ethics in Death Penalty Jurisprudence*, 95 GEO. L.J. 1941, 1976 (2007).

<sup>213</sup> See *Harper*, 494 U.S. at 222 & n.8.

<sup>214</sup> See AM. COLL. OF PHYSICIANS ET AL., *supra* note 210, at 44.

In *Singleton*, the Eighth Circuit decided that it did not need to undertake a “difficult and unnecessary inquiry” into the state’s motives for forcibly medicating, given that the state has the obligation to provide appropriate medical care.<sup>215</sup> On the one hand, this rationale appears to be consistent with the Supreme Court’s conclusion in *Sell* that if a court authorizes forcible medication on the grounds discussed in *Harper*—namely, to manage inmate dangerousness or to ensure that the inmate ingest drugs crucial to his health—“the need to consider authorization on trial competence grounds will likely disappear.”<sup>216</sup> On the other hand, this rationale blatantly ignores the further fact that, in *Harper*, consideration of the ethical standards of the medical community was specifically incorporated by the Court into the analysis of what is medically appropriate for the inmate.<sup>217</sup> The *Harper* Court determined the criterion of medical appropriateness to be met by the requirement that the decision to medicate be made by an inmate’s treating physician.<sup>218</sup> The Court operated on the assumption that physicians would act in the best interests of their patients and dismissed concerns that medication would be prescribed for reasons unrelated to medical needs on the grounds that “the ethics of the medical profession are to the contrary.”<sup>219</sup> The Court therefore relied on the ethical standards of the medical profession to ensure inmates’ constitutional right to medically appropriate care.<sup>220</sup> This reliance in turn necessitates consideration of medical ethical standards in deciding related cases.<sup>221</sup>

The decision to forcibly medicate involves diagnosing an inmate with a mental disorder, determining whether, as a result of that disorder, he is dangerous to himself or others, and determining what regimen of psychoanalysis and/or pharmaceutical intervention will best serve to improve his cognition and behavior.<sup>222</sup> Those responsible for the inmate’s well-being must weigh the benefits of improved behavior against the impact of unwanted intervention and potentially devastating side effects.<sup>223</sup> Moreover, the inmate’s reaction to medication must

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<sup>215</sup> 319 F.3d at 1027.

<sup>216</sup> See *Sell*, 539 U.S. at 183.

<sup>217</sup> See *Harper*, 494 U.S. at 222 & n.8.

<sup>218</sup> *Id.* at 222 n.8.

<sup>219</sup> *Id.*

<sup>220</sup> See *id.*; see also Lloyd, *supra* note 166, at 236.

<sup>221</sup> See Lloyd, *supra* note 166, at 236.

<sup>222</sup> See Horton, *supra* note 208, at 1212–13.

<sup>223</sup> See *Sell*, 539 U.S. at 181. To conclude that involuntary medication will significantly further state interests in bringing a criminal defendant to trial, a court must find that administration of the drugs is “substantially likely to render the defendant competent to

be continually monitored, and treatment mechanisms adjusted to optimize mental health and long-term normative adjustment.<sup>224</sup>

Clearly, although the decision to forcibly medicate entails “societal and legal implications,” it is essentially and inescapably a *medical* determination that can be made only by medical professionals.<sup>225</sup> Indeed, in *Sell, Harper*, and the 1992 decision of *Riggins v. Nevada*, the Supreme Court has clearly emphasized that a court’s ultimate decision regarding the medical appropriateness of a forcible medication regimen will hinge on preliminary determinations of medical experts.<sup>226</sup>

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stand trial,” and, at the same time, is “substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel in conducting a trial defense.” *Id.* By analogy, in the context of execution, involuntary medication would have to be determined to be substantially likely to render the condemned competent for execution, and substantially unlikely to result in serious side effects that would interfere significantly his ability to rationally understand his pending execution. *See id.*

<sup>224</sup> *See Harper*, 494 U.S. at 231–32; *see also* Gardner, *supra* note 195, at 816 (distinguishing coercive therapy from punishment in part by noting that therapy is “purposeful behavior toward another person . . . intended to alter that person’s condition in a manner beneficial to him,” and adding that “[t]his purportedly beneficial behavior is always subject to revision upon a showing that a different mode of behavior would produce more beneficial results, or that a change in the person’s condition has [eliminated] the need for further therapy”).

<sup>225</sup> *See Harper*, 494 U.S. at 231–32. In its discussion regarding whether due process demanded judicial determinations of competency to stand trial, the *Harper* Court concluded that competency determinations could constitutionally be made by qualified medical professionals: “Though it cannot be doubted that the decision to medicate has societal and legal implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms.” *Id.* The Court elaborated on its own institutional shortcomings in formulating competency determinations: “We cannot make the facile assumption that the patient’s intentions, or a substituted judgment approximating those intentions, can be determined in a single judicial hearing apart from the realities of frequent and ongoing clinical observation by medical professionals.” *Id.* Finally, the Court conceded that determinations regarding competency are fundamentally medical decisions to be made by medical professionals:

Under [the prison policy], the decisionmaker is asked to review a medical treatment decision made by a medical professional. That review requires two medical inquiries: first, whether the inmate suffers from a “mental disorder”; and second, whether, as a result of that disorder, he is dangerous to himself, others, or their property. Under the Policy, the hearing committee reviews on a regular basis the staff’s choice of both the type and dosage of drugs to be administered, and can order appropriate changes. The risks associated with antipsychotic drugs are for the most part medical ones, best assessed by medical professionals.

*Id.* at 232–33 (citation omitted).

<sup>226</sup> *See Sell*, 539 U.S. at 181–83 (holding that opinions of medical experts provide the basis for courts’ determinations of medical appropriateness); *Riggins*, 504 U.S. at 135–37 (holding the same); *Harper*, 494 U.S. at 222 & n.8, 231–33 (holding the same).

But the medical community is all but unanimous in the view that treatment to restore competence for execution is ethically proscribed behavior for medical professionals, members of a profession dedicated to healing, who pledge to “first, do no harm.”<sup>227</sup> Medical ethics may not always warrant judicial deference, but deference is surely mandated if the practice at issue can only be performed by medical professionals but is ethically proscribed by the medical community,<sup>228</sup> and especially if the Supreme Court relies upon medical participation, expertise, and discretion to ensure the constitutionality of the practice.<sup>229</sup>

Thus, it is imperative that courts consider the pertinent ethical guidelines of the AMA and the APA when deciding the medical appropriateness of forcibly medicating to restore competence for execution.<sup>230</sup> These guidelines prohibit physicians from participating in legally authorized executions.<sup>231</sup> The principle underlying this prohibition is

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<sup>227</sup> See AM. COLL. OF PHYSICIANS ET AL., *supra* note 210, at 37. This report describes the outraged response from the medical community to statutes requiring physician participation in executions. *Id.* at 13–16. Furthermore, this report details the manner in which participation in executions is antithetical to the purpose of the medical profession: “When the healing hand becomes the hand inflicting the wound, the world is turned inside out.” *Id.* at 36–39 (quotation omitted).

<sup>228</sup> Cf. *Roe v. Wade*, 410 U.S. 113, 159 (1973) (citing lack of medical consensus regarding the question of when life begins as a reason for the judiciary to refrain from “speculat[ing] as to the answer”).

<sup>229</sup> See *Harper*, 494 U.S. at 222 & n.8; see also Lerman, *supra* note 212, at 1977 (noting that ethical guidelines regarding practices such as advertising, retaining patients’ medical records, and charging hospital admission fees do not warrant judicial deference in the manner that “physician involvement in capital proceedings” do, since the latter practice uniquely implicates “professional integrity, decency, dignity and liberty”).

<sup>230</sup> See AM. MED. ASS’N, *supra* note 147, at E–2.06; AM. PSYCHOLOGICAL ASS’N, *supra* note 147; see also Lloyd, *supra* note 166, at 233–35 (illustrating the manner in which “the law and medical ethics are inextricably linked” by citing examples of cases in which the U.S. Supreme Court has relied on medical ethics). Indeed, history is rife with examples of disastrous consequences when state law compromises a physician’s loyalty to the medical needs of his or her patient. See, e.g., Lloyd, *supra* note 166, at 246–47 (discussing the manner in which physicians contributed to state policy of “racial hygiene” in Nazi Germany); AM. COLL. OF PHYSICIANS ET AL., *supra* note 210, at 29 (citing WORLD MED. ASS’N, HANDBOOK OF DECLARATIONS 22 (1985)) (recounting how, following the “egregious violations of medical ethics perpetrated by physicians during the Nazi regime,” the World Medical Association adopted the Declaration of Geneva (1948) and the International Code of Medical Ethics (1949) intended to reinvigorate the spirit of the Hippocratic oath and “condemn physician complicity in the commission of antihumanitarian acts at the behest of the state”).

<sup>231</sup> See AM. MED. ASS’N, *supra* note 147, at E–2.06 (defining physician participation as: “(1) an action which would directly cause the death of the condemned; (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned; (3) an action which could automatically cause an execution to be carried out on a condemned prisoner”).

that a physician is “a member of a profession dedicated to preserving life when there is hope of doing so.”<sup>232</sup> Physicians are not ethically enjoined from palliative measures intended to mitigate extreme suffering resulting from psychosis or illness; in cases in which a condemned prisoner has been declared incompetent to be executed, however, physicians may not treat that prisoner to restore competence, unless a commutation order has been issued before treatment begins.<sup>233</sup> How, then, if treatment to restore competence for execution is specifically prohibited by the medical community, can it in any sense be deemed “medically appropriate” as required by *Sell*?<sup>234</sup> Does it not lose its former medical appropriateness and become simply a step in the enforcement of a legal punishment?<sup>235</sup>

These questions are answered by the American Bar Association, which asserts that unethical medical treatment cannot be understood to be medically appropriate and so cannot meet the threshold for constitutionality required by *Sell* and *Harper*.<sup>236</sup> The Louisiana Supreme Court advocated a similar position in its 1992 decision *State v. Perry*, concluding that forcible medication to restore competence for execution is “antithetical to the basic principles of the healing arts” and cannot constitute medical treatment.<sup>237</sup> Rather, as a necessary precursor to execution, forcible medication must be understood as part of the capi-

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*; see Lloyd, *supra* note 166, at 232 (“Because the ethical permissibility of the treatment turns on the physician’s intention for administering the medication, the AMA is relying on the inherent high ethical standards that physicians are perceived to embody.”).

<sup>234</sup> See *Sell*, 539 U.S. at 181; *infra* notes 236–242 and accompanying text.

<sup>235</sup> See *infra* notes 236–242 and accompanying text.

<sup>236</sup> See AM. BAR ASS’N, *supra* note 58, at 676 (noting the consensus among medical health professionals that treatment with the purpose or likely effect of enabling the state to carry out the execution of an incompetent inmate is unethical, and concluding that “[b]ecause treatment is unethical, it is not ‘medically appropriate’ and is therefore constitutionally impermissible when a prisoner objects under the criteria enunciated by the Supreme Court in [*Sell*] and [*Harper*]”).

<sup>237</sup> See *Perry*, 610 So. 2d at 751, 753 (noting that when a medical procedure is against the patient’s interest and will but is legally authorized, it constitutes government-imposed punishment); AM. COLL. OF PHYSICIANS ET AL., *supra* note 210, at 37 (“[I]n the larger picture, the physician is taking over some of the responsibility for carrying out the punishment and in this context, becomes the handmaiden of the state as executioner. In return for possible reduction of pain, the physician, in effect, acts under the control of the state, doing harm.”); Jami Floyd, *The Administration of Psychotropic Drugs to Prisoners: State of the Law and Beyond*, 78 CAL. L. REV. 1243, 1272–78 (1990) (discussing the blurry legal distinction between medical treatment and criminal punishment, and arguing that involuntary administration of psychotropic medication should be understood as punishment).

tal punishment itself.<sup>238</sup> The analysis of the Eighth Circuit in *Singleton* is therefore irretrievably defective for declining to examine the state's motives for forcibly medicating and in ignoring the contingent circumstance of the setting of an execution date.<sup>239</sup> Setting an execution date on a forcibly medicated condemned inmate is tantamount to a state decision to cease to provide appropriate medical care to that inmate in contravention of its constitutional obligation to do so.<sup>240</sup>

b. *An Unethical Forcible Medication Regimen Constitutes Excessive Punishment Under the Eighth Amendment*

In addition to compromising a physician's ethical duties, a forcible medication program fundamentally distorts the condemned inmate's experience of treatment, further calling into question whether such a program could ever be construed as medically appropriate.<sup>241</sup> These distortions transform medication from a source of healing into a source of punishment that inflicts acute psychological distress and suffering.<sup>242</sup> A condemned inmate is not only forced to submit body and mind to powerful and invasive medications, but is also forced into an inequitable

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<sup>238</sup> *Perry*, 610 So. 2d at 753; see also *Jenkins*, *supra* note 60, at 177 ("Because the administration of drugs and the associated side effects are pursuant to the state's attempt to consummate a punitive goal, it follows that the forcible administration of drugs falls under the protection of Eighth Amendment restrictions."). Additionally, there is a concern grounded in legal realism that additional practical motives will be cited by the state as a mere pretext for forcible medication. See Bryan Lester Dupler, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 55 OKLA. L. REV. 1, 54 (2002) ("As a matter of candor and common sense, the long-term health (or 'medical interest') of the insane capital prisoner is not the concern of the State that seeks to forcibly medicate him."); Roberta M. Harding, "Endgame": *Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment*, 14 ST. LOUIS U. PUB. L. REV. 105, 125 (1994) ("[T]here is a real risk that a state might cite an 'appropriate' reason for forcible medication, such as providing medical care as required by the Eighth Amendment, while refusing to disclose the real reason, wanting to make the inmate death qualified[.]"); *Jenkins*, *supra* note 60, at 177 ("*Perry* pointed out that the state could not credibly come forward with a request to forcibly administer antipsychotic drugs to a death row inmate and claim the involuntary medication was in the inmate's medical interest when the state has condemned the inmate to death.").

<sup>239</sup> See *Singleton*, 319 F.3d at 1026; see also Entzeroth, *supra* note 58, at 658 ("The Eighth Circuit's suggestion that the only ill effect of the forced administration of the medication is execution flies in the face of reality and common sense . . .").

<sup>240</sup> See *Sell*, 539 U.S. at 181–82; see also *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (establishing the state's constitutional obligation to provide adequate medical treatment to a prison inmate).

<sup>241</sup> See *Perry*, 610 So. 2d at 768.

<sup>242</sup> See Entzeroth, *supra* note 58, at 657–59; Gardner, *supra* note 195, at 815–16; *Jenkins*, *supra* note 60, at 177.



situation where any positive response to medication will have the perverse effect of contributing to his ultimate doom.<sup>243</sup> Additionally, because the treating physician ultimately acts contrary to core principles of medical ethics to end life rather than to promote long-term normative adjustment, this inmate is denied the benefit of a trusted and trustworthy guide throughout the supposed recovery process.<sup>244</sup> States continued cooption of the medical profession in this manner despite strong opposition from medical professionals is further troubling insofar as it indicates neglect of the evolving standards of decency incorporated into the ethical prescriptions of the medical and psychiatric communities.<sup>245</sup>

In *Perry*, the Louisiana Supreme Court ably articulated precisely why, implicit in the practice of medicating-to-execute, there is a vast potential for causing uniquely extreme physical and psychological pain to an inmate of fragile mental health.<sup>246</sup> The court understood the practice to amount to an excessive punishment that offended basic principles of humanity:

Rather than calling upon Perry to suffer only the extinguishment of his life in a humane manner, the state would have him undergo a course of maltreatment that is inherently loathsome and degrading to his dignity as a human being. Unlike sane death row prisoners who retain dignity until the end, Perry would be forced to endure the usurpation of control of his body and mind by the state and the deprivation of medical treatment in his best interests before he is dispatched by the lethal injection. He must experience an indefinite period of indignity, anxiety and fear, assimilating unwanted anti-psychotic drugs into his brain and body against his will at the

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<sup>243</sup> See *Perry*, 610 So. 2d at 768; see also *Lackey v. Texas*, 514 U.S. 1001, 1045 (1995) (noting that “one of the most horrible feelings” a prisoner can be subjected to is the uncertainty during his long stay on death row) (quotation omitted).

<sup>244</sup> See Lerman, *supra* note 212, at 1975 (noting that physician participation in medicating-to-execute “violate[s] a deeply-rooted expectation that when patients place themselves in the hand of physicians, the physician will use her powers in a fashion consistent with her ethical obligations to her patient”).

<sup>245</sup> See AM. COLL. OF PHYSICIANS ET AL., *supra* note 210, at 13 (explaining how, beginning in the 1980s, the emerging use of lethal injections as states’ primary execution method prompted the U.S. medical community “to clarify its position on physician involvement in executions, and to solidify its opposition to physician participation”); Lerman, *supra* note 212, at 1974 (noting that, because consensus against physician participation in execution exists “in the very community best equipped to judge the decency of these practices,” courts should consider these professional standards when evaluating evolving standards of decency).

<sup>246</sup> See *Perry*, 610 So. 2d at 768.

risk of harmful and fatal side effects. He will go through this painful test involving his intimate mental and bodily processes without the aid of a trusted physician acting in his welfare and in whom he can confide. There is in this process of executing the death sentence no match, equivalence or proportionality. These circumstances amount to more than the mere extinguishment of life; they degrade human dignity and reach a sum in which there is something inhuman, barbarous, and analogous to torture.<sup>247</sup>

Indeed, incompetent inmates appear doomed to suffer a form of capital punishment that is qualitatively different from that suffered by inmates who retain their sanity on death row.<sup>248</sup> Although the punishment of execution is not grossly disproportionate under the Eighth Amendment to the crime of deliberate murder, the line into unconstitutionality is crossed when the pain and humiliation attendant upon a normal execution is increased sharply by preliminary subjection of an inmate to forced medication.<sup>249</sup> Historically, the U.S. Supreme Court has acknowledged that punishments that induce severe psychological strain can be impermissibly cruel.<sup>250</sup> Subverting the purpose of medical intervention to facilitate execution disregards an inmate's humanity, treating him instead as merely an object to be "toyed with and dis-

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<sup>247</sup> *Id.*

<sup>248</sup> See *Trop*, 356 U.S. at 102. The logic behind the ban against the punishment of expatriation seems applicable to a death sentence which requires a forcible regimen of antipsychotic medication followed by a "wait and see" period during which life and death is uncertain:

[The punishment of expatriation] is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

*Id.* (citation omitted).

<sup>249</sup> See *id.* at 100 ("While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards.").

<sup>250</sup> See *Furman*, 408 U.S. at 273-74 (Brennan, J., concurring) (citing *Trop*, 356 U.S. at 101) (expatriation was deemed a "punishment more primitive than torture" because "it necessarily involve[d] a denial by society of the individual's existence as a member of the human community").

carded.”<sup>251</sup> Although intense psychological strain is inherent in every execution, especially in light of the long period between sentencing and the actual execution, a state that forcibly medicates to facilitate execution is inflicting punishment “so degrading and indecent as to amount to a refusal to accord the criminal human status.”<sup>252</sup>

## 2. Government Interest

Similar to the way it disregarded the question of medical ethics, the Eighth Circuit in *Singleton* also disregarded whether certain circumstances can mitigate the government’s interest in effecting a death sentence.<sup>253</sup> Rather, the court simply invoked an essential government interest in carrying out a lawfully imposed sentence, positing further that “[s]ociety’s interest in punishing offenders is at its greatest in the narrow class of capital murder cases in which aggravating factors justify imposition of the death penalty.”<sup>254</sup> The court deemed this government interest to override the condemned inmate’s liberty interest in being free from unwanted medication.<sup>255</sup> According to the U.S. Supreme Court in *Sell*, however, before the state may forcibly medicate an inmate to render him competent for trial, a finding that “important governmental interests are at stake” and a conclusion that “involuntary medication is necessary to further those interests” is required.<sup>256</sup> The *Sell* Court pinpointed the government interest in bringing a criminal defendant to trial as the interest in “protect[ing] through application of the criminal law the basic human need for security.”<sup>257</sup> Though it recognized this as an always-important government interest, it specifically rejected the conclusion that it would always be of enough importance to justify forcible medication; rather, it concluded certain circumstances could mitigate the government’s interest in prosecution.<sup>258</sup> The potential for lengthy future confinement in the event that an inmate would not take drugs voluntarily was offered as a specific example of what might constitute such a special circumstance.<sup>259</sup>

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<sup>251</sup> See *id.* at 273.

<sup>252</sup> See *id.*

<sup>253</sup> See 319 F.3d at 1025.

<sup>254</sup> *Id.*

<sup>255</sup> See *id.*

<sup>256</sup> *Sell*, 539 U.S. at 180, 181.

<sup>257</sup> *Id.* at 180.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* (“[L]engthy confinement in an institution for the mentally ill . . . would diminish the risks that ordinarily attach to freeing without punishment one who has committed a serious crime.”).

By analogy, a court should not determine that the government's interest in carrying out a death sentence will, in every case, be of such importance to justify forcible medication; rather, that government interest may reasonably be mitigated by the special circumstance that an incompetent inmate's commuted death sentence will invariably be replaced by a sentence of life imprisonment without the possibility of parole.<sup>260</sup> Though failure to carry out a death sentence may deprive society and the victim's family of a measure of the retributive value of the original sentence,<sup>261</sup> an inmate's assured future of lifetime confinement substantially meets the government interest in protecting society and in providing harsh criminal punishment for heinous crimes while maintaining respect for basic human dignity.<sup>262</sup>

In other words, imposition of a life sentence without parole renders the government interest in execution subordinate to the inmate's significant liberty interest and the state's own interest in preserving the integrity of the medical profession.<sup>263</sup> Persisting in the imposition of a death penalty in the face of this subordinate government interest in punishment amounts to "the pointless infliction of suffering" in violation of the Eighth Amendment.<sup>264</sup>

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<sup>260</sup> See MD. CODE ANN., CORR. SERVS. § 3-904(c), (h)(2) (LexisNexis 2008 & Supp. 2009). This is the approach adopted by Maryland. See *id.*

<sup>261</sup> See *Furman*, 408 U.S. at 308 (Stewart, J., concurring).

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

*Id.*

<sup>262</sup> See *Roper*, 543 U.S. at 560 ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.").

<sup>263</sup> See *supra* notes 208–240 and accompanying text.

<sup>264</sup> See *Gamble*, 429 U.S. at 103–04; *Furman*, 408 U.S. at 279 (Brennan, J., concurring).

A punishment is excessive . . . if it is not necessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.

*Furman*, 408 U.S. at 279 (Brennan, J., concurring) (citation omitted).

## CONCLUSION

When a state seeks to forcibly medicate and then execute an otherwise incompetent inmate, it exacts an unconstitutional punishment because the process cannot conform to the due process requirements for forcible medication established by the Supreme Court in *Sell v. United States*. Requiring that medication be both medically appropriate and necessary to further a sufficiently important government interest protects not only an inmate's due process rights, but also an inmate's Eighth Amendment right to be free from disproportionate and unnecessary punishment. As soon as an inmate is scheduled for execution, a forcible medication regimen ceases to be medically appropriate and becomes simply a component of the capital punishment to be inflicted by the state. Furthermore, the government's interest in execution is not strong enough to override both the inmate's significant liberty interest and the state's own interest in preserving the ethics of the medical profession, given that a sentence of execution would be replaced by a sentence of life without the possibility of parole. Thus, when the government seeks to forcibly medicate an inmate with antipsychotic drugs to facilitate that inmate's execution, it inflicts punishment that is both disproportionate and unnecessary, and therefore cruel and unusual under the Eighth Amendment.

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