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COMMENTS

RESTORATION OF COMPETENCY FOR EXECUTION: FURIOSUS SOLO FURORE PUNITUR

by Nancy S. Horton

For 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. Similarly, 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. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be 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, the restriction finds enforcement in the Eighth Amendment.


I. INTRODUCTION

In Ford v. Wainwright the United States Supreme Court held that the eighth amendment prohibits the execution of a convicted capital defendant who becomes insane while on death row. Common law philosophy supports and state statutes codify the rationale for not executing the insane:

3. In 1976, the United States Supreme Court held that application of the death penalty did not constitute "cruel and unusual punishment" within the meaning of the eighth amendment. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion). Gregg emerged after a four-year ban on the death penalty pursuant to Furman v. Georgia, 408 U.S. 238 (1972) (per curiam) which abolished all existing state death penalty statutes.
4. See 4 W. BLACKSTONE, supra note 1.
5. See state statutes, supra notes 226-53 and accompanying text. Additionally, nations
insanity is its own punishment.\textsuperscript{6}

The \textit{Ford} holding left many questions unanswered regarding determination and restoration of competency for execution.\textsuperscript{7} Consider the cases of Gary Eldon Alvord and Michael Owen Perry: In 1975, the state of Florida tried, convicted, and sentenced Gary Alvord to death for three capital murders.\textsuperscript{8} On November 24, 1984, five days before his execution, Alvord’s counsel submitted evidence that Alvord’s mental condition had significantly deteriorated in the ten years since trial, possibly resulting in his incompetency for execution.\textsuperscript{9} Pursuant to \textit{Ford}’s substantive procedures regarding determination of insane death row inmates, the Florida Governor immediately ordered a panel of three state psychiatrists to evaluate the prisoner’s mental condition.\textsuperscript{10} A psychiatric recommendation of Alvord’s incompetency for execution prompted the governor to stay the death penalty and place Gary Alvord in a state mental facility for medical treatment.\textsuperscript{11} Typical of most states, Florida requires a condemned prisoner found mentally unfit for execution to be transferred and committed to a mental institution until a hospital official determines that he has been “restored to sanity.”\textsuperscript{12} During Alvord’s respite at the mental institution, the state administered extremely powerful medication to him.\textsuperscript{13} Although the tranquilizing drugs appeared to improve Alvord’s mental capacity by subduing the major symptoms of his mental illness,\textsuperscript{14} Alvord remained under the influence of antipsychotic drugs when the state transferred him back to death row.\textsuperscript{15}

Louisiana death row inmate Michael Owen Perry exhibits behavioral characteristics similar to Alvord, and suffers from an extensive and docu-

\textsuperscript{generally prohibit execution of an insane prisoner. See United Nations Secretary General statement: “With regard to mental illness, the majority of countries reported that this precludes the possible sentencing or execution of capital offenders.” Capital Punishment Report of Secretary General, E/1985/43, 26 April 1985, quoted in AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 76 (1987) [hereinafter AMNESTY INTERNATIONAL].

6. \textit{Ford}, 477 U.S. at 406. The rationale is based on the English common law principle that executing a prisoner who is unable to understand the nature of the punishment and why it is to be imposed serves no retributive or deterrent value. See, e.g., \textit{Magwood v. Smith}, 791 F.2d 1438 (11th Cir. 1986) (Alabama common law provides guidance determining sanity death row procedures).

7. In addition to the restoration issue, \textit{Ford} posed threshold questions regarding what degree of evidence is required to create a right to a competency hearing, who should determine the issue, and what methods should be used in that determination.


10. Florida’s competency standard required Alvord to possess “the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him.” \textit{FLA. STAT. ANN. § 922.07(2)} (West 1985).

11. Radelet & Barnard, \textit{supra} note 9, at 301.


14. Letter from Louis A. Vargas, General Counsel, Florida Department of Corrections to Wm. J. Sheppard, Attorney to Alvord (Aug. 17, 1987) [hereinafter VARGAS LETTER].

15. \textit{Id.} As of November 1990, Alvord still waits on death row.
mented history of a schizoaffective mental illness. In 1983, during a release from a Louisiana state mental institution, Perry was arrested for murdering five family members, including his mother and father. Based upon the recommendations of several psychiatrists, the trial court initially found Perry incompetent to stand trial and transferred him to a Louisiana mental forensic facility where he received medical treatment. Eighteen months later, the trial court determined him competent to stand trial.

In 1985 the state of Louisiana tried, convicted, and sentenced Perry to death. Although the Supreme Court of Louisiana confirmed the conviction and sentence, the court suggested that a review of Perry's competency for execution "might be in order." Pursuant to Ford, the trial court appointed three psychiatrists and a psychologist to evaluate Perry's competency for execution. Each expert agreed that Perry was suffering from a schizophrenic mental disorder which prevented Perry from remaining in touch with reality and that the administration of a mind-altering drug, Haldol, made Perry's thinking more coherent, rational, and less paranoid. Even assisted with the powerful drugs, however, the experts concluded that Perry is only sporadically competent to be executed and that his competency cannot be predicted with reasonable certainty.

In 1988 the trial court ruled that under the Ford standard of competence, Perry was competent to be executed only when maintained on Haldol.


17. Hudsmith & Giarruso, supra, at 36; Amici Curiae Brief, supra, at 3.


20. Perry, 502 So. 2d at 564. Pursuant to a Louisiana statute, the court noted that Perry's counsel, the court, or even the state prosecutor could raise the issue of competency for execution. Perry, however, has the burden of proving by a preponderance of the evidence that he lacks the capacity for execution. The court further stressed that "the determination of defendant's sanity is for the trial judge, not a sanity commission." Id.

21. The medical professionals evaluating Perry included the following: Dr. Curtis Vincent, Ph.D, Clinical Psychologist (March 5 evaluation concluding Perry incompetent to be executed); Dr. Glen Estes, M.D. (March 9, 1988 evaluation concluding Perry has schizoaffective disorder and is completely unaware of the nature of proceedings against him); Dr. Theresa G. Jimenez, M.D., Psychiatrist (February 4, 1988 evaluation concluding Perry incompetent to be executed); Dr. Aris W. Cox, M.D., Forensic Psychiatry Consultant (September 7, 1988 evaluation concluding Perry incompetent to be executed).

For a complete transcript of each doctor's medical diagnosis, see Joint Appendix, Michael Owen Perry v. Louisiana, at 52-67, 543 So. 2d 487 (La. 1989), reh'g denied, 545 So. 2d 1049, vacated, 1990 WL 174052 (U.S.) (Nov. 13, 1990) (per curiam) [hereinafter Joint Appendix].

22. Doctor Jimenez concluded that Perry could probably regain competency for execution if the doctors properly adjusted the medication. See Joint Appendix, supra, at 64-65. Dr. Cox, on the other hand, observed that Perry appeared to be "deteriorating and relapsing even though he was receiving medication." Id. at 66-67.

23. Judge Hymel, presiding over the 19th Judicial District Court in East Baton Rouge Parish, held:
Although the court recognized that Perry possessed a right in avoiding unwanted medication, the court determined that Louisiana's recognized interest in carrying out the jury verdict outweighed Perry's interest. Therefore, the trial court ordered the Louisiana Department of Public Safety and Corrections to forcibly medicate Perry in order to achieve his competency for execution.

Are Gary Alvord and Michael Perry legally competent to be executed? What are the limits of determining "restoration of competency" for execution? The United States Supreme Court recently considered in Perry v. Louisiana whether the eighth and fourteenth amendments prohibit a state from forcibly medicating a death row inmate with mind altering drugs in order to make the inmate competent to be executed. The Court, however vacated and remanded the Louisiana trial court decision without addressing the merits of the issue. This Comment analyzes the restoration issue and specifically probes whether a state may legally administer antipsychotic drugs to an insane convicted capital offender for the express purpose of achieving competency for execution. Part II examines the current status of the eighth and fourteenth amendments in an execution context; Part III explores the historical background of restoration of competency; and Part IV analyzes the attempts by states, courts, and physicians to address and resolve the ethical and constitutional problems associated with restoration of competency for execution. This Comment concludes that restoration of competency violates the cruel and unusual punishment clause of the eighth amendment and the due process clause of the fourteenth amendment. Finally, this Comment proposes an alternative to restoration of competency for execution and recommends that a state commute the death sentence to life imprisonment upon a Ford determination that the death row inmate is incompetent to be executed.

It is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment.

It is further ordered that defendant's competence is achieved through the use of antitropic or antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication as to be prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection.

Joint Appendix, supra note 21, at 50-51. See also Amici Curiae Brief, supra note 16, at 4-5; Hudsmith & Giarusso, supra note 16, at 36.

24. Joint Appendix, supra note 21, at 50-51.

25. Id.

26. State v. Perry, 543 So. 2d 487 (La. 1989), reh'g denied, 545 So. 2d 1049, vacated, 1990 WL 174052 (U.S.) (Nov. 13, 1990) (per curiam). The Supreme Court heard oral argument on October 2, 1990 and issued its per curiam opinion only one month later. The Court merely concluded that "[t]he judgment is vacated and the case is remanded to the 19th Judicial District Court of Louisiana for further consideration in light of Washington v. Harper, 494 U.S. — (1990). It is so ordered." Id.
II. AN ANALYSIS OF THE EIGHTH AND FOURTEENTH AMENDMENTS IN AN EXECUTION CONTEXT

A. The Eighth Amendment

The eighth amendment prohibits the imposition of cruel and unusual punishment upon persons convicted of criminal wrongdoing.\(^{27}\) In *Ingraham v. Wright*\(^{28}\) the Supreme Court outlined three ways that the cruel and unusual punishment clause constitutionally prohibits states from application of criminal punishment.\(^{29}\) First, the cruel and unusual punishment clause "imposes substantive limits on what can be made criminal and punished as such."\(^{30}\) Second, the clause determines the types of punishments which states may constitutionally impose, including imprisonment, fines, and forfeitures.\(^{31}\) Third, the cruel and unusual punishment clause prohibits application of excessive punishment or punishment which is too severe for the crime for which it is imposed.\(^{32}\) A punishment is excessive when it does not "comport with the basic concept of human dignity at the core of the Amendment."\(^{33}\) Thus, the criminal punishment must not result in "unnecessary and wanton infliction of pain."\(^{34}\) Although the Supreme Court concluded that the death penalty is not per se unconstitutional criminal punishment,\(^{35}\) a state's application of the death penalty may, in certain instances, violate the eighth amendment if the penalty completely lacks either of the peneological criminal punishment justifications of deterrence or retribution.\(^{36}\)

Relevant in determining whether a punishment is cruel and unusual are the "evolving standards of decency that mark the progress of a maturing society."\(^{37}\) In reaching this objective standard of community values to prohibit degradation of an individual's honor and dignity, courts analyze vari-

\(^{27}\) The eighth amendment states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.


\(^{29}\) The prohibition against cruel and unusual punishment is applicable to the states through the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

\(^{30}\) *Ingraham*, 430 U.S. at 667. For instance, the Court found unconstitutional the criminal punishment of a person for exercising or possessing personal traits in the absence of an illegal act. See *Robinson*, 370 U.S. at 666-67 (cruel and unusual punishment to impose criminal sanctions based on defendant's addiction to narcotics).

\(^{31}\) *Ingraham*, 430 U.S. at 667.

\(^{32}\) Id.


\(^{35}\) See supra note 3.


ous factors, including international custom, legislative and congressional statutes, actual jury verdicts and sentencing, historical evolution of common law, public sentiment and community morals.

B. The Fourteenth Amendment

The fifth and fourteenth amendments protect persons against governmental intrusions on life, liberty, or property without due process of law. When faced with a due process issue, courts first determine whether the defendant possesses a legitimate protected liberty or property interest. Liberty interests may be created by the Constitution, a statute, a state regulation, a court order, or a standard policy, method, or custom. Upon affirmative conclusion that a liberty or property interest exists, courts then analyze the current practice to determine the procedural protections required under due process in order to protect that interest.

In an imprisonment context, the Supreme Court generally concludes that the interest is not protected under constitutional safeguards if the prison official possesses discretionary authority to limit such liberty interest. The Court reaches this conclusion by balancing the prisoner's interest in remain-

38. See Thompson, 487 U.S. at 830-31 & nn.31 & 34 (plurality opinion) (recognizing international custom of Western European countries, countries with Anglo-American culture, the Soviet Union, and three human rights treaties, all of which conclude that application of the death penalty to juvenile criminals constitutes cruel and unusual punishment).
40. Gregg, 428 U.S. at 181 (plurality opinion) (jury is "significant and reliable objective index of contemporary values because it is so directly involved").
43. The fifth amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The fourteenth amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
46. Id. at 487-90 (statute outlining requirements for prison transfer to mental institution created liberty interest in freedom from transfer).
51. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 466-67 (1981) (since Board given complete discretion, routine procedure practiced 75% of time does not create protected liberty interest in parole date).
ing free from an erroneous decision, the government interest in maintaining prison security, and the court’s ability to institute additional procedures to avoid the risk of error.\footnote{52}

C. Ford v. Wainwright

In 1986 the Supreme Court held in \textit{Ford v. Wainwright}\footnote{53} that executing a prisoner who becomes insane on death row constitutes cruel and unusual punishment in violation of the eighth amendment.\footnote{54} Whether the Court will interpret the Constitution as placing a substantive restriction on the state’s power to chemically restore the mental health of an insane prisoner for execution purposes, however, remains an open issue.

\textit{Ford} involved a fact scenario similar to that of Gary Alvord and Michael Perry; Alvin Ford, a convicted prisoner facing capital punishment, became insane after a lengthy confinement on death row. Evidence proved Ford competent at the commission of his crime, at trial, and at sentencing. Pursuant to the Florida statute governing determination of a death row prisoner’s competency,\footnote{55} the governor ordered a mental evaluation of Ford. Three psychiatrists conducted a thirty-minute group interview and diagnosed him as incompetent, yet all three experts differed in their mental diagnosis. Despite their incompetency recommendation, the Florida Governor signed the death warrant.

1. The Eighth Amendment

Writing the five to four majority decision for the Court, Justice Marshall traced society’s justification for not executing an insane prisoner and examined various common law rationales in support of the prohibition:\footnote{56} madness is its own punishment, execution of the insane serves no retributive value, execution of the insane fails to deter, execution deprives the insane inmate of the opportunity to assist in his defense, execution prevents the insane individual from making spiritual restitution before death, and execution of mentally incompetent individuals simply offends human dignity.\footnote{57} Lack of retributive value, however, surfaced as the primary reason for not executing an insane person; when the individual cannot comprehend the reason for his punishment and, ultimately, the reason for his execution, society does not benefit from the punishment.\footnote{58}

\footnote{52. See Vitek v. Jones, 445 U.S. 480, 495 (1980) (prisoner’s interest in avoiding arbitrary or erroneous determination as mentally ill outweighs state’s interest in segregating and treating mentally ill prisoners; Court instituted constitutional safeguards of notice and adversary hearing).

\footnote{53. 477 U.S. 399 (1986).

\footnote{54. Id. at 409-10.


\footnote{56. Traditionally, executing an insane prisoner offends humanity; the punishment is “savage and inhuman.” 4 W. BLACKSTONE, COMMENTARIES *24-*25 (1769), quoted in \textit{Ford}, 477 U.S. at 406.

\footnote{57. \textit{Ford}, 477 U.S. at 404-07.

In addition to common law, the Court analyzed "objective evidence of contemporary values" in state statutes which indicate society will not tolerate executing "one who has no capacity to come to grips with his own conscience or deity." The Court thus concluded that execution of the insane constitutes cruel and unusual punishment. Justice Marshall cited previous Supreme Court cases addressing capital punishment of insane prisoners and noted the developing trend toward interpreting the eighth and fourteenth amendments as guaranteeing greater protection of a prisoner's constitutional rights. The majority concluded that under the "evolving standards of decency that mark the progress of a maturing society," the eighth amendment prohibits execution of the insane.

Justice Powell concurred with the Court's eighth amendment prohibition of capital punishment of the insane. However, Justice Powell claimed the majority failed to promulgate a legal test of competency for execution and, in turn, proposed a two-pronged competency standard: first, the prisoner must be aware of the punishment he or she is about to suffer, and, second, the prisoner must understand the reasons why death is to be inflicted. In short, the prisoner must comprehend the nature, pendency, and purpose of the execution.

2. The Fourteenth Amendment

Although seven Justices held that the Florida statutory procedures violated the fourteenth amendment, the Court failed to issue a majority opinion delineating the precise substantive due process procedures a state must

59. Ford, 477 U.S. at 406, 409. The Court noted that states currently prohibit execution of the insane. Id. at 408. See infra section on state statutes at notes 228-53 and accompanying text.

60. Ford, 477 U.S. at 409-10.

61. Id. at 405.

62. Id. at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).


64. Ford, 477 U.S. at 418-27 (Powell, J., concurring in part and concurring in judgment).

65. Id. at 422. Although the majority has not expressly approved Justice Powell's concurring opinion standard, Powell's test has been enacted into state law, recognized by federal and state courts, and referred to positively by numerous members of the Supreme Court. See Penny v. Lynaugh, 109 S. Ct. 2934, 2954, 106 L. Ed. 2d 256, 287-88 (1989) (a prisoner who does not meet Powell's two-pronged test "cannot be executed"); Lowenfield v. Butler, 843 F.2d 183 (5th Cir. 1988); Martin v. Dugger, 686 F. Supp. 1523 (S.D. Fla. 1988); State v. Rice, 757 P.2d 889 (Wash. 1988); Ex Parte Jordan, 758 S.W.2d 250 (Tex. Crim. App. 1988) (en banc). See also state statutes supra notes 228-53 and accompanying text; ABA Standards, supra notes 254-69 and accompanying text.

66. Ford, 477 U.S. at 422.

67. Id.


69. Ford, 477 U.S. at 410-18 (plurality) (Marshall, J., with Justices Brennan, Blackmun, and Stevens); id. at 418 (Powell, J., concurring); id. at 427 (O'Connor, J., with White, J., concurring in part and dissenting in part).
initiate to determine inmate insanity. The plurality opinion, authored by Justice Marshall, requires an adversary fact-finding procedure without mandating a full evidentiary hearing before a judge. The plurality permits states to develop their own death row insanity procedures as long as those procedures cure the constitutional defects in Florida’s statutory process. Justice Powell argued against a complete sanity trial and, rather asserted that a limited board hearing, which provides the inmate with an opportunity to present evidence, would sufficiently protect the prisoner’s constitutional due process rights. Justice O’Connor, joined by Justice White, concluded that the fourteenth amendment provides the death row inmate with limited constitutionally protected liberty interests. Justice O’Connor found that this minimal due process interest, however, created only a right to be heard in an informal competency for execution hearing. Justice Rehnquist, joined by Chief Justice Burger, dissented and rejected both the eighth amendment cruel and unusual punishment theory and the fourteenth amendment due process theory. Rehnquist advocated administration of the death penalty for insane death row prisoners and found all of Florida’s insanity procedures constitutionally acceptable, including an executive branch determination of sanity. Moreover, Justice Rehnquist urged the Court not to constitutionalize the ban on executing the insane because no state currently permits such practice. Because a prisoner previously received a full trial on the issue of guilt and sentencing, Justice Rehnquist found it unnecessary to require another trial to expressly decide insanity.

As a result of these split holdings, the Supreme Court opinion provides limited guidance to states in determining what types of procedures or com-

70. The Court merely concluded that the district court must conduct a sanity hearing for Ford because the state court had not provided one for him. Id. at 418.
71. The plurality provided three reasons why the Florida statute determining mental competency of a death row prisoner was constitutionally inadequate. First, the statute lacked any procedure for the prisoner to present evidence of his incompetency. Id. at 413. Second, the statute prevented an opportunity for cross-examination or impeachment of the three state-appointed psychiatrists. Id. at 415. Third, the statute placed the absolute decision within the judgment of the executive branch which appoints the examining psychiatrists and which controls the prosecuting attorneys; the governor lacked neutrality and objectivity because the executive branch initiated “every stage of the prosecution of the condemned from arrest through sentencing.” Id. at 416.

The Court also held that even if a state court determines that a prisoner is competent, a federal court must hold an evidentiary hearing on habeas corpus if the state court did not adequately provide the defendant with a full and fair hearing pursuant to 28 U.S.C. §§ 2254(d)(2), (d)(3), (d)(6) (1982). Id. at 411.
73. Id. at 427 (Powell, J., concurring in part and concurring in judgment).
74. Id. at 427-31 (O’Connor, J., with White, J., concurring in part and dissenting in part).
75. Id. at 429.
76. Id.
77. Id. at 431-35 (Rehnquist, J., with Burger, C.J., dissenting).
78. Id. at 434.
79. Id. at 435.
80. Id. Justice Rehnquist warned that allowing judges to determine insanity would be an “invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity.” Id.
petency standard govern restoration of a condemned prisoner's sanity.\textsuperscript{81} Nonetheless, \textit{Ford} explicitly provides relief when the process determining an inmate's sanity lacks sufficient due process guarantees.\textsuperscript{82}

\textbf{D. Penry v. Lynaugh}

In 1989 the Supreme Court in \textit{Penry v. Lynaugh}\textsuperscript{83} refused to extend the eighth amendment's prohibition against cruel and unusual punishment to prevent states from executing mentally retarded prisoners. The Supreme Court did, however, reverse and remand a Texas state court decision sentencing a mentally retarded man to death because the Texas jury instructions did not consider mental retardation as an individual mitigating circumstance when capital punishment was at issue.\textsuperscript{84} Although psychiatric experts concluded that Penry suffered from mild to moderate mental retardation and possessed the mental age of a seven year-old child,\textsuperscript{85} the jury rejected Johnny Penry's insanity defense and convicted him of rape and capital murder.\textsuperscript{86}

Despite its apparent conflict with \textit{Ford}'s application of the eighth amendment to capital punishment of mentally incompetent inmates, the \textit{Penry} Court upheld the execution of a mentally retarded inmate regardless of the mentally retarded person's intelligence level or inadequate mental capacity.\textsuperscript{87} Before addressing the merits of the case, the Court considered the implication of \textit{Teague v. Lane},\textsuperscript{88} which banned retroactive application of new rules announced on collateral review.\textsuperscript{89} In particular, \textit{Teague} determined whether the Court had authority to grant Penry judicial relief.\textsuperscript{90} In the only unanimous portion of the Court's opinion, Justice O'Connor con-

\begin{itemize}
\item \textsuperscript{81} See Martin v. Dugger, 686 F. Supp 1523, 1557 (S.D. Fla. 1988) (The \textit{Ford} opinion is a "precedential quagmire").
\item \textsuperscript{82} 477 U.S. at 410-13 (Any deficiency in state procedure would affect "presumption of correctness" accorded state court's findings) (Marshall, J., plurality opinion); id. at 423-24 (Powell, J., concurring).
\item \textsuperscript{83} 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).
\item \textsuperscript{84} \textit{Id.} at 2942, 106 L. Ed. 2d at 272. The jury sentenced Penry to death based solely on three questions in the sentencing phase:
\begin{enumerate}
\item whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
\item whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
\item if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
\end{enumerate}
\item \textsuperscript{86} 109 S. Ct. at 2941, 106 L. Ed. 2d at 271. The doctors also concluded that Penry had the social maturity of a nine to ten year-old child.
\item \textsuperscript{87} \textit{Id.}
\item \textsuperscript{88} \textit{Id.} at 2942, 106 L. Ed. 2d at 272.
\item \textsuperscript{89} 109 S. Ct. 1060, 108 L. Ed. 2d 334 (1989).
\item \textsuperscript{89} Penry, 109 S. Ct. at 2952-53, 106 L. Ed. 2d at 285-86. \textit{Teague} prevents the Court from applying new rules on collateral review unless they fall into one of two exceptions. \textit{Teague}, 109 S. Ct. at 1075, 103 L. Ed. 2d at 356.
\item \textsuperscript{90} Penry's relief included the requirement that juries consider mental retardation as a mitigating factor in capital sentencing. \textit{Penry}, 109 S. Ct. at 2952, 106 L. Ed. 2d at 284.
\end{itemize}
cluded that Penry fell into an exception outlined by Teague. Teague’s non-retroactivity exception allows courts to constitutionally place certain conduct completely beyond the state’s power to punish because of a defendant’s status or offense. In Penry the status at issue is the eighth amendment’s prohibition against executing mentally retarded persons.

Like the Ford opinion, Penry is fraught with numerous concurring and dissenting opinions. Although not expressly supporting universal prohibition of the death penalty, Justice O’Connor, who authored the majority opinion, was the only Justice who viewed mitigation as a determinative factor. She persuasively argued that mentally retarded persons are unique individuals with different capabilities, and thereby require individual consideration of mitigating circumstances in a capital sentencing determination. O’Connor focused the Court’s attention on the individual’s mental capacity rather than mental age, which she characterized as imprecise because age undervalues the human experiences of mentally retarded persons and overestimates their ability to address and solve problems.

1. Mental Retardation and Mitigation

Justices Brennan, Marshall, Stevens, and Blackmun joined O’Connor in the part of her opinion that overruled the Texas statutory application of the death penalty to mentally retarded persons. Because punishment should directly relate to the criminal defendant’s personal culpability, the plurality requires Texas juries to mitigate any evidence of mental retardation when determining whether to impose the death penalty. The plurality concluded that the Texas law limiting the jury’s sentencing decision to three questions prevents the jury from expressing its “reasoned moral response” to relevant mental retardation evidence, and thus prohibits an individualized capital sentencing determination.

91. Id. The Court relied primarily on two previous Supreme Court cases which required courts to evaluate evidence relevant to character, background, and specific factual information which would mitigate against imposing the death penalty. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).
92. Penry, 109 S. Ct. at 2952, 106 L. Ed. 2d at 285.
93. Id. at 2953, 106 L. Ed. 2d at 285.
94. Id., 106 L. Ed. 2d at 286. Similarly, in a competency for capital punishment context, the status could represent an express finding of sanity. Because Ford announced a new rule by prohibiting execution of insane persons on eighth amendment terms, any further finding by the court would simply be an extension of Ford’s holding—and therefore not violative under Teague.
95. Id. at 2958, 106 L. Ed. 2d at 292. No other Justice joined O’Connor in Part IV-C of the Penry opinion.
96. Id.
97. Id. at 2950-53, 106 L. Ed. 2d at 282-86.
98. Id.
99. Id. at 2958, 2963, 106 L. Ed. 2d at 292, 298 (plurality).
100. Id.
101. Id. at 2947, 106 L. Ed. 2d at 279 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion) (emphasis in original)).
2. Mental Retardation and the Eighth Amendment

In turn, Justices Scalia, Kennedy, White, and Chief Justice Rehnquist joined O'Connor in the part of her opinion finding no eighth amendment constitutional protection for mentally retarded persons. The Justices further advocated full utilization of the Texas death penalty. By comparing the definition of "mental retardation" proposed by the American Association of Mental Retardation (AAMR) to the common law term of "idiot," the Court attempted to distinguish the execution of a mentally retarded person from that of an incompetent person. Penry is mentally retarded; although he possesses limited mental and behavioral capability, Penry can distinguish between right and wrong. Ford, Alvord, or Perry are legally incompetent; each is unable to appreciate the wrongfulness of his conduct and, therefore, lacks the reasoning capacity to form criminal intent.

Finally, the Penry Court conducted an evaluation of current public sentiment and national consensus to conclude that execution of a mentally retarded person does not offend the "evolving standards of decency that mark the progress of a maturing society." Although the Court cited numerous public opinion polls and medical organizations opposing execution of the mentally retarded, lack of state legislation on the issue significantly influenced the Court's conclusion that objective evidence failed to indicate an emerging national consensus against executing mentally retarded persons.

Although the dissenting Justices concluded that the eighth amendment prohibits execution of mentally retarded persons regardless of the degree or severity of the mental handicap, the four Justices submitted separate opinions reaching that conclusion. Only Justices Brennan and Marshall provided reasons why the Court should extend O'Connor's mitigation holding

102. Id. at 2964, 106 L. Ed. 2d at 299 (Scalia, J., concurring in part and dissenting in part). See also Note, Eighth Amendment-The Death Penalty and the Mentally Retarded: Fairness, Culpability, and Death, 80 J. Crim. L. & Criminology 1211 (1990) (arguing death penalty for mentally retarded is cruel and unusual punishment).

103. Id. at 2966-68, 106 L. Ed. 2d at 302-05 (Scalia, J., dissenting).

104. The AAMR requires a mentally retarded person to possess an I.Q. below 70 as well as adaptive behavioral problems. Id. at 2941 n.1, 106 L. Ed. 2d at 271 n.1.

105. Common law courts referred to "idiots" as those persons possessing no capacity to reason, comprehend, or distinguish between right and wrong. Penry, 109 S. Ct. at 2954, 106 L. Ed. 2d at 287.

106. Id. (quoting American Law Institute, Model Penal Code § 4.01, at 61 (1985) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law")).

107. Id. at 2942, 106 L. Ed. 2d at 272. Psychiatric experts concluded that Penry did not suffer from mental illness because he possessed a limited mental capacity to understand criminal responsibility.

108. Id. at 2953, 106 L. Ed. 2d at 286 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Ford, 477 U.S. 399, 406.

109. Penry, 109 S. Ct. at 2955, 106 L. Ed. 2d at 289. Penry proposed only one federal law and one state statute to support his argument that states opposed the execution of mentally retarded persons.

110. Id. at 2958-63, 106 L. Ed. 2d at 292-98 (Brennan, J., concurring in part and dissenting in part).
to a constitutional cruel and unusual punishment standard. Both Justices believe that executing a mentally retarded person furthers neither of the primary capital punishment objectives of retribution or deterrence. The Justices thus concluded that nothing could be more "purposeless and needless" than the pain and suffering inflicted when executing mentally retarded persons. Justice Stevens and Blackmun argued that the amici curiae briefs of the American Association of Mental Retardation and many others "compels the conclusion that such executions [of mentally retarded persons] are unconstitutional."

Both the Ford and Penry holdings are ambiguous in terms of defining the competency standard required for execution. Justice O'Connor repeatedly referred to criminal responsibility at the time of the offense, yet failed to differentiate between criminal responsibility and capacity for execution. The Penry Court cited Justice Powell's two-pronged Ford standard in determining that the eighth amendment does not categorically prohibit execution of mentally retarded persons, yet never addressed how mental retardation, as opposed to mental illness, should be evaluated to determine competency for execution. Nevertheless, Penry suggests that severely mentally retarded persons never will be executed. It remains unclear whether the Penry Court was implying that these individuals never would get past the trial stage or whether, if found guilty, the extremity of the mental retardation would create an incapacity to appreciate fully the crime or to understand the reason for the impending execution.

III. HISTORICAL BACKGROUND OF SYNTHETIC SANITY

A. Synthetic Sanity Defined

Psychotropic drugs refer to a general category of medication that affects a person's thinking processes and ability to communicate. Often characterized as "synthetic sanity" or "chemical competence," this mental condition is created when psychotropic medication is administered to restore
competence for defendants facing trial and execution. Antipsychotic drugs, also referred to as neuroleptics or major tranquilizers, constitute a subset of psychotropic medications that retard and reduce the symptoms of complex mental illness, like schizophrenia, psychosis, and manic depression. Approximately 70% of all death row prisoners are diagnosed with schizophrenia or psychosis.

Since their initial release in the 1950's, psychiatrists have generally chosen antipsychotic drugs as the preferred treatment over mechanical restraints and seclusion. Some critics consider these drugs a more effective and humane type of treatment for mental disorders; others, however, still consider them a chemical straitjacket. Despite their beneficial effects, antipsychotic drugs merely mask the debilitating symptoms of major mental disorders; the drugs do not cure the mental disorder. The patient usually lapses back into a delusional state when he or she ceases taking the antipsychotic medication. Moreover, continual treatment creates severe side effects, including often irreversible movement disorders such as dystonia, akathisia, and tardive dyskinesia. Although other medications regulate

123. Treatment used to restore competency for defendants facing trial and execution consists primarily of psychotropic medication such as Thorazine, Haldol, or Mellaril. Winick, Psychotropic Medication and Competence to Stand Trial, AM. B. FOUND. RES. J. 769 (1977).

124. Id.

125. AMNESTY INTERNATIONAL, supra note 5, at 108-09 (citing R. JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981)).

126. Gutheil & Appelbaum, supra note 121, at 100.


128. See Jost, The Right to Say No: Can an Inmate Refuse Medication?, A.B.A.J. 72, 73 (Feb. 1990). This ability to control behavior disorders through antipsychotic drugs has resulted in a decreased population at mental hospitals by approximately seventy-five percent—from 600,000 patients in 1955 to 160,000 patients in 1979. Id.

129. See Kemna, Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs, 6 J. LEGAL MED. 107, 110 (1985).

130. Guthel & Appelbaum, supra note 121, at 100. Dr. Aris Cox, a forensic psychiatry consultant who repeatedly examined Michael Perry on death row in response to the Louisiana trial court's order to determine whether Perry is competent to be executed, compared his observations of Perry both on and off the neuroleptic medication.

During the times I have seen him off neuroleptic medication, it has been my opinion that he was so psychotic and so out of contact with reality that he could not appreciate the reason for his execution, nor indeed could he appreciate the execution process itself, nor the seriousness of this sentence. At these times Mr. Perry told me that he was God, and he did not feel that the electrocution process would result in his death.

On the other hand, I have seen Mr. Perry at times when, on neuroleptic medication, he has been in fairly good contact with reality, and certainly did appreciate the seriousness of his situation and the purpose of his death sentence. . . . It is my opinion that if Mr. Perry is allowed to remain off neuroleptic medication for any significant period of time (by this I mean three weeks or longer), I believe he will become so psychotic that he will not be competent to be executed.

Joint Appendix, supra note 21, at 68-89 (emphasis added).

131. Dystonia results in severe muscle spasms of the face, throat, lips and tongue. Akathisia creates restlessness to such a degree that patients are unable to remain stationary and are constantly in a period of agitated frustration. Tardive Dyskinesia, the most common and serious of psychotropic drug side effects, causes repetitive involuntary spasms of the arm, hands, trunk, face and especially the mouth where common motions like licking, sucking, and chew-
some of these side effects, most of the disabling disorders permanently affect the patient even after the medication is ceased.\footnote{Dr. Aris Cox, a forensic psychiatrist, who examined Perry concluded:

He [Perry] deteriorates quickly when off medication. So his competency status tends to change, it's very labile, it moves about. What I meant by this perhaps offhand remark ["moving target"] was that his competency changes frequently and he's not in the same place all the time. And sometimes he's competent and sometimes he's not.


Both Michael Perry and Gary Alvord’s mental condition fluctuates between active and remissive states. Psychiatrists have described the shifting nature of Michael Perry's mental condition as a “moving target.”\footnote{Letter from Emanuel Tanay, M.D., Clinical Professor of Psychiatry, Wayne State University to Wm. J. Sheppard, Attorney to Alvord, at 114-15 (November 14, 1984) [hereinafter TANAY LETTER].} Similarly, psychiatrists who have treated Alvord during the past thirty years document periods in which his illness stabilized and he appeared quite normal.\footnote{Id.} Yet this stability temporarily results from medication. Alvord’s medical history indicates that his tranquility crumbles during periods of stress or uncertainty,\footnote{Mossman, \textit{Assessing & Restoring Competency to be Executed: Should Psychiatrists Participate?}, 5 BEHAV. SCI. & L. 383, 398 (1987) (death row confinement creates traumatic mental disorders).} as it did on death row during the week of his scheduled execution.\footnote{For an analysis of civil and criminal cases addressing the right to refuse medical treatment, see Gutheil & Appelbaum, \textit{supra} note 121, at 77.}

\textbf{B. Washington v. Harper}

The decision by a patient whether to undergo a treatment or take a drug raises fundamental issues pitting individual liberty against governmental authority. In both civil and criminal jurisdictions,\footnote{Id. at 79.} different federal and state constitutional rights recognize the patient’s right to refuse antipsychotic treatment.\footnote{Id.} Originally, federal courts broadly interpreted the fourteenth amendment due process clause to constitutionally guarantee an individual’s right to refuse treatment.\footnote{Id. at 79.} Many states utilize the administrative procedure outlined in \textit{Rogers v. Commission},\footnote{390 Mass. 489, 458 N.E.2d 308 (1983).} wherein the state holds a judicial hearing to determine whether an individual refusing treatment is competent to make that medical decision.\footnote{Id.} If the defendant is found incompetent, the court provides the defendant with a substituted judgment decision regarding

\textit{COMMENT}
the right to refuse treatment. The state usually determines the substituted judgment decision. Ford, however, prohibits the executive branch or state from individually determining competency for execution. Thus, the substituted judgement decision would be difficult to apply in the capital punishment competency context. Alternatively, other states allow mental health professionals to provide an adequate substituted judgment of the state judicial decision to determine competency. Again, however, this rationale ultimately places the medical professional in the ethical dilemma of determining whether to administer treatment if continued treatment will result in execution.

The United States Supreme Court has not addressed whether an insane death row inmate can refuse treatment that would medically restore competency for execution. Currently, federal circuits disagree on whether a state corrections department may forcibly medicate a defendant to stand trial or a convicted prisoner to restore competency. One state court described the use of psychotropic drugs for purposes contrary to treatment as "Orwellian." In 1990, however, the United States Supreme Court held in Washington v. Harper that a prison inmate does not have the right to refuse antipsychotic drugs when administered by the state for purposes of prison safety and the inmate's personal well-being and health. Harper will play a significant role in analyzing the fourteenth amendment aspects of competency for execution.

In 1976 Walter Harper was convicted of robbery and incarcerated at the Washington State penitentiary. Harper spent a considerable amount of time in the prison's mental health unit, and voluntarily consented to the administration of antipsychotic drugs to treat his schizophrenic behavior. In 1981 the state sent him to a special institution which diagnoses and treats convicted felons with serious mental illness. At first, Harper voluntarily consented to treatment; in 1982, however, he refused to continue taking the antipsychotic drugs. Pursuant to a Washington state corrections policy,
SOC Policy 600.30, the doctor attempted to medicate Harper involuntarily. Policy 600.30 states that if a psychiatrist determines that an inmate should be medicated with antipsychotic drugs despite the patient's refusal, then the inmate must appear for a hearing before a committee composed of three medical professionals not currently treating the patient. If a majority of the committee determines that the prisoner suffers from a "mental disorder" and is either "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or property, then Policy 600.30 permits involuntary treatment of the inmate with antipsychotic drugs. The Committee periodically reviews the treatment every fourteen days, however, to determine the necessity of continued treatment.

Harper alleged that the state violated his due process rights because the doctors involuntarily administered the antipsychotic drugs before conducting a judicial hearing. The Supreme Court, however, disagreed and concluded that Policy 600.30, which requires no judicial hearing, fully comports with all the requirements of the due process clause of the United States Constitution. In reaching its conclusion, the Court attempted to balance the inmate's liberty interest in refusing involuntary administration of antipsychotic drugs with the state's interest in maintaining prison security by providing appropriate treatment to the inmate to reduce danger to such inmate or others. Justice Kennedy, writing the six-justice majority opinion, reversed the Washington Supreme Court's standard of review requiring the state to demonstrate a "compelling need" before administering the medica-

151. Id. at 1033, 108 L. Ed. 2d at 194. The Committee is composed of a psychiatrist, a psychologist, and the official in charge of the mental health unit. The psychiatrist must vote affirmatively to administer the medication involuntarily to the inmate.

152. Policy 600.30 borrowed the definitions of "mental disorder," "gravely disabled," and "likelihood of serious harm" from a Washington involuntary commitment statute. See Harper, 110 S. Ct. at 1033 n.3, 108 L. Ed. 2d at 194 n.3.

"Mental disorder" means "any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." WASH. REV. CODE at § 71.05.020(2) (1987).

"Gravely disabled" is defined as "a condition in which a person, as a result of a mental disorder: (a) [i]s in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety." Id. at § 71.05.020(1).

"Likelihood of serious harm" is "either: (a) [a] substantial risk that physical harm will be inflicted by an individual upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others." Id. at § 71.05.020(3).

153. The inmate is provided with many due process rights at the hearing, including the right to attend, to present evidence and witnesses, to cross-examine staff witnesses, and to the assistance of a neutral and objective adviser. Harper, 110 S. Ct. at 1033-34, 108 L. Ed. 2d at 194. The Supreme Court held that these evidentiary privileges comport with due process. Id. at 1044, 108 L. Ed. 2d at 207.

154. Id.
tion, and instead utilized the analysis in *Turner v. Safley* to justify the state's overriding interest in prison safety and security. The *Turner* standard for determining the validity of a prison rule that allegedly violates an inmate's constitutional rights is whether the rule is "reasonably related to legitimate penological interests."

The Court then analyzed three factors to determine whether Policy 600.30 was reasonable under due process standards. First, a court must determine whether the prison regulation or policy represents a "valid, rational connection" to a legitimate governmental interest justifying a particular action. Second, the court must evaluate the burden that accommodation of the alleged constitutional right places on guards, other inmates, and on the general allocation of prison resources. Third, a court must find a lack of other alternatives to the prison regulation.

The Court quickly dismissed the first and second factors, finding the state's interest in prison safety and security sufficiently greater than the inmate's liberty interest. Because prison officials have a duty to prevent a prisoner with a serious mental disorder from harming himself or others, the Court felt that involuntary medication represented a reasonable method of achieving that goal. As to the third factor regarding alternatives to forcible administration of antipsychotic medication, Justice Kennedy found that other methods such as physical restraints or seclusion are not as effective, either medically or monetarily.

Although the Court noted that as a matter of state law, Policy 600.30

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155. The Washington Supreme Court applied a balancing test, and cited four nonexclusive state interests sufficiently compelling to justify administering antipsychotic medication to a non-consenting prisoner: preserving life, protecting third parties' interests, preventing suicide, and maintaining the ethical integrity of the medical profession. The state was required to prove such a compelling need by "clear, cogent, and convincing evidence." Harper v. State, 110 Wash. 2d 873, 882-84, 759 P.2d 358, 364-65 (1988).


157. Washington v. Harper, 110 S. Ct. 1028, 1037, 108 L. Ed. 2d 178, 199 (1990) (citing *Turner*, 482 U.S. at 89). The *Turner* Court developed this standard to determine the validity of a prison regulation that severely restricted an inmate's right to marry; the right to marry is protected by the Due Process Clause. *Id.* at 95-96.

158. *Id.* at 1038-39, 108 L. Ed. 2d at 200. The Court stated: "There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here. There 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 a prison environment, which, 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'" *Id.* at 1038, 108 L. Ed. 2d at 200 (quoting *Turner*, 482 U.S. at 90-91).

159. *Id.* at 1038, 108 L. Ed. 2d at 200 (quoting *Turner*, 482 U.S. at 89).

160. *Id.* at 1038, 108 L. Ed. 2d at 200 (quoting *Turner*, 482 U.S. at 90).

161. *Id.* at 1038, 108 L. Ed. 2d at 200 (quoting *Turner*, 482 U.S. at 89).

162. *Id.* at 1038-39, 108 L. Ed. 2d at 200 (citing *Large v. Superior*).

163. Other courts apply a therapeutic standard and allow continued drug treatment only if it proves to be the least restrictive means in serving the prisoner's best interest. See *Large v. Superior*.
guarantees the prison inmate the constitutional right to be free from arbitrary administration of antipsychotic medication and that the injection of psychotropic medication represents a “substantial interference with that person’s liberty” under the due process clause of the fourteenth amendment. The Court nevertheless concluded that an informed medical decision to treat the inmate with antipsychotic drugs overrides the prisoner’s liberty interest in avoiding the forcible administration of the drugs. Despite the risks and serious side effects associated with antipsychotic drugs, the Court concluded that “an inmate’s interests are adequately protected, and perhaps better served,” by forcibly medicating the inmate. Moreover, the Court specifically delegated the decision whether to forcibly medicate to medical professionals, rather than to judges.

Justice Blackmun concurred with the majority, but urged states formally to commit the mentally ill prisoner before forcibly attempting to medicate him. Such a process, argued Justice Blackmun, benefits the prison inmate, the hospital, the doctors, and even the state itself.

Justice Stevens, joined in a dissent by Justices Brennan and Marshall, criticized the majority for minimizing the prisoner’s constitutionally recognized liberty interest in refusing forcible administration of antipsychotic drugs, misinterpreting the state’s policy and the Court’s analysis in Turner, and mistakenly holding that a “mock trial before an institutionally biased tribunal” guarantees due process. The dissent instead advocated the stance adopted by the Washington Supreme Court, which required an adversarial judicial hearing complete with its constitutional due process rights. Finally, the dissenting Justices severely criticized the majority’s failure to acknowledge that medical professionals making the treatment decision are not neutral decisionmakers.

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166. Id. at 1041, 108 L. Ed. 2d at 203. Cf. Winston v. Lee, 470 U.S. 753 (1985) (compelled surgery substantially interferes with liberty interest and violates fourth amendment); but see Schmerber v. California, 384 U.S. 757, 772 (1966) (extraction of blood for DWI test is insubstantial liberty interest).
168. Id. at 1042, 108 L. Ed. 2d at 204.
169. Id. The Court flatly stated that the due process clause “has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer.” Id. at 1042, 108 L. Ed. 2d at 204 (quoting Parham v. J.R., 442 U.S. 584, 607 (1979)).
170. Id. at 1044-45, 108 L. Ed. 2d at 208 (Blackmun, J., concurring).
171. Id. at 1045, 108 L. Ed. 2d at 208.
172. Id. at 1045-56, 108 L. Ed. 2d at 208-21 (Stevens, J., concurring in part and dissenting in part).
173. Id at 1052 n.20, 108 L. Ed. 2d at 216 (“The choice is not between medical experts on the one hand and judges on the other; the choice is between decisionmakers who are biased and those who are not”). The Harper Court noted that the prisoner’s best interests fade when medical professionals are forced to review the treatment decisions of their colleagues. Id. at 1052-53, 108 L. Ed. 2d at 217.
IV. Analysis and Proposal: Commute the Death Penalty to Life Imprisonment Upon a Determination of Incompetency for Execution

A. Continuing Controversy Over Standards of Competency

Although Ford provided insane death row inmates with a constitutional right to not be executed, the standards and judicial procedures protecting this right differ greatly from state to state. The ambiguity primarily stems from the varying definitions of "competency," "sanity," and "restoration of competency." Since the issue of an accused person's mental competency may be addressed at any period during a criminal proceeding, other competency tests utilized throughout the criminal process are useful in evaluating the restoration of competency for execution test.

1. Competency at the Time of the Offense

Traditionally, competency at the time the crime is committed represents the most important measurement of sanity. If the accused is not sane at the time of the offense, he may not possess the required mens rea for criminal responsibility. Insanity at the commission of the crime excuses the accused from legal responsibility.

2. Competency at the Time of Trial

Courts implement a competency test at the time of trial to ensure that the prisoner can participate in his or her own defense. In Dusky v. United States the Supreme Court described the common law test for competency to stand trial: the two-part test first determines whether the defendant possesses sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and, second, whether the defendant has a rational and factual understanding of the proceedings. The defendant's ability to meaningfully participate in the proceedings constitutes the core issue, not the defendant's criminal responsibility. Insanity at the time of trial, therefore, temporarily delays the legal proceedings until the accused regains mental competency.

175. A finding of Not Guilty by Reason of Insanity (NGRI) or Guilty But Mentally Ill (GBMI) encompasses an entirely distinct issue and is beyond the scope of this Comment.
177. Various standards have been developed to determine competency at the time of the offense including the M'Naughten Rule, Irresistible Impulse test, Product Rule, and Substantial Capacity Test. See Entin, supra note 58, at 222-23.
178. Drope v. Missouri, 420 U.S. 162, 180-83 (1975) (due process requires trial court to make further inquiry into defendant's competency to stand trial when evidence presented reasonable doubt as to defendant's competence).
180. Id. at 402.
182. A primary criticism of this temporary delay is "insanity by choice;" accused defend-
Historically, courts have held that the trial of a defendant on medication violates federal and state constitutional due process rights primarily for one of two reasons: either the administration of the drugs alters the defendant's normal mental functioning and thus affects the defendant's participation at trial, or the antipsychotic drugs suppress the defendant's courtroom demeanor. Courts advocating an unmedicated condition regarding competency generally hold that a defendant who becomes incompetent to stand trial because he voluntarily and competently chooses to withdraw from the medication may have waived his right to be tried while competent. Other courts hold that competency to stand trial for criminal defendants on psychotropic medication does not violate due process rights. When trial competency is based on the defendant's ability to consult with counsel and to understand the legal proceedings, then the defendant is competent, despite the fact that the defendant receives medication.

ants may reject the psychiatric treatment thereby remaining mentally ill and preventing the state from prosecuting. See 60 MINUTES: INSANE BY CHOICE (CBS Television Broadcast, September 10, 1989). But see United States v. Shawar, 865 F.2d 856 (7th Cir. 1989) (court hospitalized for a reasonable period defendant found mentally incompetent to stand trial to determine whether a substantial probability existed whereby he would attain trial competency in the foreseeable future).

If a federal court finds a defendant incompetent to stand trial, the defendant is committed to the custody of the Attorney General for treatment. 18 U.S.C. § 4241(d) (1988). The defendant may be hospitalized only "for such a reasonable period of time, not to exceed four months," in order for the court to determine whether substantial probability exists that the defendant will regain competency to stand trial in the "foreseeable future." 18 U.S.C. § 4241(d)(1) (1988). Detainment over a period longer than four months to determine competency violates due process; after such time, the government must either free the defendant or initiate civil commitment proceedings. See Jackson v. Indiana, 406 U.S. 715, 738 (1972) (due process violated when defendant's commitment of three and one-half years exceeded reasonable time necessary to determine whether defendant would regain competency).

183. Gutheil & Appelbaum, supra note 121, at 89-99. State v. Maryott, 6 Wash. App. 96, 492 P.2d 239 (1971) is the most widely cited case supporting the trial of a non-medicated defendant. The Maryott appellate court held that state administered tranquilizer drugs violated defendant Maryott's due process rights because the drugs visibly affected and altered his expressions, manner, and entire demeanor at trial.

184. See Commonwealth v. Louraine, 390 Mass. 28, 453 N.E.2d 437 (1983) (constitutional right guaranteed by the sixth and fourteenth amendment ensures the accused murderer's right to present himself in an unmedicated state when mental capacity is at issue).

185. See State v. Murphy, 56 Wash. 2d 761, 355 P.2d 323 (1960) (en banc) (first degree murder conviction reversed because right to appear in unmedicated state is a protected due process right).


188. In State v. Hayes, 118 N.H. 458, 389 A.2d 1379 (1978), the issue focused on a defendant's competency to stand trial. The court held that due process rights are not violated because the medication, which was also taken at the time of the offense, "has a beneficial effect on the defendant's ability to function and that without the medication he is incompetent to stand trial." Id. at 1381.

B. Restoration of Competency for Execution Violates the Eighth Amendment

The Supreme Court's modern capital punishment jurisprudence reflects a concern for the accuracy and reliability of constitutional rights.\textsuperscript{190} Due to the unique nature of the death penalty, which makes it "profoundly different from all other penalties,"\textsuperscript{191} the Supreme Court requires states to apply more strict substantive and procedural safeguards in the capital punishment context.\textsuperscript{192} The concern for accuracy, need for reliability, and seriousness of the punishment is undermined, however, when states administer antipsychotic drugs to insane death row inmates solely to achieve competency for execution.

The Supreme Court currently holds that execution of insane death row inmates constitutes cruel and unusual punishment and offends the "evolving standards of decency that mark the progress of a maturing society."\textsuperscript{193} Likewise, a state's attempt to synthetically and temporarily restore the competence of an insane death row inmate in order to execute that inmate circumvents and violates both the common law rationale and Ford's prohibition against executing the insane.

I. Restoration of Competency for Execution Compromises Medical Ethics

The definition of "sanity" or "competency" theoretically encompasses a legal, as opposed to medical, term. Judicial proceedings determine sanity or competency even though the medical or psychiatric evaluation ultimately becomes the determinative factor in the court's decision.\textsuperscript{194} The legal determination of sanity requires the medical and psychiatric profession to assume often conflicting dual roles of doctor and evaluator.\textsuperscript{195} First, the psychiatrist must evaluate the death row prisoner to determine competency for execution; second, if found incompetent, the psychiatrist must medically treat the prisoner to restore competency for execution; third, the psychiatrist must

\textsuperscript{190} See Lowenfield v. Phelps, 484 U.S. 231, 238 (1988) (Rehnquist, C.J., joined by Justices White, Blackmun, O'Connor, and Scalia) ("we are naturally mindful in such cases that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"""); see also Johnson v. Mississippi, 486 U.S. 578, 584 (1988) (Stevens, J., joined by Brennan, White, Marshall, & Stevens, J.J.) (eighth amendment creates special need for reliability that death is appropriate punishment in capital case).
\textsuperscript{191} Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).
\textsuperscript{194} See Standard 7-5.7(d), ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS: COMPETENCE AND CAPITAL PUNISHMENT (1987) (qualified mental health professionals should conduct all competency evaluations; because death is irrevocable, the medical expert must possess an impeccable level of expertise. The court, however, is the final decision maker).
\textsuperscript{195} See Entin, supra note 58, at 224-33; Adler, supra note 13, at 31.
report to the judicial factfinder when the death row inmate has chemically regained his or her sanity. In effect, the psychiatrist actively signs the defendant's death warrant by initiating the execution procedure.\textsuperscript{196}

Consistent with the public interest in preserving the medical profession's integrity, the United States Supreme Court defers to the medical profession in so-called "essentially medical" due process questions.\textsuperscript{197} In the eighth amendment setting, this judicial deference recognizes not only the professionalism of the medical community, but also the significance of the profession's ethical standards as "objective evidence of contemporary values" bearing upon society's "evolving standards of decency."\textsuperscript{198} The legal decision-maker primarily relies on the expert psychiatric opinion and the medical evaluation to determine competency of the death row inmate.

Psychiatric evaluations, however, are subjective.\textsuperscript{199} The controversial nature of the death penalty exacerbates this inherent medical imprecision.\textsuperscript{200} Although most conflicting psychiatric evaluations legitimately result from bona fide differences of medical opinion, the doctor's personal convictions regarding the death penalty may influence his or her professional diagnosis.\textsuperscript{201}

Since 1980 the medical profession has adamantly opposed direct physician participation in state executions because the executions conflict with the healing profession's ethical values.\textsuperscript{202} When several states enacted statutes authorizing capital punishment by lethal injection in the late 1970s,\textsuperscript{203} medical organizations openly criticized their forced participation to preparing, administering, monitoring, and supervising the deadly drug.\textsuperscript{204}

Like the use of lethal injections, medical treatment restoring competency constitutes a form of execution that inherently conflicts with medical eth-

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\item See Entin, supra note 58, at 224; Adler, supra note 13, at 31.
\item See Addington v. Texas, 441 U.S. 418, 430 (1979) (Supreme Court defers to "subtleties and nuances of psychiatric diagnosis" in fashioning "clear and convincing evidence" standard for involuntary commitments). See also Washington v. Harper, 110 S. Ct. 1028, 1042-44, 108 L. Ed. 2d 178, 204-06 (1990) (determination to forcibly medicate prisoner is decided by medical professionals—not judges); Vitek v. Jones, 445 U.S. 480, 495 (1980) (prisoner's transfer to a mental hospital is "essentially medical" decision).
\item See Homant, Kennedy, Kelly & Williams, Ideology as a Determinant of Views on the Insanity Defense, 14 J. CRIM. JUST. 37 (1986).
\item See Entin, supra note 58, at 230. History supports this analysis: Vietnam war sympathizers tended to aid men desiring to avoid the military draft and pro-abortion advocates medically assisted women wanting abortions more often than those physicians with less compelling convictions. Id.
\item See Ewing, Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives, 5 BEHAV. SCI. & L. 175, 176 (1987) (Both the American Medical Association and the American Psychiatric Association strongly urged physicians not to participate in legalized state executions).
\item See Ewing, supra note 202, at 176 n.8.
\item See Sargent, Treating the Condemned to Death, HASTINGS CENTER REPORT at 6 (Dec. 1986).
\end{enumerate}
The American Psychiatric Association (APA) and the American Medical Association (AMA) have adopted an official position on the conflicting medical and ethical issues regarding the due process rights of the condemned felon whose competency depends upon medication. These medical organizations resent having to comply with a judicial order compelling medical professionals to administer antipsychotic drugs forcibly to a death row inmate for the express purpose of achieving competency for execution. Although the APA and AMA have not provided medical professionals with specific guidance to resolve the death penalty conflict, each of the Association's ethical principles prohibit a medical professional from participating in a legally authorized execution.

Psychologists and psychiatrists must "avoid any action that will violate or diminish the legal and civil rights of clients or of others who may be affected by their actions." Moreover, the physician's ethical duty to prevent harm to the patient is predicated upon the Hippocratic Oath and other codes of ethics outlined by the American Medical Association.

Scholars refer to Gary Alvord's treatment at the Florida mental institution as a required provision of care or cure that kills a patient. The mental health and medical personnel treating Alvord criticized their forced participation in restoring Alvord to sanity and thus medically creating competency for execution. The staff's position stemmed from their realization that successful medical treatment of Alvord would result in his execution. Even after treating Alvord for two years, psychiatrists and staff reported uneasiness, emotional conflict, and anger at the dilemma posed by Alvord. Other concerns developed among the staff over the issues of patient

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205. See Salguero, supra note 207, at 178 n.64:
In a bizarre twist of the medical treatment situation, the express purpose of competency treatment is to guarantee that the patient will be killed. On its face, the purpose of the treatment is to cure the patient, and the consequence of the cure is to enable the state to execute.

206. The American Psychiatric Association is a national organization consisting of approximately 35,000 physicians who specialize in psychiatry. The American Medical Association is a private non-profit organization of over 280,000 physicians and medical students. See Amici Curiae Brief, supra note 16, at 1-2.


208. AMA Opinion 2.06 prohibits a physician from participating in a legally authorized execution. See Amici Curiae Brief, supra note 16, at 2.


210. See Salguero, supra note 207, at 183 nn.89-93.

211. See Adler, supra note 13.

212. The American Psychiatric Association and the Florida State Hospital Human Rights Advocacy Committee also joined the protest, fully supporting the "hospital staff who refuse on ethical grounds to provide mental health treatment to Mr. Alvord for the purpose of making him competent to be executed." AMNESTY INTERNATIONAL, supra note 5, at 83.

213. Radelet & Barnard, supra note 9, at 303.

214. Id. at 303-06.

One psychiatrist reported first approaching Alvord as one would approach the terminally ill; then thinking the inmate needed to be restored to competency so he could defend himself; then trying to empathize with the victims' family; then
confidentiality and the blurring of evaluative and treatment roles.\textsuperscript{215} Eventually, only volunteer treatment staff worked with Alvord; most permanent staff deemed the dilemma not only unresolvable, but also not worth the moral strength to justify minimal involvement.\textsuperscript{216}

2. \textit{The Purpose of Restoration of Competency Is to Punish the Insane Inmate}

The Supreme Court has flatly held that states may not forcibly administer antipsychotic drugs in order to punish a prisoner.\textsuperscript{217} The majority in \textit{Harper} concluded that forcible medication does not violate a prisoner's constitutional right if the drugs are administered solely for the purpose of treatment\textsuperscript{218} and furthermore, 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."\textsuperscript{219} States forcibly medicate an insane death row inmate, however, to restore competency so that the state may legally execute. Forcible administration solely to create competency to execute ignores the inmate's treatment needs or interests. The state's objective in forcibly medicating is not to treat the prisoner for his personal health and welfare, nor to protect him from harming himself or others, but rather to punish and kill the convicted felon.\textsuperscript{220}

When the Louisiana trial court ordered physicians to forcibly administer the antipsychotic drug Haldol to Michael Perry for the purpose of maintaining his competency for execution, the judicial order, in effect, became the court's prescription pad to carry out the death sentence on Perry.\textsuperscript{221} The order does not permit the physicians to administer antipsychotic drugs to Perry pursuant to their professional medical judgment, but rather requires the doctors to medicate Perry continuously. Because the order is not designed to treat Michael, the physicians are not allowed to alter the dosage or even cease the medication if Perry develops any of the disabling side effects which have previously plagued him.\textsuperscript{222}

\textsuperscript{215} Id. at 303.
\textsuperscript{216} Id. See also Adler, \textit{supra} note 13.
\textsuperscript{218} Harper, 110 S. Ct. at 1037, 108 L. Ed. 2d at 199.
\textsuperscript{219} Id. at 1037, 108 L. Ed. 2d at 199.
\textsuperscript{220} "The medication order in this case rests only on the State’s interest in facilitating Perry’s execution.” Amici Curiae Brief, \textit{supra} note 16, at 11.
\textsuperscript{221} The Order does not direct the doctors to simply continue treating Michael as they see fit. The judge has overridden the doctor’s judgment, has substituted his own “prescription” and has relegated the doctors to the status of technicians whose purpose is to do whatever is necessary to groom Michael for execution.
\textsuperscript{222} See Hudsmith & Giarruso, \textit{supra} note 16, at 38.
Any attempt by states to forcibly medicate a death row inmate in order to restore competency for execution is part and parcel of the state execution order. Restoration is a step toward the inmate's execution, and thus represents a part of the inmate's punishment.

3. Restoration of Competency for Execution Offends Human Dignity

A determination to execute a criminal defendant is one of the most grave decisions that citizens and public officials of the state must make.\textsuperscript{223} Even when a felon has been convicted and sentenced to the death penalty, however, the Supreme Court still restricts a state's authority to implement the death penalty by requiring that the state's authority "be exercised within the limits of civilized standards."\textsuperscript{224}

Unable to arrive at a conclusive definition of competency for execution, the Supreme Court expressly delegated to the states the responsibility to implement competency standards that prevent execution of an insane prisoner.\textsuperscript{225} Despite the \textit{Ford} mandate, legislatures and courts have not adequately resolved competency for execution procedures.\textsuperscript{226} The restoration of competency standards promote confusion because most state statutes invariably omit or only loosely define a synthetic sanity section in their competency and capital punishment articles.\textsuperscript{227}

In Florida, the restoration issue generated extreme conflict between the legislative and judicial branches. In response to \textit{Ford}, the Florida Supreme Court promulgated Emergency Rules governing competency for execution procedures and specifically included a section advocating restoration of competency for execution by the use of psychotropic medication.\textsuperscript{228} On the

\begin{footnotesize}
\begin{enumerate}
\item Ford v. Wainwright, 477 U.S. 399, 416-17 (1986) (Marshall J., plurality) ("[W]e leave to the State the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences").
\item See Johnson v. Cabana, 818 F.2d 333 (5th Cir. 1987), cert. denied, 481 U.S. 1061 (1987) (Brennan, J., dissenting) (Mississippi's procedures for determining competency for execution are inconsistent with \textit{Ford} and violate prisoner's constitutional due process rights).
\item Currently, 40 of the 50 states impose the death penalty. Of these states, only Maryland expressly addresses the synthetic sanity restoration of competency for execution issue. \textit{See infra} notes 241-45 and accompanying text.
\item In re Emergency Amendment to Florida Rules of Criminal Procedure, Rule 3.811, Competency to be Executed, 497 So. 2d 643 (Fla. 1986). Rule 3.811(C), Effect Of Adjudication Of Incompetency To Be Executed: Psychotropic Medication provided:
\begin{enumerate}
\item An adjudication of incompetency to be executed shall not operate as an adjudication of incompetency to consent to medical treatment or for any other purpose unless such other adjudication is specifically set forth in the order.
\item A prisoner who, because of psychotropic medication, has sufficient ability to understand the nature and effect of the death penalty and why it is to be imposed upon him or her shall not be deemed incompetent to be executed simply because his or her satisfactory mental condition is dependent upon such medication.
\item Psychotropic medication is any drug or compound affecting the mind, behavior, intellectual functions, perception, moods, or emotion and includes anti-psychotic, anti-depressant, anti-maniac, and anti-anxiety drugs.
\end{enumerate}
\item Id. at 644.
\end{enumerate}
\end{footnotesize}
other hand, the legislative version, proposed by the Criminal Law Section of the Florida Bar and subsequently adopted as the official rule, significantly omitted the subsection expressly approving restoration of competency by chemical treatment. Whether the omission represents Florida's lack of endorsement for executing an individual whose competency depends upon psychotropic medication must await further determination by express legislation or judicial interpretation of the statute.

Texas is one of few states to address judicially this conflict concerning the restoration of competency for execution. In *Ex Parte Jordan* the highest criminal court in Texas interpreted *Ford* to require a stay of execution, rather than a permanent suspension, when an inmate is found incompetent. Moreover, the court concluded that *Ford* does not require medical treatment of an incompetent death row inmate. The Texas Court of Criminal Appeals analyzed the Texas statute prohibiting transfer of death row inmates to mental institutions for medical restoration of competency and held that the death row inmate's constitutional rights guaranteed only in-house medical treatment. Psychiatrists examining the incompetent inmate Jordan concluded that Jordan, who likely does not desire medical treatment if it will ultimately result in his execution, could be restored to competency for execution in the near future if given appropriate antipsychotic medication. The court noted that since Texas law currently does not allow transfer to a mental hospital for such extensive medical restoration treatment, Texas must wait indefinitely for Jordan to regain competency. The Texas court recognized this dilemma resulting from an incompetency for execution determination and pleaded for a legislative resolution providing specific procedures governing medical restoration of competency for execution.

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230. See supra note 226.
231. Telephone interview with Professor Gerald Bennett, Chairperson, Subcommittee on Rule 3.811; Competency to be Executed, University of Florida School of Law (July 17, 1989); and Professor Jim Ellis, Reporter, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS: COMPETENCY AND CAPITAL PUNISHMENT (July 19, 1989). Although neither could remember exactly why Subsection (c) was omitted, both recall discussing the medical and ethical issues of competency based on medication. ("It's a catch-22 situation once you decide one has to be executed." (Statement by Bennett)).
232. Martin v. Dugger, 686 F. Supp. 1523 (S.D. Fla. 1988), the first Florida case to test its state competency to be executed procedures in light of *Ford*, does not address whether synthetic sanity can be induced by antipsychotic medication.
234. *Id.* at 254.
235. *Id.*
236. TEX. CODE. CRIM. PROC. ANN. art. 46.01 § 2(a) (Vernon 1979) expressly precludes transfer of death row prisoners to a mental facility.
237. Ex Parte Jordan, 758 S.W.2d at 254.
238. *Id.* at 251 (court ordered continual 90-day competency evaluations of Jordan).
239. *Id.* at 255.
240. *Id.* at 253.
Maryland is the only state to address legislatively medical restoration of a death row prisoner.241 The Maryland statute incorporates Justice Powell’s two-pronged Ford standard242 to define specifically both a death row inmate243 and the standard of competency for execution.244 Although Maryland has yet to utilize this statutory standard, the procedures seem constitutionally adequate to execute a synthetically sane prisoner who has been receiving medication prior to his or her competency for execution hearing. The Maryland statute envisions a singular competency for execution determination: if the inmate is found competent for execution, albeit through synthetic sanity, then the state may proceed with its punishment of death; if the inmate is found incompetent for execution, regardless of the antipsychotic medication or lack thereof, then the state must commute the sentence to life imprisonment. At this point, Maryland is prohibited from further attempting to involuntarily medicate the inmate with antipsychotic drugs in order to create competency for execution.245

The other thirty-nine states that authorize the death penalty provide no specific guidance for restoration of competency. Most state statutes follow Ford and require suspended execution if a prisoner is determined incompetent for execution.246 The reprieve, however, concludes once the inmate has


242. See supra notes 65-67 and accompanying text.

243. "'Inmate' means an individual who has been convicted of murder and sentenced to death. MD. ANN. CODE art. 27, § 75A(a)(1) (1987 & Supp. 1989).

244. "'Incompetent' means the state of mind of an inmate who, as a result of a mental disorder or mental retardation, lacks awareness:
1. Of the fact of his or her impending execution; and

245. In 1985, Governor Hughes created a Task Force to address criminal mental health services in Maryland. Maryland legislative history indicates that the Task Force struggled with the restoration of competency issue.

One of the unfortunate by-products of precluding execution while an inmate remains mentally incompetent is the awful dilemma it presents to the doctors responsible for the inmate’s medical care. They would be called upon to treat the inmate so that he or she can regain sufficient competence to be gassed to death. No attention was given to that problem by the Supreme Court, and little or no attention has been given to it by any state legislature.

By a close vote, with less than half of the Task Force members voting, it was recommended that the law provide that, if the court finds an inmate to be incompetent, the sentence should be immediately commuted to life imprisonment without possibility of parole. The Task Force recognizes that opinion may be divided as to such a provision.


246. Ford, 477 U.S. at 408-9 n.2 (Marshall, J).
been “restored” to sanity, 247 “recovers” his reason, 248 “becomes fit to be executed,” 249 is found “mentally competent to proceed,” 250 has the “requisite mental capacity” 251 or is simply no longer insane. 252 The state statutes fail to define these terms or consider the impact of the restoration effect of antipsychotic drugs upon the competency determination. Most of these states merely transfer the incompetent prisoner to a mental hospital without providing any procedure to restore competency for execution. 253

The American Bar Association (ABA) recently promulgated Competence and Capital Punishment standards as an addition to its ABA Criminal Justice Mental Health Standards (Standards). 254 The Standards provide guidelines limiting a state’s authority to adjudicate criminal proceedings of a mentally incompetent prisoner. 255 The Standards consider both the integ-


Four states have adopted by judicial decision the common law rule prohibiting execution of the insane; these states provide no guidance to the restoration of competency issue:


(3) Tennessee - Jordan v. State, 124 Tenn. 81, 89-90, 135 S.W. 327, 329 (1911);


Idaho recently repealed Idaho Code § 19-2709-13 (1987), a statute specifically addressing insanity and execution, but has yet to replace it with another provision. The remaining states with the death penalty, Texas and Vermont, lack a specific statute addressing either competency for execution or restoration of competency for execution.

Ten states currently do not have the death penalty, and therefore have not devised competency for execution statutes: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New Hampshire, North Dakota, West Virginia, Wisconsin, and Oregon.


255. Courts, however, are not bound to follow the ABA Standards. See Rector v. Lockhart, 727 F. Supp. 1285, 1292 (E.D. Ark. 1990) (after mental competency team evaluated
rity of the criminal justice system and the insane death row inmate’s rights, yet refrain from taking an active position on the controversial nature of the death penalty.256

Specifically, Standard 7-5.6 defines mental competency for execution and provides for a stay of the death sentence upon a finding of mental incompetency.257 The Standard incorporates Justice Powell’s two-pronged Ford standard into a four-part test.258 In addition to understanding the nature of the punishment and the rationale behind infliction of the death penalty, the convict must possess the rational capability to understand the criminal proceedings and must maintain sufficient ability to assist and aid an attorney in the defense.259

Standard 7-5.7 provides general guidelines for the medical professional to conduct a competency for execution evaluation.260 Yet the Standard’s restoration of competency procedures, like the state statutes, are ambiguous. The Standard merely provides for an evaluation of the inmate’s “current mental condition” at a judicial hearing when the death row inmate has been “restored to competence.”261

Pursuant to Ford, the ABA recommends that states develop their own restoration of competency procedures.262 The Standard, however, sidesteps the issue regarding execution of a death row inmate whose mental competence depends solely upon psychotropic medication.263 Additionally, despite the moral conflict created by forcible state administration of antipsychotic

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257. Id. Standard 7-5.6(a).
258. Id. Standard 7-5.6(b).
259. Id. Commentary to Standard 7-5.6 states that the primary rationale for expanding Powell’s two-pronged test is based on the integrity of the criminal judicial system: “The possibility that a defendant could be executed because of inability to communicate information that could be relevant to the decision whether to carry out the death sentence is equally unacceptable as executing someone who could not understand the penalty.” Commentary to Standard 7-5.6, n.7.


261. Id. Standard 7-5.7(i).
262. Id.

The Standard leaves to the discretion of the states the issue of whether to seek restoration of competence and whether to attempt to persuade the court to lift the stay of execution. Although it is beyond the scope of these Standards, it is important for states to address the issues raised by permanently incompetent convicts on death row.

Commentary to Standard 7-5.7.

263. Id. Commentary to Standard 7-5.7 expressly states: “The Standard does not address the issue of possible therapeutic or habilitative efforts to restore the competence of a condemned prisoner. Such efforts raise profoundly troubling ethical issues for mental disability professionals.” Id.
medication to death row inmates,264 the ABA refused to take a position on the death row prisoner's right to refuse treatment.265 Nonetheless, the ABA Standards maintain that the defendant must possess the necessary mental capacity to work with his or her attorneys in preparation of a defense.266 The Standards thus do not recognize a defendant's right to refuse reasonable treatment creating competency to stand trial.267

The Ford Court expressly held that the lack of state statutes advocating execution of insane death row inmates established that civilized society was fundamentally offended by such cruel and unusual punishment.268 Similarly, the lack of state statutes, the opinions of medical professionals, and the unclear stance adopted by the ABA Criminal Justice Mental Health Standards regarding restoration of competency for execution reveals that society is morally and ethically offended when states administer medication solely for the purposes of grooming an inmate for execution. “Objective evidence of contemporary values” indicating an emerging national consensus against execution of synthetically restored individuals supports evidence that executing the restored inmate is an affront to the fundamental human dignity protected by the eighth amendment.269

C. Restoration of Competency for Execution Violates the Fourteenth Amendment

When a "sufficient doubt" of incompetency exists, due process requires a hearing to determine legal competency to stand trial;270 when a "reasonable probability" of insanity exists, due process and the eighth amendment require suspension of the death sentence.271 Ford requires the prisoner to demonstrate only a "threshold showing" of insanity in order to initiate the competency evaluation and hearing process.272 "Reasonable probability" and "threshold showing," however, do not implicate the same standard.273 Whether Ford's threshold requirement is applicable in the restoration con-
Because a Ford hearing occurs after conviction and sentencing, both a judicial determination that the prisoner is competent to stand trial and a fact-finding determination that the prisoner is sane at the time of the offense have already occurred. The state may base its presumption that the prisoner is sane and competent for execution on these two prior competency evaluations. A Ford determination of incompetency for execution, however, extinguishes the state's presumption of sanity. As a result, any medical evaluation determining restoration of competency must overcome the clear presumption and factual finding of incompetency. Additionally, once found competent the defendant inmate can make repeated requests for new incompetency hearings immediately prior to execution. Although the state possesses a strong interest in preventing the death row inmate from abusing insanity claims in order to delay execution, the insane inmate possesses an equally strong due process interest in avoiding execution if incompetent.

The Supreme Court held in Harper that “[t]he liberty of citizens to resist the administration of mind altering drugs arises from our Nation’s most basic values.” The Court recognized that the fourteenth amendment pro-


275. See Hance v. Kemp, 258 Ga. 649, 373 S.E.2d 184, 192 (1988) (Ford-hearings may only result when execution is immediate; habeas corpus allegation of present sanity is premature for Ford competency for execution purposes).


277. Id. at 426 (Powell, J., concurring in part and concurring in judgment); id. at 429 (O’Connor, J., with White, J., concurring in part and dissenting in part).

See Evans v. McCotter, 805 F.2d 1210 (5th Cir. 1986) (sister’s affidavit that death row inmate brother is currently insane is not sufficient to overcome state presumption of sanity).


279. Standard 7-5.7(h), ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS: COMPETENCE AND CAPITAL PUNISHMENT (1987) (counsel, however, may not plead incompetency merely to delay the proceedings).

See Salguero, supra note 207, at 179 n.71; see also State v. Perry, 502 So. 2d 543, 564 (La. 1986) (state will not impose death penalty if inmate found insane subsequent to conviction for murder); LA. CODE CRIM. PROC. ANN. art. 642 (West 1981) (prisoner possesses right to question “at any time” competency for execution). Cf. Martin v. Dugger, 686 F. Supp. 1523, 1560 (S.D. Fla. 1988) (theoretically, repeated competency determinations are permissible, yet the probability of erroneous incompetency claims is high).

280. See Nobles v. Georgia, 168 U.S. 398, 405-06 (1897) (court’s fear of repeated competency claims factor in denial of jury trial to determine competency after sentence).

281. Ford, 477 U.S. at 429 (O’Connor, J., with White, J., concurring in result and dissenting in part).

tects a prisoner's liberty interest in refusing forcible administration of antipsychotic drugs. Execution achieved solely by synthetic sanity restoration deprives the death row inmate of his or her liberty interest in a basic and fundamental sense.

If the standard of restoration of competency for execution refers only to the defendant's ability to function and to make a connection between death and his crime, then courts likely will hold an insane, yet technically synthetically sane, convicted inmate competent. On the other hand, if the standard of restoration of competency for execution incorporates the spirit of Ford, Penry, and Harper, then courts may find a constitutional due process justification to prohibit execution through synthetic sanity restoration. Under a due process analysis, a court must balance the death row inmate's liberty interest in protecting his dignity and bodily integrity against a state's alleged reasons for invading individual liberty. Ford posits the rationale for accurate and reliable truth finding procedures by providing increased due process protection for capital defendants. Since complete consideration of mitigating evidence enhances the reliability of the jury sentencing decision, Penry proposes the argument that evidence of competency based on antipsychotic medicine must be individually evaluated to determine competency for execution. Although the majority did not universally recognize the prisoner's due process liberty interest in avoiding unwanted antipsychotic drugs, Harper interpreted the due process clause to permit states to administer antipsychotic drugs against an inmate's consent only when the inmate is dangerous to himself or herself or others, and the medication is in the best interest of the prisoner. Thus, the forcible administration of antipsychotic drugs must, in some way, further legitimate penal interests. Penology is defined as "the science of prison management and rehabilitation of criminals." Because the capital punishment context lacks any rehabilitative characteristic, this standard appears meaningless in a restoration of competency for execution analysis.

The death row inmate's entire medical history is relevant when a panel of psychiatrists observe the appearance and demeanor of the prisoner to determine competency for execution. Psychiatric and medical experts experience difficult problems in evaluating and diagnosing mental competency. This task, therefore, should not be obscured by altering the conduct or masking the major symptoms of the inmate's mental disorder with antip-
sychotic drugs. A medical evaluation of competency should be conducted after the inmate’s mental condition stabilizes at a predictable level. Otherwise, a state cannot guarantee that the inmate is in fact competent at the time of his execution as required by Ford. Although a defendant’s rights are limited in a hearing to determine competency for execution, medicating a defendant and then evaluating the prisoner’s competency in the medicated state does not comport with the insane prisoner's constitutionally protected due process rights and, furthermore, is not the type of fact finding procedure protected by the Constitution.

D. Proposal: Commute the Death Sentence to Life Imprisonment Upon a Determination of Incompetency for Execution

English common law presents a strong and consistent precedent to commute death sentences for persons found incompetent for execution.292 Since the Supreme Court reinstated capital punishment in 1976, no state has participated in an execution involving a prisoner found incompetent for execution and then restored to sanity.293 If either Gary Alvord or Michael Perry is executed, he likely will be the first.294

Both scholars295 and medical organizations296 who have examined Alvord’s unique case agree that executing Gary Alvord would cause ethical, medical, social, and economic problems that far surpass any potential benefits for the state of Florida.297 Medical experts have concluded that Gary Alvord suffers from a continuing mental illness extensively documented since early childhood.298 While he has experienced some periods of lucidity, those periods are both infrequent and solely the result of the medication.299 Alvord continues to be mentally ill; yet Florida spends time, money, and


293. Letter from Bonnie R. Strickland, Ph.D., President, American Psychological Association to The Honorable Bob Martinez, Governor of Florida (August 20, 1987) [hereinafter STRICKLAND LETTER].

294. Id.

295. See Adler, supra note 13, at 33; Radelet & Barnard, supra note 9, at 300.

296. See STRICKLAND LETTER, supra note 293; AMNESTY INTERNATIONAL, supra note 5, at 83.

297. Although the ethical and moral issues overshadow fiscal concerns, it should be noted on monetary grounds alone, ample reasons exist to commute the death penalty to life imprisonment. A 1982 study by the New York Public Defenders Association indicated that the cost of litigating an average New York death penalty case costs approximately $1.8 million; an average life imprisonment case costs approximately $602,000. Absent commutation, the uniqueness of the death sentence guarantees that the costs of medical treatment and security will greatly surpass the cost of treating other inmates. The cost of execution also includes complex mental health evaluations and prolonged litigation. AMNESTY INTERNATIONAL, supra note 5, at 170.

298. TANAY LETTER, supra note 134, at 8; Adler, supra note 13, at 32.

299. TANAY LETTER, supra note 134, at 8-12; Adler, supra note 13, at 32.
medical resources on him so that he can be readied and groomed for execution. When Alvord arrived at the hospital, the Florida State Hospital Human Rights Advocacy Committee, a group of hospital staff, took offense at what they saw as a misuse of medical resources and recommended that a sentence of life imprisonment be instated whenever a death row prisoner has been declared mentally incompetent for execution.  

A logical alternative to the troubling issues posed by incompetency and restoration of competency for execution is to grant clemency to Gary Alvord and Michael Perry and commute their death sentences to consecutive life terms with no parole. The proposal to commute the death sentence to life imprisonment when a convicted felon becomes incompetent for execution reflects both the constitutional and common law prohibition against executing a mentally incompetent individual as cruel and unusual punishment. Allowing psychiatric treatment to result in the patient's death compromises medical ethics and degrades both the state's interest in promoting public health care and the judicial deference reserved for the physician in diagnosing medical conditions.

I. The State Perspective

From the state perspective, the societal value of restoring competency for the express purpose to execute does not outweigh the inmate's right to commutation. States have a constitutional duty and recognized interest in administering medical treatment to incarcerated mentally ill individuals. Under Harper, however, the duty permits forcible medication only when the inmate is dangerous to himself or herself, others, or property. States also have a duty to minimalize criminal acts against society. If the administration of antipsychotic drugs restores competency which ultimately results in execution, then the state achieves its societal goal of protecting the community against dangerous offenders. Society, however, can maintain its criminal protection simply by not releasing the convicted inmate back into the mainstream of society. At least one state, Maryland, has enacted a statute

300. AMNESTY INTERNATIONAL, supra note 5, at 84 n.15. The Florida State Hospital Human Rights Advocacy Committee recommended that a death row inmate who has been determined to lack the mental capacity to be executed should have his sentence commuted to life imprisonment before being sent to a state facility for mental health treatment. See supra note 212.

301. See Ford, 477 U.S. at 407 (citing Sir Edward Coke for the rationale that executing an insane person is "a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others"); see also Standard 7-5.6, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS: COMPETENCE AND CAPITAL PUNISHMENT (1987) (opposing execution of inmates whose incompetence resulted from either mental illness or mental retardation).


304. A survey of over 900 Georgia residents, three-fourths of whom advocated capital punishment, indicated that 52% would favor, as an alternative to the death penalty, life imprison-
whereby the death sentence of an inmate determined incompetent for execution is automatically commuted to life imprisonment. 305 Thus, a prisoner once sentenced to death remains in a lifetime maximum security setting either in a Maryland state penitentiary or in a mental hospital.

2. The Medical Perspective

From a medical perspective, the decision whether to provide psychiatric and medical treatment to an incompetent inmate in order to groom the inmate for execution or to refuse treatment places doctors in an emotional and ethical conflict. If a physician withholds psychiatric or medical treatment, then incompetency has been prolonged, and the state will forego execution. By doing so, however, the doctor inhumanely confines the inmate to a life of mental anguish and torment. 306 The ethical decision to perpetuate the death sentence compromises the physician's duty to cure the patient and psychologically impairs an inmate's ability and motivation to heal.

Psychiatric treatment is an essentially medical function. 307 States thus should defer to the ethical duty of the medical profession to cause no harm to patients by continuing to recognize the common law right to commutation upon a determination of insanity. Since states have no constitutionally acceptable interest in carrying out the death penalty against the insane, 308 states should not be permitted to transform medical treatment of the death row inmate into a device merely to punish by execution. Providing medical treatment aimed at executing the patient once cured directly conflicts with society's humanitarian commitment to medically treat prisoners. Commutation, therefore, resolves the dilemma posed by the successful introduction of antipsychotic drugs into medical treatment. 309

3. The Death Row Inmate's Perspective

From the death row inmate's perspective, due process liberty interests and individual constitutional rights outweigh the societal value of restoring competency for execution. If treatment of the insane prisoner only temporarily restores the inmate to sanity and does not cure the mental disorder, then due
process requires an examination of not only when the execution should occur but whether the prisoner should ever be executed. Although a death row prisoner possesses fewer constitutional rights and less guaranteed protections than a prisoner at trial or sentencing, Ford’s "evolving standards of decency" seemingly prohibit restoration of competency for execution. A logical alternative, therefore, involves commutation of the sentence to life imprisonment.

V. CONCLUSION

The Constitution permits and a majority of the states exercise capital punishment, the most severe and detrimental deprivation of liberty that a state can impose upon a citizen. Despite one’s position on capital punishment as a moral or public policy issue, the overwhelming body of both common law and constitutional law indicates that society must not execute insane prisoners. Although public opinion polls do not always consistently reflect public sentiment, certain identifiable segments in society, especially the medical profession, do not support restoration of competency for execution.

Different standards of insanity are imposed on the defendant at different periods throughout the criminal proceeding. Although a majority of courts and the ABA Criminal Justice Mental Health Standards strongly support competency to stand trial based on antipsychotic drugs, neither the courts nor the ABA have upheld the administration of antipsychotic drugs to a death row inmate in order to determine mental competency for execution.

In Ford v. Wainwright the Supreme Court upheld the common law philosophy prohibiting execution of insane convicts under the eighth amendment, questioned the constitutionality of state procedures to evaluate the mental status of death row inmates, and guaranteed insane convicted capital offenders certain due process rights, including those in the post-conviction hearing stage. Yet the ambiguous and complex holding in Ford does not provide the states with a bright line rule for devising fair and constitutional standards for restoration of competency. Nevertheless, the procedural death penalty requirements and its imposition on executions of the mentally ill in Ford and the mentally retarded in Penry provide important insight into the issue of restoration of competency for execution.

While compelling arguments indicate that a prisoner in the post-conviction stage should receive only minimal consideration of mental capacity in any form, including medical restoration, equally compelling arguments incorporate common law and Ford's eighth amendment prohibition against executing an insane prisoner. In addition to the protection of fundamental dignity in Ford, medical ethics and a prisoner's constitutional right to treatment also provide "objective evidence of contemporary values" that commutation is necessary to avoid an eighth amendment violation of cruel and unusual punishment.

A requirement that states should carefully evaluate a person's restored mental capacity would ensure the fourteenth amendment due process safeguards envisioned by Ford and Harper. Medical professionals must be allowed to administer antipsychotic medication pursuant to the inmate's
personal medical treatment needs; states should not seek forcible administra-
tion of the antipsychotic drugs because the intended result is to punish,
rather than cure, the inmate by grooming him or her for execution. Finally,
if the medically created synthetic sanity is a "but for" cause of Ford’s two-
pronged requirement that an inmate understands both the death penalty and
the reason behind its imposition, then due process guarantees have not ade-
quately protected the insane death row inmate’s constitutional rights; the
antipsychotic medication creates only fleeting competency, and does not
cure the mental disorder. The ultimate analysis, however, rests on the evolv-
ing standards of decency guiding contemporary society. Responsibility
turns not on whether the state can restore a death row inmate to synthetic
sanity and thereby create legal competency, but on whether society has a
duty to ensure that a prisoner, according to constitutional standards, pos-
sesses the capacity to be executed.