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THE ILLUSION OF SANITY: THE CONSTITUTIONAL AND MORAL DANGER OF MEDICATING CONDEMNED PRISONERS IN ORDER TO EXECUTE THEM

LYN SUZANNE ENTZEROTH*

One of the more complicated and morally fraught aspects of the death penalty scheme in the United States is its imposition on individuals suffering from severe mental illnesses, such as schizophrenia or other psychotic or delusional disorders.¹ In *Ford v. Wainwright*² and *Panetti v. Quarterman*³, the U.S. Supreme Court recognized that the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibits the execution of someone deemed insane.⁴ However, these decisions left unanswered an important question: Can a state execute a condemned inmate whose sanity appears to be restored by the administration of antipsychotic drugs? This question raises significant Eighth Amendment and due process issues, as well as moral and ethical problems for the medical personnel who must administer the antipsychotic medication so as to render the inmate ready to execute. Further complicating this brew of legal and ethical concerns are constitutional doctrines allowing prisoners to be medicated, against their will, if it is in the best interest of the prisoner and a substantial state interest is at stake. Thus, there is a more troubling question: When can the state forcibly medicate a condemned prisoner for the purpose of execution?

Given the growing number of mentally ill prisoners on death row⁵ and the advances of antipsychotic medications,⁶ the Supreme Court will likely face

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1. For a discussion generally on the imposition of the death penalty on the mentally ill, see Lyn Entzeroth, *The United States' Continuing Practice of Executing the Mentally Ill*, 20 AMICUS J. (forthcoming 2009).

2. 477 U.S. 399 (1986).

3. 127 S. Ct. 2842 (2007).

4. *Ford*, 477 U.S. at 399, 409–10; *Panetti*, 127 S. Ct. at 2847. See generally Entzeroth, *supra* note 1.

5. According to some reports, 5-10% of death row inmates suffer from severe mental illness. See Vidisha Barua, "Synthetic Sanity": *A Way Around the Eighth Amendment?*, 44 CRIM. L. BULL. 561, 561 (2008); Henry F. Fradella, *Competing Views on the Quagmire of Synthetically Restoring Competency to Be Executed*, 41 CRIM. L. BULL. 447, 447 (2005).

questions of whether a medicated, mentally ill prisoner can be executed and whether a state can force a prisoner to take antipsychotic medication in preparation for execution.⁷ The case of Gregory Thompson, a mentally ill man awaiting execution on Tennessee's death row, raises these questions and similar concerns presented by executing a medicated, mentally ill prisoner.⁸ It seems likely that this dilemma and the scope of the Eighth Amendment's prohibition on the execution of the insane will be one of the significant death penalty issues facing the United States in the next decade.

This article considers the fate of those death row inmates whose mental illnesses render them so disabled that they fall within the exemption to the death penalty that the Supreme Court has recognized for the insane, but whose mental illness symptoms may be alleviated or lessened through the use of antipsychotic medication administered either voluntarily or involuntarily.⁹ In exploring this problem, the article first considers the death penalty exemption for the insane and the current scope of that exemption under the Eighth Amendment of the U.S. Constitution. The article then examines case law allowing the state, under certain circumstances, to administer antipsychotic medication involuntarily to mentally ill prisoners. Next, the article explores the collision of these two constitutional doctrines and the constitutional and ethical problems raised by executing mentally ill, condemned prisoners who can only be rendered execution-competent through antipsychotic medication. The article further highlights the American Bar Association's (ABA) recommendation on the imposition of the death penalty on the severely mentally ill. Ultimately, the article recommends that the Eighth Amendment's exemption of the insane from the death penalty includes persons whose sanity can only be restored through medication.

1. THE CONSTITUTIONAL DOCTRINE EXEMPTING DEATH ROW INMATES DEEMED INSANE FROM EXECUTION

Ever since the Supreme Court allowed the reinstatement of various death penalty schemes in the mid-1970s,¹⁰ the Court has recognized certain classes or

6. See generally Barua, *supra* note 5, at 561; NATIONAL INSTITUTE OF MENTAL HEALTH: MEDICATIONS (2007), available at <http://www.nimh.nih.gov/health/publications/medications/medications.pdf> (explaining how and why medications can be used to treat mental health problems) [hereinafter MEDICATIONS].

7. See Barua, *supra* note 5, at 571–72 (making a similar prediction about the likelihood that the Supreme Court will confront this issue).

8. Thompson was convicted of capital murder and sentenced to death in 1985. *Thompson v. Bell*, 315 F.3d 566, 573, 576 (6th Cir. 2003). There have been significant post-trial proceedings in both state and federal court. *Id.* at 576–84. At present, Thompson is still on death row in Tennessee.

9. For a general discussion of the limits of this exemption, see Entzeroth, *supra* note 1.

10. In 1972, in *Furman v. Georgia*, 408 U.S. 238 (1972), the U.S. Supreme Court ruled that the death penalty system in Georgia was unconstitutional, partly because it allowed

groups of people on whom the death penalty cannot be imposed.¹¹ In *Ford v. Wainwright*,¹² the Court gave constitutional effect to the long-standing common law prohibition on executing the insane. In *Ford*, the Court considered the plight of Alvin Bernard Ford, a severely mentally ill man facing execution in Florida.¹³ Ford had been diagnosed with various mental illnesses, including schizophrenia, which is a mental illness characterized by “delusions, hallucinations, disorganized speech, [and] grossly disorganized or catatonic behavior.”¹⁴

While it appears that Ford was mentally competent at the time of the commission of his crime and at his trial, during his time on death row Ford’s mental health and his grasp on reality disintegrated.¹⁵ According to the Court, at one point Ford’s ability to communicate degenerated “into nearly complete incomprehensibility, [with Ford] speaking only in a code characterized by intermittent use of the word ‘one,’ making statements such as ‘Hands one, face one. Mafia one. God one, father one, Pope one. Pope one. Leader one.’”¹⁶ At another point, Ford referred to himself as “Pope John Paul, III.”¹⁷ At least one doctor examining Ford “concluded that Ford had no understanding of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed sincerely believed that he

unfettered discretion in determining who would be sentenced to death. *Id.* at 263. *Furman* effectively struck down all the death penalty systems and statutes then in place across the United States. States and the federal government reacted by enacting new statutes that attempted to address the concerns raised in *Furman*. In 1976, in a set of five cases, the Supreme Court gave constitutional approval to a death penalty system, providing direction in the sentencing process but allowing juries discretion to consider mitigating circumstances and impose a sentence less than death. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); *Proffitt v. Florida*, 428 U.S. 242, 260 (1976); *Jurek v. Texas*, 482 U.S. 262, 271-72 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976). For criticism and aspects of these decisions by Justice Blackmun, see *Callins v. Collins*, 510 U.S. 1141, 1141 (1981) (dissenting from denial of certiorari), and by Justice Scalia, see *Walton v. Arizona*, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring in part and concurring in the judgment).

11. For example, the death penalty cannot be imposed on someone under the age of eighteen at the time of the commission of the crime, such as in *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005), or on individuals diagnosed with mental retardation. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

12. 477 U.S. 399 (1986).

13. *Id.* at 409-10.

14. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 298 (4th ed. 2000) [hereinafter DSM-IV-TR].

15. *Ford*, 477 U.S. at 401-02. For a compelling discussion of how time spent on Oklahoma’s death row contributed to the deterioration of the fragile mental health of wrongfully convicted death row inmate Ron Williamson, see JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* 241, 245-48, 257-62 (Doubleday 2006).

16. *Ford*, 477 U.S. at 403; see Entzeroth, *supra* note 1.

17. *Ford*, 477 U.S. at 402.

would not be executed because he owned the prisons and could control the Governor through mind waves."¹⁸

Ford's severely diminished mental condition placed before the Court the question of when, if ever, a state can execute someone deemed insane. The answer to that question was relatively, and perhaps deceptively, straightforward: The Court found that a state cannot execute someone who is insane at the time of his execution.¹⁹ In reaching this conclusion, the Court considered both the history of the Cruel and Unusual Punishment Clause and contemporary standards with regard to the execution of the insane.²⁰

Turning first to the history of the Eighth Amendment, the Court stated that the Eighth Amendment, "at a minimum," prohibits punishments outlawed at the time of the Amendment's ratification.²¹ The Court observed that at the time of the Eighth Amendment's ratification in 1791, the common law forbade the execution of the insane.²² The Court cited the eighteenth century legal commentator William Blackstone, who observed that the execution of the insane had long been deemed barbaric and inhumane and that such executions should not be carried out.²³ Similarly, the Court noted that "Sir Edward Coke had earlier expressed the same view of the common law of England: '[B]y intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.'"²⁴ Thus, relying on common law and societal standards in effect at the time of the Eighth Amendment's ratification, the execution of the insane could not constitutionally stand.

In addition to the standards and restrictions on punishment in effect at the time of ratification, the *Ford* Court interpreted the Cruel and Unusual Punishment Clause to include "evolving standards of decency that mark the progress of a maturing society."²⁵ This approach to interpreting the Eighth Amendment meant that the Court could consider contemporary practices and social norms in its determination of the Eighth Amendment's proscription on

18. *Id.* at 403; Entzeroth, *supra* note 1.

19. *Ford*, 447 U.S. at 410.

20. *Id.*

21. *Id.* at 405.

22. *Id.* at 406-07 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *24-*25).

23. *Id.*

24. *Id.* at 407 (citing SIR EDWARD COKE, 3 INSTITUTES OF THE LAW 6 (6th ed. 1680)).

25. *Id.* at 406 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). As the Court stated: "[T]he Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. Not bound by the sparing humanitarian concessions of our forebears, the Amendment also recognizes the "evolving standards of decency that mark the progress of a maturing society." In addition to considering the barbarous methods generally outlawed in the 18th century, therefore, this Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects.

Id. at 406 (citations omitted).

cruel and unusual punishments. In this regard, the *Ford* Court found contemporary death penalty practices relevant to the state's ability to carry out a death sentence on someone who is insane at the time of execution.²⁶ In 1986, at the time of the *Ford* decision, the Court found that no state permitted the execution of someone who is insane at the time of execution.²⁷ Therefore, the Court found that contemporary standards prohibited the execution of the insane.²⁸

Interestingly, the Court did not provide a definition or standard for determining insanity, but rather focused its attention on the procedures that states must afford to someone who claims insanity. However, the Court's explanation of the rationales for death penalty prohibition may provide some insight:

The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. 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.²⁹

Therefore, part of the purpose of the prohibition is to prevent the execution of those whose mental illness robs them of the ability to understand or comprehend their pending execution and the reasons for the execution, as well as to reflect society's abhorrence of the infliction of death on such mentally ill individuals.³⁰

26. *Id.*

27. *Id.* at 408–09.

28. *Id.* at 409–10.

29. *Id.*

30. The *Ford* Court did not declare Ford insane and thus exempt from the death penalty, even though the Court discussed extensive evidence supporting the conclusion that Ford was unable to understand his pending execution or the reason for it. *Id.* at 418. Instead, the Court remanded Ford's case to the lower federal courts for further proceedings applying the standards the Supreme Court had articulated. *Id.* The federal district court concluded that Ford was not insane, despite all the evidence of his delusions and mental illness. Obituary, *Alvin Ford, 37, Dies; Stricken on Death Row*, N.Y. TIMES, Mar. 19, 1991, § L, at 11. Ford died in prison awaiting execution. *Id.*; see also Entzeroth, *supra* note 1.

Justice Powell in his concurrence addressed this issue more explicitly. He opined that “the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.”³¹ In the wake of *Ford*, Powell’s standard appears to have guided state courts³² and legislatures.³³

31. *Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment).

32. See, e.g., *People v. Geary*, 131 N.E. 652, 654 (Ill. 1921) (noting state cannot execute person who is insane); *State v. Allen*, 15 So. 2d 870, 871 (La. 1943) (“One who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition.”); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (recognizing common law and Eighth Amendment prohibition on execution of insane and setting out standards and procedures to be applied in cases of insane prisoners facing execution).

33. See, e.g., ALA. CODE § 15-16-23 (1995); (“If after conviction and sentence to death, but at any time before the execution of the sentence, it is made to appear to the satisfaction of the trial court that the convict is then insane, such trial court shall forthwith enter an order in the trial court suspending the execution of the sentence to the time fixed in the order”); ARK. CODE ANN. § 16-90-506 (2006) (“When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness” an inquiry will be held to determine competence for execution.); CAL. PENAL CODE § 3704 (West 2000) (“[I]f it is found that the defendant is insane, the warden must suspend the execution[.]”); CONN. GEN. STAT. ANN. § 54-101 (West 2001) (When person sentenced to death is found to be “insane, said court or such judge shall order the sentence of execution to be stayed and such person to be transferred to any state hospital for mental illness for confinement, support and treatment until such person recovers sanity[.]”); FLA. STAT. ANN. § 922.07 (West 2001) (“When the Governor is informed that a person under sentence of death may be insane, the Governor shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person.”); GA. CODE ANN., § 17-10-61 (2008) (“A person under sentence of death shall not be executed when it is determined under the provisions of this article that the person is mentally incompetent to be executed”); KAN. STAT. ANN. § 22-4006 (2007) (If at conclusion of hearing on competency to execute, the “judge determines that the convict is insane, the judge shall suspend the execution until further order.”); KY. REV. STAT. ANN. § 431.240 (1999) (“If the condemned person is insane, as defined in KRS 431.213 . . . on the day designated for the execution, the execution shall be suspended until the condemned is restored to sanity”); MISS. CODE ANN. § 99-19-57 (2007) (“If it is found that the offender is a person with mental illness, as defined in this subsection, the court shall suspend the execution of the sentence.”); NEB. REV. STAT. § 29-2537 (1995) (If it is determined that “the convict [is] mentally incompetent, the judge shall suspend his or her execution until further order.”); NEV. REV. STAT. 176.455 (1997) (“If it is found by the court that the convicted person is insane, the judge shall make and enter an order staying the execution of the judgment of death until the convicted person becomes sane”); N.H. REV. STAT. ANN. § 4:24 (2003) (“The governor, with the advice of the council, may respite from time to time, for stated periods, the execution of a sentence of death upon a convict . . . if it appears to their satisfaction that the convict has become insane”); N.M. STAT. § 31-14-7 (2008) (“[I]f it is found that the defendant is insane, the warden must suspend the execution”); N.Y. CORRECT. LAW § 656 (McKinney 2003) (“When an inmate shall be found incompetent . . . , the court shall . . . promptly enter an order finding the inmate incompetent, staying the execution of the inmate”); OHIO REV. CODE ANN. § 2949.29

A little more than twenty years after its pronouncement in *Ford*, the Court attempted to clarify this standard in *Panetti v. Quarterman*.³⁴ In *Panetti*, the Court considered the pending execution of Scott Louis Panetti, a mentally ill man who for many years had suffered from a number of severe mental illnesses³⁵ including schizophrenia,³⁶ schizoaffective disorder,³⁷ major depression,³⁸ paranoia,³⁹ and delusions.⁴⁰ The Fifth Circuit sanctioned Panetti's execution and found that a state can execute a condemned prisoner as long as the individual understands the reasons for his execution, even if the inmate's mental illness causes him to suffer from a delusional belief system that deprives him of a rational understanding of the connection between his execution and

(LexisNexis 2002) ("If it is found that the convict is insane . . . , the judge shall continue any stay of execution . . . "); OKL. ST. ANN. tit. 22, § 1008 (West 2003) ("[I]f it is found that the defendant is insane, the warden must suspend the execution . . . "); OR. REV. STAT. § 137.463 (2005) ("Notwithstanding any other provision in this section, if the court finds that the defendant suffers from a mental condition that prevents the defendant from comprehending the reasons for the sentence of death or its implications, the court may not issue a death warrant until such time as the court, after appropriate inquiries, finds that the defendant is able to comprehend the reasons for the sentence of death and its implications."); S.D. CODIFIED LAWS § 23A-27A-22 (2004) (noting process and warden's obligations if inmate appears mentally incompetent to be executed). See also Entzeroth, *supra* note 1.

34. 127 S. Ct. 2842 (2007). For further discussion on *Panetti*, see Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257 (2007).

35. For a discussion on Panetti's long history of mental illness, see Bonnie, *supra* note 34, at 259–62.

36. The DSM-IV-TR describes schizophrenia as a disorder that includes, during its active phase, two or more of the following symptoms: "delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior." DSM-IV-TR, *supra* note 14, at 298.

37. The DSM-IV-TR describes schizoaffective disorder as "a disorder in which a mood episode and the active phase of Schizophrenia occurs together." *Id.* at 298.

38. The DSM-IV-TR describes major depressive disorder as follows:
[A] period of at least 2 weeks during which there is either depressed mood or the loss of interest or pleasure in nearly all activities. . . . The individual must also experience at least four additional symptoms drawn from a list that includes changes in appetite or weight, sleep, and psychomotor activity; decreased energy; feelings of worthlessness or guilt; difficulty thinking, concentrating or making decisions; or recurrent thoughts of death or suicidal ideation, plans, or attempts.

Id. at 349.

39. The DSM-IV-TR describes the paranoid subtype of schizophrenia as including "the presence of prominent delusions or auditory hallucinations." *Id.* at 313. The DSM-IV-TR describes a paranoid personality disorder as "a pattern of pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent." *Id.* at 690.

40. The DSM-IV-TR defines delusions as the "false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary." *Id.* at 821.

the reason for that execution.⁴¹ The Supreme Court, in an opinion written by Justice Kennedy, rejected the Fifth Circuit's approach to execution-competency stating:

The principles set forth in *Ford* are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution, as opposed to the real interests the State seeks to vindicate. We likewise find no support elsewhere in *Ford*, including in its discussions of the common law and the state standards, for the proposition that a prisoner is automatically foreclosed from demonstrating incompetency once a court has found he can identify the stated reason for his execution. A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it. *Ford* does not foreclose inquiry into the latter.⁴²

Thus, the *Ford* standard of competency demands that a person slated to be put to death have a rational understanding of his pending execution and the reasons for his execution.

One interesting aspect of *Panetti* is the Court's acknowledgment of the complexity of mental illness and the difficulty in dealing with mental illness, particularly in the context of a state's decision to exact the most extreme form of punishment, the death penalty, on an individual who suffers from mental illness. In this regard, the Court stated:

This is not to deny the fact that a concept like rational understanding is difficult to define. And we must not ignore the concern that some prisoners, whose cases are not implicated by this decision, will fail to understand why they are to be punished on account of reasons other than those stemming from a severe mental illness. The mental state requisite for competence to suffer capital punishment neither presumes nor requires a person who would be considered "normal," or even "rational," in a layperson's understanding of those terms. Someone who is condemned to death for an atrocious murder may be so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality. Those states of mind, even if extreme compared to the criminal population at large, are not what petitioner contends lie at the threshold of a competence inquiry. The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.⁴³

Thus, the Court seems to indicate that persons like Panetti, who have a long, documented history of psychotic or delusional mental illness, raise particular concerns with respect to carrying out an execution. Accordingly, the

41. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2860 (2007).

42. *Id.* at 2861–62 (citation omitted).

43. *Id.* at 2862.

delusional belief system of these mentally ill individuals must be considered to determine whether the individual has a rational understanding of the pending execution and the reasons for that execution.⁴⁴

Left unanswered by both *Ford* and *Panetti*, however, is the issue of what happens if a mentally ill, psychotic prisoner's rational understanding of his or her execution and the reasons for his or her execution could be restored by means of antipsychotic medication.⁴⁵ Continued use of medication, coupled with necessary dosage adjustments, can provide the individual with a relatively stable ability to function in life.⁴⁶ However, as the Court has noted in other cases,⁴⁷ these medications can have serious adverse side effects, and the efficacy of the medications may be inconsistent.⁴⁸ More important, antipsychotic medication does not cure the underlying mental illness.⁴⁹ Rather, the medication ameliorates the symptoms providing the afflicted individual relief from the delusions, hallucinations and psychosis that plague him or her.⁵⁰ If the patient discontinues the medication, the individual's symptoms return.⁵¹

Thus, a condemned prisoner, his or her lawyers, and the state face a dilemma. The prisoner, unmedicated, is insane and, under *Ford* and *Panetti*, exempt from execution. Unmedicated, this prisoner must suffer the disabling effects of the disease, including delusions, hallucinations, and paranoia.

44. As in *Ford*, the Supreme Court did not decide if Panetti was in fact too mentally ill to be executed. *Id.* at 2863. Instead, the Court remanded Panetti's case to the lower federal courts to apply the standards set out by the Court's decision. *Id.* On March 26, 2008, the federal district court, reviewing Panetti's claims of incompetency, found that although Panetti had a credible, well-documented, long history of severe mental illness, which included delusions and delusional belief systems, he was nonetheless sufficiently competent for the State of Texas to execute. *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at *36-37 (W.D. Tex. Mar. 26, 2008); see also Entzeroth, *supra* note 1.

45. Many symptoms of severe mental illness can be alleviated by medication, such as Trialafon, Clozapine, Haldol, Prolixin, Taractan, Loxitane, Mellaril, Risperdal, Zyprexa, Seroquel, Geodon, and Navane. MEDICATIONS, *supra* note 6, at 30.

46. *Id.* at 2.

47. See, e.g., *Washington v. Harper*, 494 U.S. 210, 229-30 (1990); *Riggins v. Nevada*, 504 U.S. 127, 134 (1992) (quoting *Harper*, 494 U.S. at 229-30).

48. See Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 377 (1994).

49. *Id.* (citing Michelle K. Bachand, Note, *Antipsychotic Drugs and the Incompetent Defendant: A Perspective on the Treatment and Prosecution of Incompetent Defendants*, 47 WASH. & LEE. L. REV. 1059, 1061 (1990)); Thomas G. Gutheil & Paul S. Appelbaum, "Mind Control", "Synthetic Sanity", "Artificial Competence", and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 HOFSTRA L. REV. 77, 101 (1983); MEDICATIONS, *supra* note 6, at 2.

50. Byers, *supra* note 48, at 375-78; Gutheil & Appelbaum, *supra* note 49, at 100; MEDICATIONS, *supra* note 6, at 2.

51. Barua, *supra* note 5, at 564 (citing *Singleton v. Norris*, 319 F.3d 1018, 1033 (8th Cir. 2003)); Gutheil & Appelbaum, *supra* note 49, at 100; Nancy S. Horton, *Restoration of Competency For Execution: Furiosus Solo Furane Punitur*, 44 SW. L.J. 1191, 1204 (1990).

Alternatively, the condemned prisoner can be treated with antipsychotic medication to relieve his or her symptoms, which is the medically appropriate response to his or her disease. Can the state kill the prisoner now that his or her symptoms are relieved, even though he or she is still severely mentally ill? How can the condemned prisoner, or his or her lawyer, or his or her doctor, or the state make that decision?

2. MEDICATING MENTALLY ILL PRISONERS AND CRIMINAL DEFENDANTS TO RENDER THEM COMPETENT

Although the Supreme Court has not ruled on medicating a prisoner to render the prisoner sane enough for execution, the issue of medicating prisoners, including involuntary medication, has arisen in other contexts. A prominent example is *Washington v. Harper*,⁵² where the Court considered the efforts of the State of Washington to treat a mentally ill prisoner involuntarily with antipsychotic drugs, arguably to allow the prisoner to function more appropriately in a prison setting.⁵³ Writing for the majority, Justice Kennedy found that the prisoner possessed “a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.”⁵⁴ The Court recognized that this liberty interest was “not insubstantial”⁵⁵ and “forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.”⁵⁶ Nonetheless, the Court made clear that this liberty interest is limited and the prisoner’s interest in declining treatment must be balanced with the institutional interests of the prison.⁵⁷ Accordingly, the Court held that a state could “treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will,” but only if “the inmate is dangerous to himself or others” and “the treatment is in the inmate’s medical interest.”⁵⁸

Two years after *Harper*, in *Riggins v. Nevada*,⁵⁹ the Court reviewed a state court’s decision requiring a criminal defendant to be treated involuntarily with antipsychotic medication during the course of his trial for capital murder.⁶⁰ The defendant claimed that the forced medication undermined his insanity defense.⁶¹ The Court, in a fairly narrow holding, found that Nevada could not medicate a criminal defendant involuntarily absent a showing of an “essential

52. 494 U.S. 210 (1990).

53. *Id.* at 209–10.

54. *Id.* at 221–22.

55. *Id.* at 229.

56. *Id.*

57. *Id.* at 222–24.

58. *Id.* at 227.

59. 504 U.S. 127 (1992).

60. *Id.* at 129.

61. *Id.* at 130.

state policy” being advanced or protected by the forced antipsychotic medication.⁶² In a concurring opinion, Justice Kennedy stated:

I file this separate opinion . . . to express my view that absent an extraordinary showing by the State, the Due Process Clause prohibits prosecuting officials from administering involuntary doses of antipsychotic medicines for purposes of rendering the accused competent for trial, and to express doubt that the showing can be made in most cases, given our present understanding of the properties of these drugs.⁶³

He further opined:

If the State cannot render the defendant competent without involuntary medication, then it must resort to civil commitment, if appropriate, unless the defendant becomes competent through other means. If the defendant cannot be tried without his behavior and demeanor being affected in this substantial way by involuntary treatment, in my view the Constitution requires that society bear this cost in order to preserve the integrity of the trial process. The state of our knowledge of antipsychotic drugs and their side effects is evolving and may one day produce effective drugs that have only minimal side effects. Until that day comes, we can permit their use only when the State can show that involuntary treatment does not cause alterations raising the concerns enumerated in this separate opinion.⁶⁴

In 2003, the Court confronted a different situation of the forced administration of antipsychotic drugs upon a mentally ill criminal defendant to render him competent to stand trial. In *Sell v. United States*,⁶⁵ the federal government prosecuted Charles Thomas Sell, a former dentist, for health care fraud, attempted murder, conspiracy, and solicitation to commit violence.⁶⁶ Sell suffered from serious mental health problems, including delusions and psychosis.⁶⁷ During the course of his criminal prosecution, Sell’s behavior became increasingly erratic and out of control.⁶⁸ The court quickly realized that his mental health was deteriorating once again.⁶⁹ Eventually, the federal magistrate judge found Sell incompetent to stand trial and ordered him hospitalized for treatment.⁷⁰ When Sell refused treatment for his deteriorating

62. *Id.* at 138.

63. *Id.* at 138–39.

64. *Id.* at 145.

65. 539 U.S. 166 (2003).

66. *Id.* at 170.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 171.

mental health, the lower courts ordered him treated against his will to render him competent to stand trial.⁷¹

Recognizing that a prisoner has a constitutional liberty interest in refusing the administration of antipsychotic medication,⁷² the Supreme Court nonetheless held that the forced medication of criminal defendants is permitted under certain conditions but must be "solely for trial competence purposes."⁷³ The Court required the state to meet a four-part test in order to involuntarily medicate a prisoner.⁷⁴ The first requirement is that "a court must find that *important* governmental interests are at stake."⁷⁵ The Court opined that "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important."⁷⁶ The Court's second requirement is that "the court must conclude that involuntary medication will *significantly further* those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial."⁷⁷ Third, the Court must find that "involuntary medication is *necessary* to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results."⁷⁸ Fourth, the Court must find that "administration of the drugs is *medically appropriate, i.e.,* in the patient's best medical interest in light of his medical condition."⁷⁹ The *Sell* Court concluded that the lower federal courts did not adequately satisfy this criteria and thus reversed the orders requiring forced medication.

3. THE UNIQUE CONSTITUTIONAL AND MORAL DILEMMA OF ADMINISTERING ANTIPSYCHOTIC DRUGS TO RENDER THE CONDEMNED PRISONER SUFFICIENTLY COMPETENT FOR THE STATE TO EXECUTE

One of the first cases to address the state's authority to medicate a condemned prisoner was *Louisiana v. Perry*.⁸⁰ Louisiana convicted and sentenced Michael Owen Perry to death.⁸¹ However, in subsequent proceedings the state court found that Perry was "incurably insane and incompetent for execution."⁸² There was, however, a possibility that the administration of antipsychotic drugs could render Perry sufficiently competent to be executed.⁸³

71. *Id.* at 171–75.

72. *Id.* at 178–79.

73. *Id.* at 180.

74. *Id.* 180–81.

75. *Id.*

76. *Id.*

77. *Id.* at 181.

78. *Id.*

79. *Id.*

80. 610 So. 2d 746 (La. 1992).

81. *Id.* at 747.

82. *Id.* at 749.

83. *Id.*

Louisiana sought to medicate him forcibly in order to carry out his death sentence.⁸⁴ The Supreme Court of Louisiana, relying on the Louisiana Constitution and state law, prohibited Louisiana from forcibly medicating Perry for the sole purpose of rendering him competent to execute.⁸⁵ Distinguishing medicating to execute from other permissible circumstances in which an inmate could be medicated against his or her will, the Louisiana Supreme Court, in a lengthy and comprehensive opinion, found that this type of forcible medication infringes on the privacy and integrity of the condemned prisoner in violation of the Louisiana Constitution, which prohibits “cruel, excessive or unusual punishment.”⁸⁶ Under the Louisiana Constitution, the Louisiana Supreme Court found:

We conclude that the death penalty as applied to an insane offender . . . [who can be forcibly medicated to a level of competency required for execution] is unconstitutional. The punishment is cruel because it imposes significantly more indignity, pain and suffering than ordinarily is necessary for the mere extinguishment of life, excessive because it imposes a severe penalty without furthering any of the valid social goals of punishment, and unusual because it subjects to the death penalty a class of offenders that has been exempt therefrom for centuries and adds novel burdens to the punishment of the insane which will not be suffered by sane capital offenders.⁸⁷

The Louisiana Supreme Court also addressed the ethical dilemma facing doctors and medical personnel who must administer an antipsychotic drug to render the inmate competent for execution. As the Louisiana Supreme Court observed:

The trial court's order places any physician having a duty to treat Perry for his mental illness in a severe conflict of interest, as we have noted in distinguishing forcible medication for execution from forcible medical treatment for safety and health. In short, whether the doctor prescribes and administers antipsychotic drugs or refuses to do so, he must act contrary to his patient's best medical interests either by promoting the execution of his patient or by failing to alleviate suffering. In this ambiguous situation there is great risk that physicians who choose to forcibly administer drugs may pursue the clear goal of execution more vigorously than the vaguer duty of protecting the inmate from drug side effects; and there is danger that the involuntary dispensation may be removed effectively from physicians' hands altogether.⁸⁸

84. *Id.* at 758.

85. *Id.*

86. LA. CONST. art. I, § 20; *Perry*, 610 So. 2d at 761.

87. *Perry*, 610 So. 2d at 761.

88. *Id.* at 766.

The ethical dilemma presented to the Louisiana Supreme Court further evidences the degrading and repugnant nature of forced medication for the purpose of execution.

Likewise, the South Carolina Supreme Court, in *Singleton v. State*,⁸⁹ prohibited the forcible administration of antipsychotic medication so that South Carolina could carry out a death sentence.⁹⁰ In *Singleton*, the South Carolina Supreme Court found:

[T]he South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution. An inmate in South Carolina has a very limited privacy interest when weighed against the State's penological interest; however, the inmate must be free from unwarranted medical intrusions. Federal due process and our own South Carolina Constitution require that an inmate can only receive forced medication where the inmate is dangerous to himself or to others, and then only when it is in the inmate's best medical interest.⁹¹

Accordingly, the court concluded, "that justice can never be served by forcing medication on an incompetent inmate for the sole purpose of getting him well enough to execute."⁹²

In contrast, the Eighth Circuit, in *Singleton v. Norris*,⁹³ found that Arkansas did not violate the federal Constitution by forcibly medicating Charles Laverne Singleton, a severely mentally ill man suffering from psychosis, for the sole purpose of rendering him competent to execute.⁹⁴ The court concluded that Arkansas had an essential interest in carrying out a lawfully imposed sentence⁹⁵ and that forcible treatment with antipsychotic drugs was the least intrusive way to render Singleton competent enough to meet the legal standard for execution.⁹⁶ Thus, the Eighth Circuit found that the forcible medication was actually in his best interest, as well as the best interest of the state.⁹⁷ The circuit court reasoned:

Singleton's argument regarding his long-term medical interest boils down to an assertion that execution is not in his medical interest. Eligibility for execution is the only unwanted consequence of the medication. The due

89. 437 S.E.2d 53 (S.C. 1993).

90. *Id.* at 62.

91. *Id.*

92. *Id.*

93. 319 F.3d 1018 (8th Cir. 2003).

94. *Id.* at 1027. See generally Julie D. Cantor, *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate When Execution Looms*, 2 IND. HEALTH L. REV. 119 (2005) (discussing the medical and ethical dilemma of medicating a person to render them competent for execution).

95. *Singleton*, 319 F.3d at 1025 (citing *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

96. *Id.* at 1025.

97. *Id.* at 1026.

process interests in life and liberty that Singleton asserts have been foreclosed by the lawfully imposed sentence of execution and the *Harper* procedure. In the circumstances presented in this case, the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution. Thus we hold that the mandatory medication regime, valid under the pendency of a stay of execution, does not become unconstitutional under *Harper* when an execution date is set.⁹⁸

The Eighth Circuit, in a rather perfunctory fashion, ultimately held that a medicate-to-execute protocol did not violate the Eighth Amendment.⁹⁹

In a scathing dissent in *Singleton*, Judge Heaney stated, “to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what Justice Marshall called ‘the barbarity of exacting mindless vengeance.’”¹⁰⁰ After reviewing Singleton’s medical history and the effectiveness of the medication used to treat his severe psychosis,¹⁰¹ Judge Heaney opined, “I am left with no alternative but to conclude that drug-induced sanity is not the same as true sanity. Singleton is not ‘cured;’ his insanity is merely muted, at times, by the powerful drugs he is forced to take. Underneath this mask of stability, he remains insane.”¹⁰² Accordingly, since Singleton remained insane, under *Ford* he could not be executed; the mere fact that medication masked his symptoms did not change this conclusion.¹⁰³ Judge Heaney concluded his dissent by stating:

Charles Singleton is an insane death row inmate. He is forced to submit to a treatment regime that includes powerful, mind-altering drugs. As a result of his treatment, he sometimes appears lucid and rational; other times he does not. The fact is, however, that he remains insane. I believe that we must continue to abide by the Supreme Court’s prohibition on executing the insane, particularly in this case, where the state is motivated to medicate a person into competence in order to carry out its punishment. I am gravely concerned that the majority has created a serious ethical dilemma for the medical community as a result of its opinion. I would hold that the State may continue to medicate Singleton, voluntarily or involuntarily, if it is necessary to protect him or others and is in his best medical interest, but it may not execute him. I continue to believe that the appropriate remedy is for the district court to

98. *Id.*

99. *Id.* at 1026–27. In contrast, other courts have seen a clear distinction between medicate-to-execute protocols and other types of forced medication to render a prisoner competent to participate in court proceedings. *See, e.g.,* *Commonwealth v. Sam*, 952 A.2d 565, 587–89 (Pa. 2008) (distinguishing medicate-to-execute schemes from other types of forced medication utilized to render the prisoner competent for court proceedings including post-conviction proceedings).

100. *Singleton*, 319 F.3d at 1030 (Heaney, J., dissenting) (quoting *Ford v. Wainwright*, 477 U.S. 399, 410 (1986)).

101. *Id.* at 1030–34.

102. *Id.* at 1034.

103. *Id.*

enter a permanent stay of execution. Accordingly, I have no alternative but to dissent.¹⁰⁴

Despite the compelling constitutional issues raised by *Singleton*, the Supreme Court denied certiorari review.¹⁰⁵ Arkansas's governor at that time, Mike Huckabee, refused to commute Singleton's sentence,¹⁰⁶ and Singleton was executed by lethal injection on January 6, 2004.¹⁰⁷

In *Thompson v. Bell*,¹⁰⁸ the District Court for the Eastern District of Tennessee reviewed the habeas corpus application of Gregory Thompson, which argued that it is unconstitutional to execute a condemned prisoner who has taken medication to become "chemically competent."¹⁰⁹ The district court found that Thompson procedurally defaulted federal court review of this claim because he had not properly raised it before the Tennessee state courts.¹¹⁰ The district court also concluded that even if he had not procedurally defaulted the constitutional claim, Thompson was time-barred from asserting the claim.¹¹¹ Moreover, the court found that Thompson failed to show that he was being forced to take antipsychotic medication.¹¹² He also failed to present any Supreme Court precedent which held that executing a prisoner medicated to achieve competency was unconstitutional.¹¹³ Accordingly, the district court denied habeas relief to Thompson.¹¹⁴

The problem with both the Eighth Circuit's decision in *Singleton* and the Eastern District of Tennessee's discussion of this issue in *Thompson* is that neither court adequately considered the Eighth Amendment problems raised by executing prisoners who can only be rendered competent through the administration of antipsychotic medication. The prohibition of the execution of the insane is not a newly created protection of a modern Supreme Court; it is a centuries-old prohibition that predates the United States Constitution and the

104. *Id.* at 1036–37.

105. *Singleton v. Norris*, 540 U.S. 832 (2003) (denying writ of certiorari).

106. Cantor, *supra* note 94, at 166–69.

107. Alan A. Stone, *Condemned Prisoner Treated and Executed*, PSYCHIATRIC TIMES, Mar. 2004, <http://www.deathpenaltyinfo.org/node/11103> (last visited Jan. 14, 2009). See Cantor, *supra* note 94, at 166–69 (discussing final days leading up to Singleton's execution). For a discussion of other severely mentally ill prisoners who have been executed, see Barua, *supra* note 5. For further discussion on the insanity exemption and medicating to execute, see Bryan Lester Dupler, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 55 OKLA. L. REV. 1 (2002).

108. No. 1:04-CV-177, 2006 WL 1195892, at *1 (E.D. Tenn. May 4, 2006).

109. *Id.* at *30.

110. *Id.*

111. *Id.* at *31.

112. *Id.* at *33.

113. *Id.* Of course, there is also no Supreme Court case holding that it is constitutional to execute a medicated insane inmate or that it is constitutional to forcibly medicate an inmate to make him ready to execute.

114. *Id.*

Eighth Amendment.¹¹⁵ The modern complication is that medications now exist that can alleviate the prisoner's symptoms and suffering, even though the prisoner remains insane, albeit with fewer apparent or outward symptoms.¹¹⁶ Executing an insane prisoner is as abhorrent today as it was in the days of Blackstone.

Moreover, this dilemma forces the prisoner to either suffer the agonies of the "delusions and hallucinations" that plague him or her when unmedicated or treat the symptoms of his or her illness and be executed.¹¹⁷ This grisly choice is as barbaric and inhumane as executing someone who is insane, and it creates an excessive, cruel and unusual punishment that is not imposed on death row inmates who are not insane.

One of the compelling reasons for the prohibition of executing the insane is "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."¹¹⁸ As Judge Heaney observed, it is barbaric for society to force a prisoner to suffer the choice of death or the ravages of mental illness when it is clear that, unmedicated, the prisoner could not be executed.¹¹⁹ To construe the exemption otherwise would mean that all insane prisoners would be forced to serve their remaining years unmedicated and tormented by the symptoms of their mental illness because treatment, whether voluntary or involuntary, would result in death.¹²⁰ Therefore, the insane prisoner's punishment is not simply death; it is death or untreated psychosis.¹²¹ This is not a punishment that should be sanctioned by the Eighth Amendment.¹²²

115. See *supra* notes 21–24 and accompanying text.

116. See *supra* notes 44–51 and accompanying text.

117. *Singleton v. Norris*, 319 F.3d 1018, 1037 (8th Cir. 2003).

118. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). Another compelling reason for protecting the mentally ill from execution is to protect and provide dignity to the condemned individual who is to be put to death. Bonnie, *supra* note 34, at 277. As Professor Richard Bonnie explains:

If this prohibition has any continuing justification in the contemporary context, I believe it must be found in respect for the dignity of the condemned. The prisoner has a right, even under imminent sentence of death, to be treated as a person, worthy of respect, not as an object of the State's effort to carry out its promises. As Justice Powell suggested, a person under the shadow of death should have the opportunity to make the few choices that remain available to him. He should have the opportunity to decide who should be present at his execution, what he will eat for his last meal, what, if anything, he will utter for his last words, and whether he will repent or go defiantly to his grave. A prisoner who does not understand the nature and purpose of the execution is not able to exercise the choices that remain to him. To execute him in this condition is an affront to his dignity as a person and to the "dignity of man," the core value of the Eighth Amendment.

Id. at 277.

119. *Singleton*, 319 F.3d at 1036–37.

120. *Id.* at 1037.

121. *Id.*

122. This Eighth Amendment problem exists even if the medication is voluntarily administered because it would require the prisoner to forego treatment if he wished to avoid

In addition, to the extent the state seeks to force a prisoner to take antipsychotic drugs to render him or her execution-competent, such forcible administration of antipsychotic medication seems at the very least inconsistent with the principles of *Harper*, *Riggins*, and even *Sell*.¹²³ These cases allow a state to medicate a prisoner forcibly only where the state has a substantial interest and the forced medication is in the prisoner's best interest.¹²⁴ While the state may have a substantial interest in carrying out a death sentence, how can forcing a prisoner to take drugs so the state can end his life be in the prisoner's best interest? Forcing someone to take medication so the state can kill him or her is qualitatively different from forcing a prisoner to take drugs so he or she will not hurt himself or herself or so he or she can stand trial competently. The Eighth Circuit's suggestion that the only ill effect of the forced administration of the medication is execution flies in the face of reality and common sense, particularly given that after the execution the antipsychotic medication will have no effect, beneficial or otherwise, on the prisoner who, by then, will be dead.¹²⁵

Recognizing the horrors of executing the mentally ill, the American Bar Association, the American Psychiatric Association, the American Psychological Association, and the National Alliance on Mental Illness recommend a death penalty exemption for severely mentally ill death row prisoners.¹²⁶ For example, in August 2006, the American Bar Association House of Delegates adopted a recommendation specifically protecting the mentally ill from execution.¹²⁷ Among its recommendations, the ABA Recommendation and Report on the Death Penalty and Persons with Mental Disabilities proposes:

If . . . a court finds that a prisoner has a mental disorder or disability that significantly impairs his or her capacity to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the

execution.

123. *Sell v. United States*, 539 U.S. 166 (2003); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Washington v. Harper*, 494 U.S. 210 (1990).

124. *See Sell*, 539 U.S. at 183; *Riggins*, 504 U.S. at 134–35; *Harper*, 494 U.S. at 222–23.

125. *Singleton*, 319 F.3d at 1026.

126. *See, e.g., Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 668, 668 (2006) [hereinafter *Recommendation and Report*] (including a recommendation that severely mentally ill defendants not be executed); *see also* Bonnie, *supra* note 34, at 257. Likewise, the international community has called for the end of executions of the mentally ill. *See* Commission on Human Rights Res. 2003/67, (4)(g), U.N. Doc. E/CN.4/RES/2003/67 (Apr. 25, 2003); Commission on Human Rights Res. 2000/65, (3)(e), U.N. Doc. E/CN.4/RES/2000/65 (Apr. 27, 2000).

127. *Recommendation and Report*, *supra* note 126, at 668; *see also* Bonnie, *supra* note 34, at 257; John W. Parry, *The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 667, 667 (2005) (discussing upcoming 2006 vote).

prisoner's own case, the sentence of death should be reduced to the sentence imposed in capital cases when execution is not an option.¹²⁸

Under this approach, the inmate's sentence is commuted to life or life without the possibility of parole once the determination is made that the inmate is not competent to be executed.¹²⁹ Then, the inmate can undergo the necessary medical treatment without the uncertainty of execution hanging over the inmate's head.

In condemning the medicate-to-execute scheme sanctioned in the Eighth Circuit's opinion in *Singleton*, the ABA Report states:

Mental health professionals are nearly unanimous in the view that treatment with the purpose or likely effect of enabling the state to carry out an execution of a person who has been found incompetent for execution is unethical, whether or not the prisoner objects, except in two highly restricted circumstances (an advance directive by the prisoner while competent requesting such treatment or a compelling need to alleviate extreme suffering). Because treatment is unethical, it is not "medically appropriate" and is therefore constitutionally impermissible when a prisoner objects under the criteria enunciated by the Supreme Court in *Sell v. United States and Washington v. Harper*.¹³⁰

The ABA Report further provides:

There is only one sensible policy here: a death sentence should be automatically commuted to a lesser punishment (the precise nature of which will be governed by the jurisdiction's death penalty jurisprudence) after a prisoner has been found incompetent for execution. Maryland has so prescribed, and subpart 3(d) of the Recommendation embraces this view. Once an offender is found incompetent to be executed, execution should no longer be a permissible punishment.¹³¹

4. THE FUTURE OF MEDICATING CONDEMNED PRISONERS WITH ANTIPSYCHOTIC DRUGS FOR EXECUTION

In conclusion, it is my view that medicating prisoners to render them "sane enough" to allow the state to execute them violates the Eighth Amendment, and the forced administration of that medication violates substantive due process. Condemned prisoners who are ineligible to be executed due to their insanity are extremely ill. Even Panetti and Ford, who undoubtedly suffered severe mental disorders, failed to prove on remand that they were insane and thus incompetent

128. *Recommendation and Report*, *supra* note 126, at 668.

129. *See generally* Cantor, *supra* note 94, at 163–65 (discussing the pros and cons of a similar approach regarding death row inmates who suffer from severe mental illness).

130. *Recommendation and Report*, *supra* note 126, at 676 (citations omitted).

131. *Id.* (citations omitted).

to be executed.¹³² Further, those prisoners who are deemed insane often have a long, well-chronicled history of severe and debilitating mental illness, including significant delusions or psychosis. The only remedy is to alleviate the symptoms with antipsychotic medication because they cannot be cured. In keeping with the centuries-old common law prohibition on the execution of the insane and the Eighth Amendment protection of the mentally ill, severely mentally ill, condemned prisoners should be exempt from the death penalty and, instead, should serve a lesser sentence, such as life or life without the possibility of parole, where they can be treated in a medically appropriate and humane manner.

As noted at the outset of this article, the issue of medicating a mentally ill death row inmate to render the inmate competent for execution is an issue that the Supreme Court has avoided.¹³³ Nevertheless, the Court will likely be forced to confront it. It seems probable that Justice Kennedy will be the key vote in any consideration of a state's effort to medicate condemned prisoners for execution particularly given that he wrote the majority opinion in *Panetti*, the majority opinion in *Harper*, and a strong concurring opinion in *Riggins*. Accordingly, it is worthwhile to recall that in his concurring opinion in *Riggins*, Justice Kennedy raised grave concerns about the forcible administration of medication where the purpose was not to protect prisoners or to serve their best interest but rather to serve the state's interest in prosecuting medicated criminal defendants.¹³⁴ Justice Kennedy found this state action particularly troubling where the forced administration of medication could have an adverse effect on a defendant's insanity defense.¹³⁵ A similar argument or concern could be raised in cases where a state seeks to forcibly medicate a prisoner in order to execute him. In that instance, the purpose of a state's forced administration of medication is to execute the prisoner, not to prevent the prisoner's dangerousness or to treat and relieve the symptoms of his suffering. Although the Eighth Circuit was not persuaded by this argument, the distinction is important and may prove critical, particularly to Justice Kennedy, who is likely to play a decisive role both in resolving this problem and in illuminating the extent to which society's standards of decency have evolved.

132. See *supra* at notes 30, 44 and accompanying text.

133. *Singleton v. Norris*, 540 U.S. 832 (2003) (denying certiorari review).

134. *Riggins v. Nevada*, 504 U.S. 127, 140–41 (1992) (Kennedy, J., concurring in the judgment).

135. *Id.*