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Fraying the Hangman's Knot?: *State v. Michael Owen Perry*

I. INTRODUCTION

Death penalty cases are always difficult. In no other situation is the requirement of careful analysis of factual and legal issues more critical. Courts faced with such a case must balance the need of the sovereign to maintain order through the imposition of legislatively mandated and judicially prescribed penalties against the undesirable task of purposefully taking a human life.

Decision-making is even more troublesome when additional issues are added to the balancing process. Such was the situation in the Louisiana case of *State v. Perry* (hereinafter *Perry II*).¹ In that 1992 case, the defendant, convicted and sentenced to death, was found to be mentally incompetent to be executed absent the use of antipsychotic medication.² The Supreme Court of Louisiana faced the question of whether the state could forcibly medicate Perry in order to maintain his mental competence for execution.

The holding and opinion of the supreme court in *Perry II* are the subject of this note. Specifically, the remainder of Part I presents the facts and procedural history of the entire *Perry* case and provides the reader with a brief insight into the main points of this article. Following that, Part II surveys state and federal exemptions of mentally incompetent persons from the death penalty, standards and procedures for evaluating mental competence, and forcible medication of prisoners. Part III outlines the supreme court opinion in *Perry II*, and Part IV provides an in-depth critique of that opinion. Part V proposes an analysis which may be employed in examining the *Perry* problem; and Part VI concludes by offering a proposed statute which provides specific guidance for future courts faced with similar cases.

In the early morning hours of July 17, 1983, Michael Owen Perry entered the unlocked house of his cousins, Randy Perry and Brian LeBlanc.³ Inside,

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1. 610 So. 2d 746 (La. 1992).

2. Antipsychotic drugs, also referred to as neuroleptics, are one category of psychoactive or psychotropic drugs. Since the 1950's, they have been widely used to control symptoms of schizophrenia and other major affective disorders and have become the topic of much legal commentary in the context of forcible administration of the drugs in various settings. The brand names of such drugs include Haldol, Thorazine, and Prolixin. For an excellent explanation of the history, use, and effects of antipsychotic medication, see Dennis E. Cichon, *The Right to Just Say No: A History and Analysis of the Right to Refuse Antipsychotic Medication*, 53 La. L. Rev. 283 (1992). For insight into the actual chemical and anatomical reactions produced by the drugs, see Thomas A. Gutheil and Paul S. Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77 (1983).

3. The facts of the crime presented here are summarized from the Supreme Court of Louisiana

Perry shot and killed them both as they slept. Next, he crossed the street, broke into the locked home of his parents, and awaited their arrival. When Grace and Chester Perry returned from an out-of-town trip with their two-year-old grandson, Anthony Bonin, Michael Perry shot all three as they entered the house. After moving the bodies from the doorway, he shot each in the head again to ensure death. Following the murders, Perry fled.

Two weeks later, Perry was arrested in Washington, D.C., and returned to Louisiana for trial. Prior to the trial, two separate commissions were appointed by the state to determine Perry's mental capacity to stand trial.⁴ After the first, it was determined that Perry required treatment, and he was sent to Feliciana Forensic Facility. The second commission found him able to assist his counsel in his defense and competent to stand trial. The judge ruled Perry competent to stand trial and then allowed him, over the objection of his counsel, to withdraw his plea of not guilty by reason of insanity and stand on a plea of not guilty.⁵

In October of 1984, Perry was convicted of five counts of first degree murder. The jury unanimously recommended the death penalty, finding under Code of Criminal Procedure article 905.3 that two aggravating circumstances existed: (1) the offender knowingly created a risk of death or great bodily harm to more than one person; and (2) the offense was committed in an especially heinous, atrocious, or cruel manner.⁶ The trial judge subsequently imposed the death penalty.

After sentencing, Perry was sent to Angola state prison where he was immediately prescribed and given regular doses of the antipsychotic drug Haldol. Perry continued to receive medication at the prison until a request was submitted by his counsel to remove him from the medication on March 14, 1988.⁷ On

opinion in *State v. Perry*, 502 So. 2d 543 (La. 1987) (hereinafter *Perry I*) and Brief on Behalf of the State of Louisiana, *State v. Perry*, 610 So. 2d 746 (La. 1992) (No. 91-KP-1324).

4. Michael Perry's mental problems are well-documented. At 16, he was diagnosed as a paranoid schizophrenic. Two years later he was committed to the Central State Hospital at Pineville for schizophrenic symptoms. See Brief for the Petitioner at 3, *Perry v. Louisiana*, 498 U.S. 38, 111 S. Ct. 449 (1990) (No. 89-5120). Furthermore, the author's interview with Keith Nordyke, Perry's attorney, at his Baton Rouge office on August 24, 1993, provided insight into Perry's mental condition at the time of his arrest. Perry had rented a hotel room and filled it with television sets on which he had painted eyeballs and had written the names of his victims. Finally, the author had the extraordinary experience of meeting Michael Owen Perry on Death Row at Angola State Penitentiary in September of 1993. After a discussion that lasted about one hour, no doubt was left, in this author's wholly unprofessional opinion, that he was delusional, irrational, and completely out of touch with reality.

5. *Perry I*, 502 So. 2d at 547.

6. *Id.* at 547.

7. The circumstances of Perry's removal from regular medication became an issue later in the case. The trial court appointed Mr. Keith Nordyke of Baton Rouge as Perry's counsel and, at the request of Mr. Nordyke, authorized him to make medical decisions on behalf of Perry. Pursuant to that authority and without notice to prosecutors, Nordyke then instructed prison officials to remove Perry from all treatments. Prior to that time, Perry had been voluntarily taking Haldol as prescribed by the prison psychiatrist. See Brief on Behalf of the State of Louisiana at 5, *State v. Perry*, 610 So.

direct appeal, the Supreme Court of Louisiana affirmed Perry's conviction.⁸ In an opinion written by Justice Cole, the court, citing Code of Criminal Procedure article 642, recommended that defense counsel apply to the court for a post-conviction sanity commission:

The State of Louisiana will not execute one who has become insane subsequent to his conviction of a capital crime. . . . The State will not impose the death penalty on Michael Owen Perry if a court determines he has become insane subsequent to his conviction for first degree murder and lacks the capacity to understand the death penalty. Counsel for the defendant may apply to the trial court for appointment of a sanity commission to make such a determination. Indeed, the allegation of mental incapacity may be raised by the court or the prosecution.⁹

In January of 1988, the trial court ordered such a hearing, appointing three psychiatrists and a psychologist to examine Perry. The experts unanimously agreed that Perry suffered from a schizo-affective disorder "that causes serious hallucinations, delusional and disordered thinking, incoherent speech, and manic behavior."¹⁰

By August of 1988, the trial court (based on *ex parte* reports from prison officials) determined that Perry's condition had probably changed since the first sanity commission and ordered a second evaluation, employing two of the original four doctors. The court scheduled a hearing to finally determine Perry's competence to be executed.

After examining the commission's report and hearing testimony from the doctors, the trial court discovered the lack of a clear standard of competence for execution in Louisiana.¹¹ The court then relied on *Perry I*, Code of Criminal Procedure articles 641-661, and Justice Powell's concurring opinion in the Supreme Court case of *Ford v. Wainright*¹² to "fashion a standard through analogy with Louisiana's existing statutes and state and federal jurisprudence."¹³ The final order of the court was as follows: "It is ordered that defendant, Michael Owen Perry, is mentally competent for purposes of execution, and 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."¹⁴

2d 746 (La. 1992) (No. 91-KP-1324).

8. *Perry I*, 502 So. 2d at 563-64.

9. *Id.*

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

11. Oral Reasons For Judgment, *State v. Perry*, 19th Judicial District Court, October 21, 1988, at 95.

12. 477 U.S. 399, 106 S. Ct. 2595 (1986) (discussed *infra* at notes 40-41 and accompanying text).

13. Oral Reasons for Judgment, *supra* note 11, at 97.

14. *Id.* at 117.

The trial court, however, determined Perry was "competent only while maintained on psychotropic medication in the form of Haldol."¹⁵ After reviewing the statutes and the jurisprudential background of forcible medication for purposes of competency to stand trial, the trial judge reasoned that, even medicated, Perry met the competence standard stated above. Finally the court weighed the interest of the state in carrying out its penalty versus Perry's interest in refusing medication and stated:

[I]t is felt by this Court that Louisiana's interest in the execution of [the] jury's verdict override [sic] [the] rights of Mr. Perry [to refuse medication]. The State is entitled to have [its] judgment made executory. To allow Mr. Perry to have the authority to make this decision and to refuse treatment and thereby become incompetent would allow total usurption [sic] of the criminal laws in this area.¹⁶

That order was the subject of immediate appeal to both the Supreme Court of Louisiana and the Supreme Court of the United States. The Supreme Court of Louisiana denied certiorari¹⁷ and appeal,¹⁸ but the Supreme Court of the United States subsequently granted the writ.¹⁹ After receiving briefs and hearing oral arguments, the Court vacated certiorari and remanded to the trial court²⁰ to re-examine in light of its recent decision in *Washington v. Harper*.²¹

On remand, the trial court again accepted briefs and heard oral argument but found the *Harper* case inapposite and reinstated its original medication order. The court specifically adopted Justice Powell's test for competence in *Ford*: "Under this test, which this court hereby adopts, the state is prohibited from

15. *Id.* at 115.

16. *Id.* at 117.

17. *State v. Perry*, 543 So. 2d 487 (La. 1989).

18. *Id.*

19. *Perry v. Louisiana*, 494 U.S. 1015, 110 S. Ct. 1317 (1990).

20. *Perry v. Louisiana*, 498 U.S. 38, 111 S. Ct. 449 (1990).

21. 494 U.S. 210, 110 S. Ct. 1028 (1990). The *Harper* decision was rendered by the Court just five days before oral argument in *Perry* and is discussed *infra* at note 58 and accompanying text. A review of Justice Marshall's recently released memoirs provides several interesting side notes: (1) Despite the fact that there were some reports that Perry had made threats to Justice O'Connor some years before the case arose, she had no recollection of such events and decided not to recuse herself. (2) The original plan, proposed by Justice White, was to certify a question to the Louisiana Supreme Court as to whether Louisiana law permitted the forcible administration of antipsychotic drugs for the purpose of maintaining competence for execution. After receiving its answer, the Court could have let the issue rest under Louisiana law, but would have maintained jurisdiction if the Louisiana decision had been unfavorable. While this proposal was eventually abandoned, it demonstrates that at least some members of the Court believed that Louisiana law was the appropriate first choice for the basis of the decision. (3) The Court, at the time, consisted of only eight Justices—Justice Souter was still involved in the confirmation process. While there are no specific allusions to the fact, it may be that the Court chose to "return" the case to the State and decide it later with a full court, thereby avoiding a possible 4-4 vote.

executing those who are *unaware of the punishment they are to suffer and why they are to suffer it.*"²²

After the second trial, Perry again applied for a writ of certiorari to the Supreme Court of Louisiana. The court granted the writ and stayed the execution pending its holding.²³ After briefs and argument, the court affirmed the trial court's finding that Perry was not competent absent the use of antipsychotic medication, but reversed the order to forcibly medicate him.²⁴ In a majority opinion written by Justice Dennis, the court held the order to medicate Perry for purposes of maintaining his mental competence for execution violated both Perry's right of privacy under Article I, section 5 of the Louisiana Constitution of 1974, and the prohibition against cruel, excessive, or unusual punishment of Article I, section 20.²⁵

While correct in conclusion under the law at the time, the majority opinion failed in several significant areas. The court, in an opinion that has been called "forty-seven pages of sociology,"²⁶ provided an in-depth review of "the centuries old prohibition against execution of the insane,"²⁷ but gave no solid legal basis for that prohibition under current law. Furthermore, as evidenced by the necessity that the trial court "fashion" a standard for mental competence to be executed, the court also failed by not providing a specific legal test to be applied in determining the mental competence required of a person before he may be executed.

The court also provided an in-depth analysis of the right to privacy under the Louisiana Constitution of 1974 but failed to properly weigh this right against the interest of the state in carrying out its prescribed penalty. Such a failure sets dangerous precedent by allowing the unchecked privacy right to eclipse valid state interests and may potentially have serious ramifications on Louisiana's criminal justice system.

Furthermore, the court, by requiring the state to demonstrate that Perry has become mentally competent, independent of any drugs, before it may seek to modify the stay of execution, allowed Perry to voluntarily take the drugs which he refused to take in order to avoid execution. If he does voluntarily accept medication,²⁸ the state may never seek to modify the stay of execution since it will never be able to show Perry's mental condition was achieved independently of drugs. In effect, the very drugs the state could not force him to take may now

22. Oral Reasons for Judgment, *State v. Perry*, 19th Judicial District Court, April 25, 1991, at 9 (emphasis added).

23. *State v. Perry*, 584 So. 2d 1145 (La. 1991).

24. *State v. Perry*, 610 So. 2d 746, 771 (La. 1992).

25. *Id.* at 749-71.

26. Justice Luther F. Cole, Address to the Legal Writing Seminar of Louisiana State University Law School (Nov. 9, 1993).

27. *Perry II*, 610 So. 2d at 747.

28. At the meeting with Perry, *see supra* note 4, Perry told the author that he was on daily medication (after the Supreme Court opinion). This statement, however, cannot be considered reliable, considering Perry's mental state at the time.

serve as the main obstacle to the state in carrying out Perry's sentence. Again, this precedent could have serious ramifications on the administration of the death penalty.

The above criticisms are discussed in more detail following a presentation of the legal background in the next section.

II. LEGAL BACKGROUND

A. *Exempting the Insane From Execution—An Historical Analysis*

The notion that insane persons may not be punished by death dates back to at least the mid-17th Century: "It is uncharitable to dispatch of an offender into another world, when he is not of capacity to fit himself for it."²⁹ Most of the early common-law rationales for exempting insane persons from execution are based in religious and moral tenets. Besides the belief that a madman could not prepare himself for the afterlife, many early commentators simply believed that to put to death one who was insane was "a miserable spectacle, both against law, and of extreme inhumanity and cruelty."³⁰ Others felt that madness was punishment, in and of itself, which offset the need for execution.³¹

As mentioned above, however, these ancient reasons for exempting insane persons from execution may carry little weight in today's legal system. "The sheer number of rationales may indicate that the rule was designed to address social concerns which are now obsolete."³² What should be judged is a legal level of competence which is derived from and grounded in the criteria and justifications (or the lack thereof) for the death penalty itself.

It has also been argued that a convicted person must be able to assist his counsel in defense up until the very last possible moment. This, again, is a somewhat old idea and presupposes that insanity or incompetence robs the inmate of all capability to assist his counsel. Furthermore, the current appeal process for capital punishment cases ensures all facts are determined before the penalty is assessed, and it is unlikely a convicted offender will discover new facts or develop a new legal theory between the end of the appeal process and the execution itself.³³ Nevertheless, under the Fifth and Fourteenth Amendments, this rationale must be considered in developing the test for competence to be executed.

Another traditional argument focuses on the lack of deterrence of potential future criminals. As far back as Lord Coke, it was believed that execution of

29. *Perry II*, 610 So. 2d at 749 (quoting Hales, Remarks on the Trial of M. Charles Basement, 11 Howard State Trials 474, 477 (1685)).

30. 3 E. Coke, Institute 6 (1794).

31. See 4 W. Blackstone, Commentaries 395.

32. Barbara A. Ward, *Competence for Execution: Problems in Law and Psychiatry*, 14 Fla. St. U. L. Rev. 35, 48 (1986).

33. *Id.* at 50.

insane "can be no example to others."³⁴ A more modern view, however, demonstrates the reverse logic of this attempted rationalization of exempting insane persons from the death penalty: "If the purpose [of exempting the incompetent from execution] is to serve as an example to others, the demonstration that not even supervening insanity will halt the execution of one who commits a capital crime will . . . make the *in terrorem* effect so much the stronger."³⁵

A somewhat related rationale for exempting insane persons is the notion that the execution of an insane person is somehow less acceptable to society than the execution of a wholly sane offender. This rationale has been labeled "nothing less than an oblique attack on the death penalty itself."³⁶ As one noted jurist suggested:

Is it not inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment for sane men, a curious reasoning that would free a man from capital punishment only if he is not in full possession of his senses?³⁷

The most intricate of the current rationales for exempting insane persons from execution is the notion that the retributive effect of the death penalty is lost on persons who are mentally incompetent. Since the deterrent effect of capital punishment in general is somewhat suspect, most of the argument centers around the retribution rationale. In one line of argument, retribution is not satisfied by execution of an insane inmate because his death is not of "equal value" to the life taken by him.³⁸ A second argument holds that a prisoner must be able to perceive the "expression of society's moral outrage,"³⁹ in order to satisfy the retribution criteria. Still a further point is made to the effect that, since an insane person may not suffer as a result of the punishment of death, society gains no retributive value from that punishment.

Whatever the historical background, virtually every common-law jurisdiction which has the death penalty has a rule exempting insane or incompetent persons from that form of punishment. Some are statutory, some are judicial, but few are clearly articulated and (as this author would have it) grounded specifically in the absence of underlying rationale for the death penalty itself.

34. E. Coke, *Institute* 6 (1794).

35. Henry Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651, 652 (1951).

36. Geoffrey C. Hazard & David N. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 U.C.L.A. L. Rev. 381, 384 (1960).

37. *Phyle v. Duffy*, 208 P.2d 668, 676-77 (Cal. 1949) (en banc) (Traynor, J., concurring).

38. See Note, *Insanity of the Condemned*, 88 Yale L.J. 533 (1979).

39. *Gregg v. Georgia*, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976) (plurality opinion).

B. *The Competence Standard—Federal Law*

The Supreme Court of the United States constitutionalized the prohibition against execution of the insane in the case of *Ford v. Wainright*. In that case, which considered the mental competence for execution of a condemned prisoner in Florida, Justice Marshall wrote a plurality opinion for four justices which referred to the traditional rationale for exempting the insane from execution and concluded: "There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time the Bill of Rights was adopted."⁴⁰

The more important opinion in this area of law has been Justice Powell's concurring opinion, which subscribed to the notion that execution of incompetent persons violated the Eighth Amendment (bringing the total number of Justices who found executing insane persons per se unconstitutional to five⁴¹) but went further than the plurality and defined a test to determine what level of mental competence is required. Affirming the standard used by Florida and several other states, Justice Powell found the appropriate rule to be that persons may not be executed if they "are unaware of the punishment they are about to suffer and why they are to suffer it."⁴² He also added:

Under these circumstances, I find no sound basis for constitutionalizing the broader definition of insanity, with its requirement that the defendant be able to assist in his own defense. States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum.⁴³

The Powell "understanding" standard has been the most widely used test for competence for execution since the *Ford* decision was delivered. This standard is based in the underlying public policy of the death penalty. If a defendant is able to perceive the connection between his crime and the punishment imposed,

40. *Ford v. Wainright*, 477 U.S. 399, 405, 106 S. Ct. 2595, 2599 (1986). Note that the *Ford* case also dealt specifically with the procedural due process requirements of evaluating a person's mental capacity for execution purposes. This issue is addressed in the plurality opinion and the concurring and dissenting opinions.

41. Justices O'Connor, White, and Rehnquist dissented, specifically stating that the Eighth Amendment does not create a substantive right not to be executed while insane. *Id.* at 427, 106 S. Ct. at 2611 (O'Connor, J., dissenting in part); *id.* at 434-35, 106 S. Ct. at 2614-15 (Rehnquist, J., dissenting).

42. *Id.* at 422, 106 S. Ct. at 2608.

43. *Id.* at 422 n.3, 106 S. Ct. at 2608 n.3. All states that currently have the death penalty have statutory or jurisprudential prohibitions against executing the insane. Of those that have a clearly defined test for competence, most employ the Powell test from *Ford* in one form or another. Some add the requirement that the defendant be able to assist counsel up until the actual moment of execution. See Ward, *supra* note 32, at 101, which provides an appendix listing the appropriate test in each state.

the goal of retribution is accomplished in the sense of the prisoner's comprehension of his wrongdoing and society's moral outrage. Furthermore, society's need to exact "equal" suffering upon a capital offender is fulfilled. The deterrent effect of the death penalty is also not diluted by allowing capital offenders to escape from the justly imposed sentence of death simply because they have been diagnosed with some medically-defined mental disorder.

Additionally, the Powell test satisfies the common-law criteria mentioned above in that an inmate who understands his impending fate is able to prepare himself for death. Society at large could find little difference in executing a person who understands his crime and his punishment (although he may suffer from some mental deficiency) and the execution of a wholly sane person (which society has found acceptable through its legislature's approval of the death penalty in the first place).⁴⁴

C. *The Competence Standard—Louisiana Law*

In his concurring opinion, Justice Powell left room for states to define their own competence standard. However, because the Powell test is based on an Eighth Amendment constitutional analysis, a state may define its standard so as to afford a convicted criminal greater, but not less, protection than does the Powell standard. However, as will be seen below, Louisiana, even after *Perry II*, has not yet adopted a clearly defined standard for competence to be executed.

In Louisiana, as in all states, there are three points in the criminal process at which a defendant's mental capacity must be evaluated: at the time of the crime, during the trial and appeal process, and at the time of execution (if that penalty is imposed). Each of the three evaluations is based on a different public policy and should, therefore, require a different legal test from the other two. The requirement of a guilty mind defines the standard for the "not guilty by reason of insanity" defense under Code of Criminal Procedure articles 650-658. The procedures outlined in Code of Criminal Procedure articles 641-649.1, governing mental capacity to proceed, are based in notions of due process and the requirement that a defendant be able to participate in his trial.

Louisiana, however, has no specific standard for mental competence to be executed. All too often, courts and commentators group this evaluation of

44. One author provides an excellent analysis of Justice Powell's derivation of the standard: By evaluating the reasons existing at common law for prohibiting the execution of the insane, Justice Powell concluded that the remaining validity of this prohibition today is premised on the notion that "retributive force depends on the defendant's awareness of the penalty's existence and purpose." Hence, Justice Powell distills the proper standard of insanity as a determination of whether the inmates are "unaware of the punishment they are about to suffer and why they are to suffer it."

Rachelle Deckert Dick, *Ford v. Wainright: Warning—Sanity on Death Row May be Hazardous to Your Health*, 47 La. L. Rev. 1351, 1355 (1987) (quoting *Ford v. Wainright*, 477 U.S. 399, 421, 422, 106 S. Ct. 2595, 2607, 2608 (Powell, J., concurring in part)) (citations omitted).

mental capacity, along with the other two, under the diagnosis of some medically-defined mental condition or the wholly undefined term "insanity." What should exist is a specific legal test for competence to be executed which is distinct from the other two evaluations of mental competence. Since the law, as it exists today, provides no such standard, courts are most likely to apply the procedure outlined in Articles 641-649.1 by analogy.⁴⁵ These articles and the jurisprudence that interprets them are, therefore, important to the *Perry* analysis.

Due process requires that a defendant in a criminal trial have the mental capacity to understand the proceedings and assist his counsel in his defense. Articles 641-649.1 of the Louisiana Code of Criminal Procedure are set up to evaluate a defendant's capability to do so. The articles set up a structure by which the defendant must raise the issue of incapacity and prove that condition to the court as a matter of law. The court may order evaluations and require reports from sanity commissions before conducting a hearing to determine a person's capacity to proceed in the judicial process.

The case of *State v. Bennett*⁴⁶ interpreted Article 641 and was the first case to provide a specific test for competency to stand trial in Louisiana. After stating that a determination of a defendant's ability to stand trial should be made "not . . . solely upon whether he suffers from a mental disease or defect, but must be made with specific reference to the nature of the charge, the complexity of the case and the gravity of the decisions with which he is faced,"⁴⁷ the court listed several criteria that must be considered in determining whether the defendant is fully aware of the nature of the proceedings.⁴⁸

When the *Perry* case arose, the issue of exempting insane persons from capital punishment was not a matter of first impression in Louisiana. In *State v. Allen*,⁴⁹ the Supreme Court of Louisiana reviewed the case of an inmate who was denied application for a lunacy commission to determine his mental state after his conviction for murder. The court examined a line of older cases and Code of Criminal Procedure article 267 (a precursor to 641) and determined: "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."⁵⁰ What the *Allen* court failed to do, however, was to explain on what grounds a trial court should determine a prisoner's sanity after conviction. The court left much discretion with the trial judge, even—as in *Allen's* case—the discretion as to whether or not a lunacy commission was required.

45. Louisiana Code of Criminal Procedure article 641 states: "Mental incapacity to proceed exists when, as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or assist in his defense."

46. 345 So. 2d 1129 (La. 1977).

47. *Id.* at 1138.

48. See *id.* at 1138 for specific factors.

49. 15 So. 2d 870 (La. 1943).

50. *Id.* at 871.

The closest the Supreme Court of Louisiana has come to clearly articulating a test by which an inmate's sanity or competence for execution may be determined was in Justice Cole's opinion in *Perry I*.⁵¹ There the court seemed to adopt the "understand the death penalty" language of Justice Powell's *Ford* opinion but added the requirement that the court determine Perry had become insane, again employing that ambiguous term without legal definition. The court stated that the issue of mental incapacity could be raised by either party or by the trial court *sua sponte* and cited Louisiana Code of Criminal Procedure article 642. Finally, the opinion clearly placed the burden of proof on the defendant, requiring him to show "by a preponderance of the evidence that he lacks the present capacity to undergo execution."⁵²

By referring to Article 642, the court may have been confirming the notion of the trial court that the Code of Criminal Procedure articles dealing with mental incapacity to proceed are to be applied by analogy to the post-conviction process to determine competence for execution. As discussed above, however, the question of competence for execution should have its own test and specific criteria based on the underlying rationale for the death penalty. Furthermore, by including the word "insane" in the determinative test, the Cole opinion left it to the trial court to interpret the basic question of competence to be executed.

D. Forced Medication—Federal Law

The federal jurisprudence regarding the constitutionality of a state's order to forcibly medicate prisoners with antipsychotic drugs has been developing steadily since the introduction of those drugs in the 1950's.⁵³ Several constitutional provisions have been relied upon as sources for a person's right to refuse such medication, including the Eighth Amendment,⁵⁴ the First Amendment,⁵⁵ the Fourteenth Amendment,⁵⁶ as well as common-law doctrines such as informed consent.⁵⁷ The culmination of this development came in the United States Supreme Court's opinion in *Washington v. Harper*, which was delivered just five days before oral arguments were heard for *Perry*.

51. See *supra* note 9 and accompanying text.

52. *State v. Perry*, 502 So. 2d 543, 564 (La. 1986).

53. See Cichon, *supra* note 2, for an overview of United States Supreme Court and other federal cases.

54. See *Mackey v. Procunier*, 477 F.2d 877 (9th Cir. 1973), in which the Ninth Circuit Court of Appeals held that experimental use on an unwilling prisoner of behavior conditioning drugs violated the Eighth Amendment's prohibition against cruel and unusual punishment, even though the State claimed the drug was not punishment but part of a treatment program.

55. See *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976), *vacated*, 458 U.S. 1101, 102 S. Ct. 3474 (1982).

56. *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452 (1982).

57. *Rennie v. Klein*, 653 F.2d 836 (3d Cir. 1981), *vacated*, 458 U.S. 1119, 102 S. Ct. 3506 (1982).

In *Harper*, the Court considered the case of a convicted robber who was forcibly administered antipsychotic drugs in accordance with a Washington prison regulation. Justice Kennedy's opinion for the Court broke the issue down into its separate procedural and substantive aspects: "[T]he substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient."⁵⁸ Citing *Youngberg v. Romeo*⁵⁹ and *Parham v. J.R.*,⁶⁰ the Court answered the substantive question and found that Harper had a right to refuse medical treatment based on the Due Process Clause of the Fourteenth Amendment.⁶¹ The Court, however, recognized that this right is not absolute and must be weighed against valid state interests in medicating the defendant. In this case, the state of Washington cited two specific interests: its need to maintain order among the prison population under the police power and its *parens patriae* interest in ensuring that Harper received medication that was deemed necessary by his physicians.⁶²

The Court also considered important to the balancing process the fact that Harper was a convicted and confined prisoner of the state and alluded to the notion that, as a prisoner, his liberty interests may be somewhat diminished: "The extent of a prisoner's right under the [Due Process] Clause to avoid unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement."⁶³

To the above-mentioned balancing test, the Court applied a reasonableness standard that, since a prison regulation was involved, was "less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."⁶⁴ By stating that the "proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests,'"⁶⁵ the Court gave great deference to the state's interests in forced medication, especially where a prison inmate is concerned.

The Court then discussed the procedural requirements to be met before the state could administer medication to Harper against his will and remanded to the trial court for further consideration under its opinion. What is important to glean

58. *Washington v. Harper*, 494 U.S. 210, 220, 110 S. Ct. 1028, 1039 (1990).

59. 457 U.S. 307, 102 S. Ct. 2452 (1982).

60. 442 U.S. 584, 99 S. Ct. 2493 (1979).

61. The Court's comments regarding the procedural issue are not germane to the analysis of *Perry* and are, therefore, not presented in detail here.

62. The trial court found and the Supreme Court accepted that, unmedicated, Harper represented a threat to both himself and other inmates and that the medication had been prescribed in Harper's best interest.

63. *Harper*, 494 U.S. at 222, 110 S. Ct. at 1045.

64. *Id.* at 224, 110 S. Ct. at 1049 (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 2405 (1987)).

65. *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2262 (1987)).

from the *Harper* decision is that the Supreme Court recognized that an inmate has a due process, liberty interest to refuse medication. This interest, however, is not absolute, and any intrusion upon it by a state must be justified by the relatively low criteria of having a reasonable relationship to a legitimate state interest. Furthermore, the Court alluded to the fact that the state's interests were higher than normal and the liberty interests lower than normal when the person whose liberty is involved is a convicted prisoner (or at least when the intrusion is based on a prison regulation).

Neither *Harper* nor any other United States Supreme Court case has addressed the specific question of forced medication to produce or maintain competence for execution. (It is probable that the Court expected to address that issue in *Perry* after remand.) Nor did *Harper* address the cruel and unusual punishment issue since, in *Harper's* case, the medication was purely for treatment purposes and not ordered in a punishment context.

E. Forced Medication—Louisiana Law

Louisiana constitutional protections of privacy extend further than do those of the Fourteenth Amendment Due Process Clause. The right to privacy under Louisiana law, however, has never been considered absolute. There are several statutory and jurisprudential situations in which the privacy right to refuse medication is overruled by legitimate state interests.

Louisiana has a statute with a similar purpose to that of the Washington prison regulation in *Harper*. Louisiana Revised Statutes 15:830.1 authorizes the Department of Public Safety and Corrections to forcibly administer treatment to mentally ill or mentally retarded inmates when a staff or consulting physician or psychiatrist certifies that such treatment is required to prevent harm or injury to the inmate or others. The Department may only continue the treatment for fifteen days, after which time it must seek a court order to continue treatment.

Title 28 of the Revised Statutes deals with mental health and addresses forced medication in the non-criminal context. Louisiana Revised Statutes 28:65 provides for non-consensual medication of patients in mental facilities in both emergency and non-emergency situations. Section 66 and following sections provide for an administrative review prior to forced medication in non-emergency situations. In emergency situations, however, a physician is authorized to treat a non-consenting patient only when he determines that the patient's condition causes a threat of physical harm to himself or others. The medication may only be continued as long as the emergency exists and, in no case, may it exceed seventy-two hours.

Louisiana Code of Criminal Procedure article 648 provides specifically for forced administration of antipsychotic drugs in the criminal trial process. Paragraph (2) provides:

If the person is charged with a felony or a misdemeanor classified as an offense against the person and considered by the court to be likely to commit crimes of violence, and if the court determines that his mental

capacity is likely to be restored within ninety days as a result of treatment, the court may order immediate jail-based treatment by the Department of Health and Hospitals not to exceed ninety days; other-wise, if his capacity cannot be restored within ninety days and inpatient treatment is recommended, the court shall commit the defendant to the Feliciana Forensic Facility.

The statute further provides for later review of the capacity of the charged person to stand trial. If the court finds the person will not, in the foreseeable future, be capable of standing trial, the court must release that person on probation. If, however, the court finds the person to represent a danger to himself or others, the court may commit him to a treatment facility—this action constituting a civil commitment.

A review of the jurisprudence concerning Articles 641-649.1 reveals that a defendant whose capacity to stand trial depends upon continued administration of antipsychotic drugs has consistently been held competent to stand trial. In *State v. Plaisance*,⁶⁶ the supreme court held that a defendant who had already been convicted on the basis he was medicated throughout the course of the trial could not successfully claim the trial judge had made an error in evaluating his mental capacity. The court found the defendant had been able to understand the proceedings and assist in his defense and rejected the notion that such mental capacity was invalid since it was induced by antipsychotic drugs.

The court took the same analysis one step further in *State v. Hampton*,⁶⁷ by outright rejection of the trial judge's finding that the antipsychotic medication of a criminal defendant induced "synthetic sanity."⁶⁸ The court reiterated that the test for capacity to stand trial was the prisoner's understanding and ability to assist counsel, whether induced by drugs or natural.

One final area of Louisiana jurisprudence requires mention. After adoption of the 1974 Constitution, the Louisiana Supreme Court struggled somewhat with the scope of the privacy protections afforded by Article I, section 5. One side viewed Section 5 to be limited to the realm of governmental intrusions related to

66. 210 So. 2d 323 (La. 1968).

67. 218 So. 2d 311 (La. 1969).

68. *Id.* at 312-13. The notion of "synthetic" or "artificial" sanity is an important concept to comprehend in examination of the *Perry* problem. A central question in *Perry* is: can the medication achieve, in the individual, the required level of mental competence? This question depends, to a large extent, upon medical testimony. While it may be that such testimony reveals that antipsychotic medications do not cure the specific mental disorder but only alleviate the symptoms, whether they create artificial or synthetic sanity depends upon the definition of sanity employed. As has been maintained throughout this article, the question is answered if it is regarded as a legal question of competence. If the clear standard employed is understanding the crime and the nature of the punishment, a court can gather specific evidence, including medical testimony and its own evaluation of the defendant, as to whether the drugs allow that defendant to understand. For an excellent discussion of synthetic sanity, see Gutheil & Appelbaum, *supra* note 2.

unreasonable searches and seizures.⁶⁹ This view also held that Article I, section 5's guarantees were equal to, but no greater than, those of the Fourth and Fourteenth Amendments. Those who expounded the other view suggested that the redactors of the 1974 Constitution understood full well the meaning of the word "privacy," which had become a term of art by 1974, and intended for Section 5 protections to encompass all meanings of that term including the personal autonomy type of privacy.⁷⁰

By 1989, it had become clear that the word "privacy" in Section 5 encompassed at least some rights of personhood or individual autonomy outside of the search and seizure realm and that those protections were generally broader in scope than those of federal provisions. In June of 1989, the Louisiana Supreme Court specifically extended Section 5's protections to the right to refuse unwanted medications. In *Hondroulis v. Schumacher*,⁷¹ the court examined the case of a woman who brought suit against her doctor for medical malpractice and failure to properly inform her about the risk of a certain medical procedure. In an opinion by Justice Dennis,⁷² the court first examined the informed consent doctrine, but chose to decide the case on constitutional grounds, stating:

[Section 5's] safeguard was intended to establish an affirmative right to privacy impacting non-criminal areas of law and establishing the principles of the Supreme Court decisions in explicit statement instead of depending on analogical development. Accordingly, we conclude that the Louisiana Constitution's right to privacy also provides for a right to decide whether to obtain or reject medical treatment.⁷³

The court also indicated that this right might only be infringed upon by the state if a compelling state interest could be demonstrated as justification.⁷⁴ *Hondroulis* laid the foundation for much of the privacy argument in *Perry II*.

III. THE *PERRY II* OPINION

The majority opinion, written by Justice Dennis, in which Justices Watson, Lemmon, and Hall concurred,⁷⁵ affirmed the trial court's finding that Perry was

69. See *State v. Church*, 538 So. 2d 993 (La. 1989) (Cole, J., dissenting); *State v. Hernandez*, 410 So. 2d 1387 (La. 1982) (Blanche, J., dissenting).

70. See John Devlin, *Privacy and Abortion Rights under the Louisiana State Constitution: Could Roe v. Wade be Alive and Well in the Bayou State*, 51 La. L. Rev. 685 (1991); Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution*, 35 La. L. Rev. 1 (1974).

71. 546 So. 2d 466 (La. 1989).

72. Justice Dennis' activity in the privacy realm has been significant. He began as a dissenter in *Hernandez* and over time encouraged the court's shift toward a broader interpretation of Article I, section 5's protections. *Hondroulis* took the scope of privacy into the medical decision realm, and *Perry II* expanded it even further.

73. *Hondroulis*, 546 So. 2d at 473 (citation omitted).

74. *Id.* at 473.

75. While Justice Hall joined the opinion, he stated in concurrence that he "does not fully

incompetent for execution without the use of antipsychotic drugs, but reversed the order to administer those drugs to Perry without his consent. The court held the forcible administration of such medication for the purposes of restoring or maintaining competence for execution violated Perry's privacy rights under Article I, section 5 of the Louisiana Constitution of 1974.⁷⁶ The court further held the medication was cruel, excessive, or unusual punishment proscribed by Article I, section 20.⁷⁷

The majority opinion began by examining the rationale behind the common-law prohibition against executing the insane. After reviewing the traditional purposes of the prohibition, the Court mentioned the recent United States Supreme Court case of *Ford v. Wainwright* and the Louisiana line of cases beginning with *State v. Allen*,⁷⁸ all of which exempt insane or incompetent inmates from the ultimate penalty. Finding execution of the insane "thrice banned in our state,"⁷⁹ the court turned to the question of medication and forcible administration.

The court first addressed the question whether it should apply Louisiana or federal constitutional analysis.⁸⁰ Relying on federal and state jurisprudence, the majority found the case must first be resolved on state constitutional grounds.⁸¹ Despite this finding, the majority opinion used several pages to distinguish *Perry II* from *Harper*.

subscribe to all that is said in Section V of the opinion." *State v. Perry*, 610 So. 2d 746, 771 (La. 1992) (Hall, J., concurring in part). Justice Lemmon concurred only as to Section VI, the cruel, excessive, or unusual argument, denoting that at least some of Justice Dennis' privacy argument did not carry a majority of the Court. *Id.* at 772 (Lemmon, J., concurring).

76. *Id.* at 747. Article I, section 5 states:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

77. *Perry II*, 610 So. 2d at 747. Article I, section 20 states: "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense."

78. 204 La. 513, 15 So. 2d 870 (1943).

79. *Perry II*, 610 So. 2d at 750.

80. The federalism issue raises an interesting question: since the United States Supreme Court remanded the case in light of *Harper* after the Louisiana Supreme Court had declined to review it, it may be argued that the case was closed as to Louisiana law and that the only subject still open was the federal law question based upon a *Harper* analysis. Had the United States Supreme Court denied writ, the case could have been closed as to both Louisiana and federal constitutional questions. Somehow, however, the review by the United States Supreme Court reopened the state law issue to review by the Louisiana Supreme Court. Professor John Devlin discussed this "ratchet" effect in John Devlin, *Louisiana Constitutional Law*, 54 La. L. Rev. 683 (1994).

81. *Perry II*, 610 So. 2d at 750-51. There are two viewpoints with respect to whether a state court should look first to its own constitution or proceed under federal constitutional analysis and federal jurisprudence. At present, the view taken by the majority in *Perry II* is predominant in most United States jurisdictions and seems to be the prevailing view in Louisiana. For excellent

The substantive portions of the majority opinion deal with the privacy and cruel, excessive, or unusual punishment arguments against the trial court's medication order. The opinion first examined Perry's privacy interest to refuse medical treatment.⁸² It began by examining the jurisprudential interpretation of Article I, section 5. Citing *State v. Church*,⁸³ *State v. Hernandez*,⁸⁴, and *State v. Breaux*,⁸⁵ the court reaffirmed the fact that the Louisiana Constitution's guarantee of privacy exceeds, in scope and application, the similar guarantee of the United States Constitution under the Due Process Clause of the 14th Amendment.⁸⁶

The Court then examined the case of *Hondroulis v. Schumacher*, another opinion authored by Justice Dennis, in which the court specifically considered the right to obtain or reject medical treatment in the context of a civil suit. In

explanations of the two conflicting viewpoints, see Justice Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980) (arguing for application of state law first), and Earl M. Maltz, *The Dark Side of State Court Activism*, 63 Tex. L. Rev. 995 (1985) (arguing for judicial restraint by state courts in application of their state constitutional laws).

82. The choice of the words "medical treatment" throughout the privacy argument presented by the majority seems to present somewhat of a contradiction with an earlier part of the opinion. In discussing the comparison to the *Harper* case, Justice Dennis found for the court:

"[A] physician's prescription and administration of antipsychotic drugs to a prisoner against his will, pursuant to the order of a state court or other government official, for the purpose of carrying out the death penalty, *does not constitute medical treatment*, but forms part of the capital punishment sought to be executed by the state."

Perry II, 610 So. 2d at 753 (emphasis added). The privacy argument, however, is based, almost exclusively, on a person's right to refuse medical treatment. While it is likely that the words "medical treatment," as used in this part of the opinion, should be read to mean "medication" or "medical activity with respect to one's body," the apparent contradiction in the opinion does exist.

83. 538 So. 2d 993 (La. 1989) (holding that, while DWI roadblocks did not violate the privacy protections of the Due Process Clause of the Fourth Amendment to the U.S. Constitution, such methods did violate the guarantee of privacy under Article I, section 5, of the Louisiana Constitution).

84. 410 So. 2d 1381 (La. 1982). In an opinion by Justice Dennis, the court held that a warrantless search of a suspect's automobile after he was arrested for DWI violated his right to privacy under Article I, section 5, of the Louisiana Constitution. Specifically, with reference to interpreting that article, the court cited the Preamble to the Louisiana Constitution of 1974, stating:

We, of course, give careful consideration to the United States Supreme Court interpretations of relevant provisions of the federal constitution, but we cannot and should not allow those decisions to replace our independent judgment in construing the constitution adopted by the people of Louisiana. . . . [Article I, section 5's] constitutional declaration of rights is not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than that afforded by the jurisprudence interpreting the federal constitution.

410 So. 2d at 1385 (citations omitted).

85. 329 So. 2d 696 (La. 1976) (holding that a warrantless search violated Article I, section 5).

86. *Perry II*, 610 So. 2d at 755. For the basis of the United States Constitution's protection of privacy, see *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965), and *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973). For analysis of the expanded scope of the Article I section 5, guarantee of privacy, see Devlin, *supra* note 70, and Hargrave, *supra* note 70.

that case, the court was asked to decide if a plaintiff had stated a cause of action in a medical malpractice suit in which a doctor failed to advise the patient-plaintiff of alternative methods of treatment and the specific risks of the treatment chosen. After citing the common-law informed consent doctrine, the court addressed the constitutional issue of the right to make personal medical choices under Article I, section 5's privacy guarantee. This was the first case in Louisiana to extend the privacy protection of Article I beyond the search and seizure realm.⁸⁷

From the above analysis, the court concluded that the "Louisiana Constitution's right to privacy also provides for a right to decide whether to obtain or reject *medical treatment*,"⁸⁸ and extended this conclusion to Perry's case. Having found that Perry had a right to refuse medical treatment, the court then applied a "compelling state interest" test to determine if the state's interests in executing Perry outweighed his interests as stated above.⁸⁹ Citing the state's claims, under *Harper*,⁹⁰ that Perry represented a threat to both himself and others, the court stated: "We believe these purposes were manufactured with the benefit of hindsight and did not in fact motivate the challenged court order."⁹¹ The court then considered the interests of the state in carrying out the penalty of death. Referring to the next section of the opinion concerning cruel or unusual punishment, the court summarily concluded that "the execution of a forcibly medicated insane prisoner will not contribute to the goal of either retribution or deterrence of capital offenses."⁹²

87. It may be argued that the issue in *Hondroulis* could have been resolved without resorting to constitutional analysis, or that "privacy" as used in Section 5 was not intended by the redactors of the 1974 Constitution to be expanded beyond the scope of search and seizure cases and into the realm of personal autonomy. See Devlin, *supra* note 70. That Article I, section 5's privacy extends to personal autonomy cases is not necessarily a settled issue in Louisiana. See *Sudwischer v. Estate of Hoffpauir*, 589 So. 2d 474 (La. 1991).

88. *Perry II*, 610 So. 2d at 756 (emphasis added). See also *supra* note 82.

89. *Perry II*, 610 So. 2d at 760-61.

90. The prosecution spent most of its brief to the Louisiana Supreme Court addressing the *Harper* issue, as that was the specific subject of remand to the trial court by the United States Supreme Court. As a matter of fact, as addressed by the State of Louisiana in its petition for rehearing, neither the state nor Perry argued Article I, section 5, in any significant manner, because both believed the case would ultimately be resolved on federal law grounds. See Respondent's Application for Rehearing, *State v. Perry*, 610 So. 2d 746 (La. 1993) (No. 91-KP-1324).

91. *Perry II*, 610 So. 2d at 761. It is important to note that only on remand did the trial court find, under *Harper*, that Perry was a danger to himself and others and that the medication was in Perry's best interest, stating:

I think the record can be read, that is the record in this case . . . can reasonably be read to conclude that Michael Owen Perry is a danger to others; and also, if we assume that the purpose of mental health treatment is to place a person in good mental health, then I think we can assume that this medication is in his best medical interest.

See Oral Reasons for Judgment, *supra* note 22, at 8. This somewhat conclusory statement may lend credence to Justice Dennis' reference to "manufactured" purposes.

92. *Perry II*, 610 So. 2d at 761.

Turning next to Article I, section 20, the majority opinion again found the Louisiana constitutional protections to be broader than those of the federal constitution. Then, referring to federal jurisprudence, the court laid out four principles for assessing the constitutional validity of a punishment under section 20: "the punishment must not be 1) degrading to the dignity of human beings; 2) arbitrarily inflicted; 3) unacceptable to contemporary society; or 4) excessive, i.e., disproportionate to the crime or failing to serve a penal purpose more effectively than a less severe punishment."⁹³

With respect to the first criteria, the majority concluded that to execute a medicated prisoner in a case like *Perry* is to treat that prisoner as "non-human" and to remove that person's "common human dignity."⁹⁴ Next, concentrating on the words "unusual" and "excessive" in Section 20, the court held the ordered execution scheme violated both the second and fourth criteria above.⁹⁵ Finally, the court concluded: "The punishment intended for Perry is severely degrading to human dignity."⁹⁶

Moving next to an examination of the potential deterrent effect of the proposed medication/execution scheme, the court first noted that attempts to evaluate the deterrent effect of the death penalty in general have been inconclusive. Relying on *Gregg v. Georgia*,⁹⁷ the court reasoned that "it is highly unlikely that the deterrent value of the death penalty will be increased measurably by including within the class of convicted offenders who may be executed a category that has been exempt from execution for centuries, viz., the insane."⁹⁸ With respect to retribution, the court found the planned punishment violated what it called the "principles limiting the unqualified pursuit of retribution," these being "respect for human dignity and equivalence between crime and punishment."⁹⁹

Summing up the Section 20 portion of the opinion, the majority wrote: "Rather than calling upon Perry to suffer only the extinguishment of his life in a humane manner, the state would have him undergo a course of maltreatment that is inherently loathsome and degrading to his dignity as a human being."¹⁰⁰ As a final point, the court concluded the medication/execution scheme ordered by the court had not been shown by "unequivocal objective evidence" to be "acceptable to society."¹⁰¹ The last sentence of the majority opinion reads: "In order to modify this stay order the state must demonstrate to this court that Perry

93. *Id.* at 762.

94. *Id.* at 762-63.

95. *Id.* at 765-66.

96. *Id.* at 766. Note that it is understood here also that the medication is part of the punishment. See *supra* note 82.

97. 428 U.S. 153, 96 S. Ct. 2909 (1976).

98. *State v. Perry*, 610 So. 2d 746, 766 (La. 1992).

99. *Id.* at 767.

100. *Id.* at 768.

101. *Id.* at 770.

has achieved or regained his sanity and competence for execution independently of the effects or influence of antipsychotic drugs."¹⁰²

Justice Watson joined the opinion, but concurred separately, stating, "the basic question—whether civilized society can medicate an insane person to make him temporarily sane in order to kill him—almost answers itself. There is no overwhelming need to execute this crazy man. Such barbarous action requires strong penological interest, not present here."¹⁰³

Justice Hall concurred in the Dennis opinion but did not "fully subscribe to all that is said in Section V," the section dealing with privacy or personhood.¹⁰⁴ Justice Lemmon concurred in the cruel, excessive, or unusual argument of the court's opinion only.¹⁰⁵

Justice Marcus, in a separate dissent,¹⁰⁶ provided a detailed analysis of the exemption of insane convicts from execution and suggested Louisiana adopt a definition for competence to be executed which is similar to that of Justice Powell's definition in *Ford v. Wainwright*. Then applying, a "reasonable relationship" test, Justice Marcus weighed Perry's right to refuse medication against the interest of the state in enforcement of its criminal laws and found Perry could be forcibly medicated without offending the Louisiana Constitution.¹⁰⁷

Finally, Justice Cole dissented, ascribing to the view that the forced medication must be separated from the execution and, as it was in Perry's best interest, was not cruel or unusual. Citing the need for retribution and the interest of the state in enforcing its penalty, Justice Cole found Perry's privacy rights were outweighed and would have held the medication order constitutional.¹⁰⁸

IV. CRITICAL ANALYSIS OF THE LOUISIANA SUPREME COURT OPINION

A. *General Criticism and the "Final Sentence" Problem*

The opinion in *Perry II* is based on a series of misconceptions. First, the court fails to make the critical distinction between insanity or medically defined disorders and legal competence to be executed. By not conducting a complete legal analysis, the court arrives at the conclusion that the prohibition against executing insane persons is absolute where a medically defined mental disorder is found. The court also fails in that it does not finally articulate a clear standard of competence for execution in Louisiana.

102. *Id.* at 771.

103. *Id.* at 771 (Watson, J., concurring).

104. *Id.* at 771 (Hall, J., concurring).

105. *Id.* at 772 (Lemmon, J., concurring).

106. *Id.* at 772 (Marcus, J., dissenting).

107. *Id.* at 775-76 (Marcus, J., dissenting).

108. *Id.* at 778-82 (Cole, J., dissenting).

Second, the court makes the related mistake of assuming that the medication involved is not capable of restoring or maintaining Perry's mental competence at the required level. The last sentence of the opinion, which prohibits the state from seeking a modification of the stay of execution unless Perry becomes sane without the influence of drugs, demonstrates that the court accepts the artificial sanity rationale which was previously rejected in *Hampton*.¹⁰⁹ This fact may have significant effects on cases like *Hampton* and *Plaisance*, in which individuals are medicated in order to achieve mental competence to stand trial. If the last sentence of *Perry II* is read to overturn *Hampton* and find that mental incapacity cannot be alleviated by antipsychotic medication, numerous criminals currently serving sentences may have valid claims for a mistrial. Furthermore, future court orders to treat charged persons in order to induce capacity to stand trial (under Article 648) may be subject to constitutional challenge.

The effects of the last sentence may also be significant on the imposition of the death penalty throughout the state. It has been estimated that up to 70% of death row inmates have been diagnosed with schizophrenia or psychosis.¹¹⁰ If the assumption is made that these diseases are incurable, the viability of the death penalty as a valid tool of the criminal justice system is threatened. Furthermore, the notion that a prisoner must be free of drugs to be competent for execution may encourage numerous death row inmates to seek prescriptions for antipsychotic medication.

The final ramification of the last sentence is that Michael Owen Perry now lives on death row and voluntarily receives antipsychotic medication on a regular basis.¹¹¹ According to the finding of the trial court, Perry is, when medicated, competent to stand trial. However, as long as he stays on medication the state may not seek to modify his stay of execution. This produces the ironic situation that the very medication the state may not forcibly administer to Perry for his execution is the barrier to the state's ability to carry out that punishment.

B. *The Section 20 Argument—Punishment or Medical Treatment*

The primary criticism of the court's cruel and unusual punishment argument is that it fails to separate the order to medicate from the punishment of execution. Notwithstanding the "medical treatment" contradiction,¹¹² the court assumes the punishment to be: medicate and execute. In fact, most classifications of this case in law review articles and journals refer to it as a "medicate to execute" scheme. The actual order by the trial court separated the two events ordering the execution to take place and finding Perry was competent to be executed only when medicated. The trial court further ordered that the

109. See *supra* note 67 and accompanying text.

110. Amnesty International, *United States of America: The Death Penalty 108-09 (1987)* (citing R. Johnson, *Condemned to Die: Life Under Sentence of Death (1981)*).

111. See *supra* note 28 and accompanying text.

112. See *supra* note 82.

medication, if prescribed, could be given over the defendant's objections if necessary. While this distinction, at first glance, may seem semantic in nature only, it significantly weakens the cruel and unusual argument of the supreme court.

What should be considered in determining if an act is cruel or unusual is the act itself, not the underlying reason for the commission of the act. The act of forcible medication itself must be considered to determine if it is cruel or unusual. Since Louisiana allows forcible medication in some circumstances where it is in the patient's best medical interest, the act of medication, in and of itself, should be found neither cruel nor unusual.

Next, the separate issue of executing a medicated inmate must be considered under the cruel and unusual punishment analysis. If it is not cruel and unusual to put a competent person to death, how is it cruel and unusual to put to death a person who is competent only because he was previously involuntarily medicated?

This distinction is also significant to the medical ethics argument presented by the majority opinion. The court maintained that a doctor, forced to give medication to an unwilling patient for the purpose of preparing him to be put to death, may fail to properly administer the medication or completely treat any side effects that may arise. The trial court's order, however, left to the doctors the discretion to prescribe the drugs if found to be in Perry's medical interest. If Perry refused the drugs, the prison institution could force him to take them.¹¹³

A final criticism of the Section 20 reasoning is that its general tone and tenor suggest that it is a diatribe against the death penalty in general. The court seems to be expressing its repulsion and disdain for what it considers an immoral or inhumane punishment. After discussing the potential side effects¹¹⁴ of the medication, the court states: "Rather than calling upon Perry to suffer only the extinguishment of his life in a humane manner, the state would have him undergo a course of *maltreatment that is inherently loathsome and degrading to his dignity as a human being.*"¹¹⁵

Since the state of Louisiana, through its legislature, has found the death penalty to be a morally acceptable and valid form of punishment and the

113. The medical ethics problem is beyond the scope of this article, but is discussed in depth in Charles P. Ewing, *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethical Perspectives*, 5 *Behav. Sci. and the Law* 177 (1987); David L. Katz, *Perry v. Louisiana: Medical Ethics on Death Row—Is Judicial Intervention Warranted*, 4 *Geo. J. Legal Ethics* 707 (1991); Michael L. Radelet & George W. Barnhart, *Treating Those Found Incompetent for Execution: Ethical Chaos with Only One Solution*, 16 *Bull. Am. Acad. Psychiatry Law* 297 (1988); Rochelle Graff Salguero, *Medical Ethics and Competency To Be Executed*, 96 *Yale L.J.* 167 (1986).

114. There is no evidence that Perry suffered any of the mentioned side effects with the exception of sleeping for up to 20 hours per day on some occasions. The court's extensive analysis of the side effects also brings up the interesting question of how a similar case might be solved in the future when a drug with the same positive effect as the current drugs but no demonstrable side effects is developed.

115. *State v. Perry*, 610 So. 2d. 746, 768 (La. 1992) (emphasis added).

Supreme Court of the United States has confirmed the constitutionality of capital punishment, the Supreme Court of Louisiana should not, at its whim, take the opportunity to "fray the hangman's knot," to chip away at the death penalty, just because some members of that court find that particular punishment immoral or unacceptable. The *Perry II* opinion may be an example of this phenomenon and may have more profound effects on capital punishment in Louisiana than even the court itself intended.

C. *The Section 5 Argument—Privacy Run Rampant*

It first must be noted that Part V of the opinion, the court's privacy argument, did not carry a majority of the court. Justice Watson concurred, Justice Hall did not "fully subscribe to all that is said in Section V of the opinion,"¹¹⁶ and Justice Lemmon concurred with the Dennis opinion only as to the Section 20 argument. Justice Hall was not specific as to which parts he accepted or rejected.

Second, there can be little doubt that the protections of Article I, section 5 are greater than those of federal privacy jurisprudence and that, at least since *Hondroulis*, the guarantee of privacy has been extended to include personal autonomy in making medical decisions. *Perry II*, however, represents a new extension of the privacy right of Article I, section 5: it is the first case in Louisiana (and, as far as this author's research demonstrates, in any United States jurisdiction) in which the punishment of a criminal, in and of itself, was considered an unconstitutional violation of the convicted person's privacy. Never before has a government's invasion of personal privacy, *after* that person has been found guilty and sentenced, been relied upon to successfully halt the imposition of that punishment. Extending the privacy right under Section 5 this far could have serious ramifications on the state's ability to exact any punishment upon criminal offenders. Is not placing a person in jail or fining a criminal offender also an invasion of that person's protected privacy rights? Might Article I, section 5 be used to argue against imposition of these penalties as well?

Furthermore, no one could argue that, under federal, state, and common law, a person (even a convicted criminal) has a right to reject medical treatment. That guarantee, however, is not absolute and can be overcome by a state interest which justifies intrusion into the person's constitutionally-protected individual rights.¹¹⁷ The court in *Perry II* correctly applies the compelling state interest test in balancing the state's needs against the privacy rights afforded Perry under Section 5. The court's analysis of the state's interests, on the other hand, is

116. *Id.* at 771 (Hall, J., concurring).

117. See 16 C.J.S. *Constitutional Law* § 645: "The constitutionally protected right of privacy extends to an individual's liberty to make decisions regarding psychiatric care without *unjustified* governmental interference." (emphasis added)

somewhat lacking. The court, after summarily dismissing the trial court's finding that Perry represented a danger to himself and others,¹¹⁸ concludes that the state has available less drastic means of punishment¹¹⁹ and that execution of Perry "will not contribute to the goal of either retribution or deterrence of capital punishment."¹²⁰ This analysis fails to explore the state's most basic police power interest—its capability to exact punishment on criminal offenders. Even held up against a compelling state interest test, this need must tip the scales of the balancing test toward the state. The state's interest in seeing that its legally imposed punishments, as recommended by juries and imposed by courts, are carried out is extremely high. To find that an individual's privacy rights outweigh this vital public interest sets dangerous precedent and threatens the integrity of the entire criminal justice system in this state.

Other points must be considered in weighing the interests of the state against the privacy interest of Perry: on the state's side of the scale must go the fact that, even if Perry is not a danger to himself and others,¹²¹ the state has a *parens patriae* interest since the medication was prescribed by doctors in Perry's medical best interest.¹²² Further, Perry's privacy rights must be considered within the context of his confinement, as stated in *Harper* and confirmed as Louisiana law in the case of *State v. Patrick*.¹²³

In the above light, what the balancing process comes down to is the somewhat reduced privacy right of the inmate to refuse medication versus the state's interests in carrying out a legally prescribed penalty, maintaining the integrity of its criminal justice system, and fulfilling its police power and *parens*

118. See *supra* note 91 and accompanying text.

119. It has been suggested by some law review commentators that the Louisiana Supreme Court should have commuted Perry's sentence to life imprisonment. Unlike other states, however, the court lacks the inherent power to commute death sentences to life. See Nancy S. Horton, *Restoration of Competency for Execution: Furiosus Solo Furore Punitur*, 44 Sw. L.J. 1191 (1990).

120. *State v. Perry*, 610 So. 2d 746, 761 (La. 1992).

121. Although the trial court found that he was dangerous, the majority opinion called that finding "manufactured" after the fact. See *supra* note 91 and accompanying text.

122. Some may argue that the state's *parens patriae* interest in protecting Perry should extend to the execution itself. That is, the state, knowing that medicating Perry will eventually lead to his execution, has an interest in avoiding that medication in order to protect Perry from impending death. This argument, however, is somewhat absurd, when it is considered that the state has already decided that this inmate must face the death penalty. The state's *parens patriae* interest in protecting Perry extends only to ensuring that, up until the time of his death, his suffering from his mental disorder is minimized.

123. 381 So. 2d 501 (La. 1980). In *Patrick*, the Louisiana Supreme Court stated:

While we have recognized that prisoners are not totally bereft of Fourth Amendment rights by virtue of their incarceration, we have also declared these rights are diminished in nature and scope because of confinement for criminal conduct. We have expressly recognized and declared that an inmate's expectations of privacy are considerably less than those of the free members of our society in general.

Id. at 503.

patriae duties. Surely the combination of these state interests must be considered compelling.

Furthermore, the privacy right being weighed against these state interests is not Perry's right to life, but his right to refuse medication. The state of Louisiana, through the legislature, the jury, and the trial judge, has already determined that the state's need to impose the death penalty outweighs Perry's right to life. If the interests of the state are sufficient to outweigh Perry's most basic privacy right—the right to life—how can they not be sufficient to outweigh the considerably lesser privacy right to refuse medication?

Finally, the biggest effect of the *Perry II* privacy argument may be on Louisiana's capability to forcibly medicate inmates in other than death penalty situations. If the right to refuse medication is held to a compelling state interest test and the state's police power and *parens patriae* rights, as mentioned above, do not satisfy that test, the constitutionality of Louisiana Revised Statutes 15:830.1 and Louisiana Code of Criminal Procedure article 648 is questionable. Trial courts rely on the *Plaisance* and *Hampton*¹²⁴ interpretation of Article 648 that defendants may be forcibly medicated to be mentally capable of standing trial. If that medication is held unconstitutional, numerous current and future defendants have significant due process claims for mistrial.

V. PROPOSED ANALYSIS

Before a court can answer the question of whether a state may forcibly medicate a prisoner to achieve competence for execution, it must analyze the underlying rationales for the death penalty and the exemption of some persons from that penalty. This section attempts to provide a framework on which that analysis may be based.

The first point of examination is the rationale for imposing the penalty of death upon certain convicted criminals. The two most common rationales for capital punishment are deterrence and retribution. The deterrence argument envisions the effect on future capital offenders of the possibility that they may suffer the ultimate penalty and the example set to such potential offenders by the execution of those convicted. The retribution notion has two sides: first, that the offender himself be subjected to a punishment equal to, or on a level with, the crime which he committed; and, second, that society as a whole be provided with a means of expressing its moral outrage at certain particularly violent or heinous criminal acts.

While the success of capital punishment in meeting these two criteria or satisfying these two goals is somewhat in doubt and the subject of endless legal debate, that particular question is beyond the scope of this article. What is

124. It is significant to note that both the *Plaisance* and *Hampton* decisions preceded the 1974 Constitution.

important to understand is that deterrence and retribution are the theories upon which imposition of capital punishment is based.

Having decided why a sovereign state may choose to employ the penalty of death, it is clear that any proposed execution which does not accomplish either (or both) of the dual criteria of deterrence and retribution must not take place.¹²⁵ Thus, the exemption of an insane or incompetent person from capital punishment is required whenever it can be shown that, because of that person's incompetence, his execution will not satisfy society's capital punishment goals.

From this reasoning must come a specific test for competence. To be effective in cases like *Perry*, this test should provide a legal standard for answering the question: when does a mental defect of the condemned person rob the execution of its capability to deter or of its retributive effect?

To properly address that question, the judiciary must be aware of the distinction between the legal definition of "incompetence," the medical assessment of certain mental disorders, and the somewhat loosely defined concept of insanity. While a judgment that a convicted criminal is incompetent for execution will unquestionably be based on evidence as to specific mental disorders, courts should not confuse that medically-defined disorder with legal incompetence. Courts should avoid use of the broad term "insane" and rely instead on the more specific legal standard for lack of mental competence to be executed. This standard should focus on the lack of deterrent and/or retributive effects, as discussed above. Furthermore, although any such test outlined by statute or jurisprudence must be clearly and concisely stated, it must be couched in general requirements since evaluation of mental competence to be executed must always be done on a case-by-case basis.

Once a clear standard of competence is derived, the next logical question is: can the medication involved achieve or maintain in a particular individual the level of mental competence for execution?¹²⁶ This question, like the one above, is a legal question which will depend to a large extent upon medical evidence and can only be answered on a case-by-case basis. The distinction between insanity or medically-defined mental disorders and legal incompetence is also important at this level of the analysis since, while medical evidence may demonstrate that insanity or schizoaffective disorders are incurable, the legal question of whether or not medication brings about a required level of mental competence is a separate and distinct issue.

125. It may be argued that the death penalty may be justified by only one of the mentioned criteria, i.e., that even without deterrent effect, capital punishment is necessary based on retribution alone, or vice versa. In this case, the convicted person's mental capacity would need to alleviate both rationales for that person to be exempt from the punishment. From the other point of view, where both rationales are required to justify execution, the absence of either (brought about by incompetence) is enough to exempt an incompetent person. Whether one or both criteria for capital punishment is required is a matter for debate and beyond the scope of this article.

126. For an excellent article addressing the effects that antipsychotic drugs have on mental disorders and intellectual functions in general, see Gutheil & Appelbaum, *supra* note 2.

Only after conducting the above analysis, developing a clear standard for competence for execution, and determining that a condemned inmate can be maintained at the appropriate level only by the administration of antipsychotic medication, may the court address the central question of *Perry II*—can the state force that medication upon that person? This question commands an examination of both the prisoner's right to refuse the medication (assuming he is mentally competent to make such a judgment) and the state's interest in carrying out its legally imposed penalty.

There can be little doubt that a person has a right to make personal decisions about whether to accept or reject an invasion into his body. Whether rooted in Fourteenth Amendment due process or liberty analysis, Louisiana constitutional or statutory guarantees, or judicially-created common-law doctrines such as informed consent, it is axiomatic that such a right is guaranteed to all persons. The right to refuse medical treatment is not absolute, however. It must be balanced against the state's interest in administering that medication.¹²⁷ In a case like *Perry*, those interests include the state's interest in carrying out sentences prescribed by the judicial system and the related interest in maintaining the integrity of and confidence in the system of criminal justice. Applying an analysis similar to that used in *Harper*, the state may also have a *parens patriae* interest (if the medication is found to be in the prisoner's own best interests or he is found to be a danger to himself) and a police power interest (if the unmedicated prisoner is found to represent a danger to other inmates or prison personnel).

In weighing the condemned prisoner's interests against those of the state, the court should employ a compelling state interest test, since the guarantee against unwarranted bodily invasion should be classified as a fundamental right. Furthermore, Louisiana courts should also consider the Louisiana Supreme Court's judicial interpretation of Article I, section 5, in which the court has determined that Louisiana's express protection of privacy is broader than that of the United States Constitution.

If the state employs this balancing approach and finds the state's interests outweigh those of the incompetent, condemned inmate, there is still another necessary step in the constitutional analysis. The Eighth Amendment prohibition against cruel and unusual punishment must be considered in the context of the medication and/or execution order. Again, the Louisiana jurisprudence has interpreted Article I, section 20's rule against cruel, excessive, or unusual punishment to be broader in scope and provide more protection than that of the Eighth Amendment.

Under either rule, the first question in the analysis must be: should the ordered medication be considered separate from the imposition of the penalty of

127. See *Riggins v. Nevada*, 112 S. Ct. 1810 (1992); *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 110 S. Ct. 2481 (1990); *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028 (1990); *Youngberg v. Romeo*, 457 U.S. 307, 102 S. Ct. 2452 (1982).

death or a part of the execution itself? If it is considered part of the penalty, then, arguably, a medication/execution scheme is both excessive and arbitrary (i.e. unusual). Furthermore, since most death penalty statutes (including Louisiana's) do not authorize antipsychotic medication as part of the punishment for the specific capital crimes involved, a court may lack the inherent authority to sentence a convicted offender to a punishment of medication and execution. If, on the other hand, the medication order is seen as a separate order, distinct from the sentence of death, the order could scarcely be described as cruel, excessive, or unusual *punishment*, assuming, of course, the medication is prescribed by a doctor and in the patient's medical best interest.

Under the cruel and unusual analysis, one must also consider whether or not a particular punishment is degrading to a prisoner's humanity or does not comport with society's notions of moral and acceptable punishment. These factors necessitate an analysis of the actual and potential side effects of the medication on the particular person involved. Again the distinction between a separate medication order and medication as part of the execution must be made, since forcible medication, in and of itself, is authorized by Louisiana and has been held constitutional.¹²⁸

Only if the medication order passes each of the tests above can the state constitutionally carry out the forcible medication of the condemned, incompetent person. If, however, the court finds that the medication order fails either of the above tests, and that the state may not forcibly administer antipsychotic drugs to an incompetent inmate for the purposes of readying him for execution, one final question must be answered: under what circumstances may the state proceed with the execution? Obviously, if the condition which causes the mental incompetence of the inmate changes naturally such that he is subsequently found to meet the required standard, the execution may be carried out. The more difficult question, however, is whether the state may proceed with the imposition of the death penalty if the inmate is restored to competence after voluntarily taking the drugs or being forced to accept the medication under some other circumstances, perhaps like those in the *Harper* case. This question is easily answered if one bears in mind the distinction between insanity and incompetence. If the standard for execution is based solely on the legal definition of competence, the execution may be carried out as long as the condemned person meets that standard, no matter how that level of mental competence may have come about.

VI. CONCLUSION

The *Perry II* opinion leaves many questions unanswered. What is the exact standard of competence to be executed in Louisiana? May the state forcibly administer antipsychotic drugs to criminal defendants under any circumstances?

128. See *Harper*, 494 U.S. 210, 110 S. Ct. 1028 (1990); La. R.S. 15:831.1 (1992).

The opinion also sets some dangerous precedents which could have serious effects on Louisiana criminal law: it assumes that insanity cannot be cured by antipsychotic medication, allowing convicted capital offenders like Perry to use that medication as a shield from the death penalty. It expands the privacy right of Article I, section 5, of the Louisiana Constitution into the realm of criminal punishment, which may, at some point, have serious effects on the imposition of non-capital punishments in this state. It holds the state to an extremely high standard to overcome a prisoner's right to refuse medication, thereby threatening the state's capability to forcibly medicate a prisoner under any circumstances.

Perry II requires action by both the legislature and Louisiana Supreme Court. Taking its example from the many states that have already done so,¹²⁹ Louisiana should statutorily adopt the Powell understanding test for competence to be executed.¹³⁰ Procedures for determining mental capacity to be executed should be outlined and may bear resemblance to those of Articles 641-649.1. The bill should specifically state that the test is legal in nature, although it necessarily depends upon medical evidence, and that a medical determination of schizophrenia, insanity, or any other specific mental disorder is not dispositive of the competence question. Furthermore, the legislature should include in the bill a statement of how the test for competence relates to its underlying rationale for imposition of the death penalty in certain cases. Finally, the legislature should clearly state its interest in seeing that the death penalty is carried out once a defendant is legally sentenced, stressing its police power interest in maintaining order. The bill may even go so far as to specifically state that competence which is produced or maintained only through the administration of medication (be it voluntarily taken or forcibly administered for some purpose other than to produce competence for execution) is valid competence for execution.¹³¹

129. For a survey of the competence standards of the various states, see the appendix to Ward, *supra* note 32, at 99-107.

130. The understanding requirement may incorporate by reference some of the *Bennett* criteria mentioned above. See *supra* notes 46-48 and accompanying text.

131. Proposed statute:

C.Cr.P. XX:

XX. Mental Competence to be Executed

Competence to be executed. (a) A person who has been sentenced to death by the State of Louisiana may not be executed if he does not understand the nature and purpose of that sentence and its relationship to the crime committed or is not aware of the impending nature of the punishment.

(b) The question of competence to be executed is separate from the question of capacity to proceed under C. Cr. P. 641 *et. seq.* and may be raised by motion of the defendant to the sentencing court after sentencing has taken place.

(c) The defendant has the burden of proving his incompetence by a preponderance of the evidence. Medical evidence as to a specific mental defect or disorder may be considered, but shall not be dispositive of the question of competence to be executed.

(d) The fact that the mental competence demonstrated by the defendant is maintained by the use of psychotropic or other medication will not, in and of itself, render that defendant incompetent for execution.

Once the above is accomplished, the knowledge and understanding required for a sound analysis of the *Perry* issue will be available to courts. Only then can the Louisiana Supreme Court properly weigh the interests of the state against the interests of a defendant and obtain a correct judgment. The court should also examine the last sentence of the *Perry II* opinion. If it finds that sentence constitutionalizes the notion of artificial sanity or the idea that competence for execution cannot be obtained through antipsychotic medication, it should expressly overrule that language.

David P. S. Charitat