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THE EROSION OF ETHICS AND MORALITY IN MEDICINE: PHYSICIAN PARTICIPATION IN LEGAL EXECUTIONS IN THE UNITED STATES

ALFRED M. FREEDMAN, M.D.,* & ABRAHAM L. HALPERN, M.D.**

I. INTRODUCTION

In recent years, there has been an erosion of moral and ethical standards in the practice of medicine. Illustrative of this new retreat is the report of the American Medical Association (AMA) Council on Ethical and Judicial Affairs (CEJA) that was adopted by the AMA as policy,[1] entitled, *Physician Participation in Capital Punishment: Evaluation of Prisoner Competence to be Executed; Treatment to Restore Competence to be Executed.*[2] Although the 1995 document (CEJA Report) had major input from the American Psychiatric Association (APA), particularly the APA Council on Psychiatry and Law, its disturbing concepts have never been reviewed by the APA Board of Trustees or the APA Assembly.[3] This article elaborates on a few specific objections to the CEJA Report.

Of particular concern is the concept that a forensic psychiatrist is not a psychiatrist in the criminal justice system, but is an "advocate of justice," better referred to as a "forensicist."[4] This forensic psychiatrist exceptionalism may well be due to a superimposition of legal ethics onto medical ethics. Disastrous consequences can follow in situations where physicians are not considered physicians, as demonstrated by recent events in Illinois.[5]

The prohibition of psychiatrist participation in legally authorized executions is virtually nullified by the CEJA Report, which declares as ethical the examination of death-row inmates for competence to be

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1. *See Council Report: Physician Participation in Capital Punishment*, 270 JAMA 365, 368 (1993) [hereinafter *Council Report*].

2. Council on Ethical & Judicial Affairs, American Med. Ass'n, *Physician Participation in Capital Punishment: Evaluation of Prisoner Competence To Be Executed; Treatment to Restore Competence To Be Executed*, CEJA Report 6-A-95 (1995) (on file with the *New York Law School Law Review*) [hereinafter CEJA Report].

3. *See infra* notes 56-70 and accompanying text.

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

5. *See infra* notes 115-23 and accompanying text.

executed.[6] The CEJA Report confuses the issue by equating, from the standpoint of ethics, psychiatric evaluations for competence to be executed with examinations to determine competence to stand trial.[7] The ambiguity of statements that may make permissible the restoration, by psychiatric treatment, of competence to be executed is also a concern.[8] These major ethical retreats threaten medicine, in general, and psychiatry, in particular, with a precipitous descent down a slippery slope that leads physicians to become "agents of the state."[9]

Horrific abuses of human rights occurred when Germany's Nazi government shielded its physicians during World War II.[10] As a result, after the War, international and national societies passed various resolutions and declarations that emphasized strict ethical standards for the practice of medicine and adhered to historical precedents dating back to Hippocrates.[11] Medicine is currently experiencing a steady erosion of these ethical principles, especially in the United States.[12] This erosion has occurred in many areas, including the area of physician-patient confidentiality.[13] However, the most glaring and distressing example of this retreat is the acceptance of physician participation in legal executions.[14]

It is clear that the call for renewed scrutiny and enactment of stringent ethical criteria for the behavior of doctors emanates from an awareness of the appalling enormity of the experiments performed by German

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6. *See* CEJA Report, *supra* note 2, at 1-2.

7. *See id.* at 1.

8. *See id.* at 2-4.

9. *Sabshin Urges Cautious Use of Professional Authority*, PSYCHIATRIC NEWS, Nov. 3, 1995, at 1.

10. *See* Edzard Ernst, M.D., *Killing in the Name of Healing: The Active Role of the German Medical Profession During the Third Reich*, 100 AM. J. MED. 579, 579-80 (1996); Fred Rosner, M.D., et al., *The Ethics of Using Scientific Data Obtained by Immoral Means*, 91 N.Y. ST. J. MED. 54, 54 (1991).

11. *See Council Report, supra* note 1, at 365 (discussing the Hippocratic Oath as a historical bar to physician participation in executions, as well as the adoption by several medical associations of policies prohibiting physician participation in executions).

12. *See* American College of Physicians, *Position Paper: American College of Physicians Ethics Manual*, 117 ANNALS INTERNAL MED. 947, 947 (1992).

13. *See id.* at 949 (noting that "[c]onfidentiality is increasingly hard to maintain in this era of computerized record keeping and electronic data processing").

14. *See* David A. Rothstein, M.D., *Psychiatrists' Involvement in Executions: Arriving at an Official Position*, 20 NEWSL. AM. ACAD. PSYCHIATRY & L. 15, 15-16 (1995).

physicians on living subjects.[15] It is now fifty years since the Nuremberg Trials:[16] the memory lives on, and our newspapers and journals still contain stories and photographs of war crimes trials that include doctors as defendants.[17] Why, then, is there a medical acceptance of capital punishment in the United States?

Over the past several years, all but a few states have enacted death penalty legislation.[18] The resulting increase in the number of death-row inmates has pressured Congress to attempt to expedite the march from sentencing to execution.[19] For example, Congress has proposed certain limitations on appeals and other legal restraints that might otherwise delay carrying out executions.[20]

Regrettably, the idea that executions must be facilitated and carried out rapidly, and possibly even with cruelty, is also evident both in the criminal justice system and public opinion. In Oklahoma, for example, a death-row inmate was found in a coma after he managed to obtain and ingest drugs.[21] He was subsequently rushed to a nearby hospital, resuscitated, and returned to death-row to be executed.[22] The Director of Oklahoma's Corrections Department, when asked why the inmate was

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15. *See* Ernst, *supra* note 10, at 580 (noting that Nazi physicians "performed outrageously cruel and criminal experiments under the guise of scientific inquiry").

16. *See generally* Symposium, *1945-1995: Critical Perspectives on the Nuremberg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 453 (1995).

17. *See, e.g., id.*; *Evading Justice: As WWII Ended, Top Nazis Took Flight*, L.A. TIMES, May 9, 1995, at 6; *Why the Nazi Hunters Keep Pressing On*, U.S. NEWS & WORLD REP., June 24, 1985, at 31.

18. *See* Richard J. Bonnie, *Dilemmas in Administering the Death Penalty*, 14 LAW & HUM. BEHAV. 67, 67 (1990). This article is confined to the issue of participation by psychiatrists in capital punishment, and does not address the more fundamental question of whether capital punishment should have a place in a civilized society. In any event, the authors strongly applaud the 1969 declaration (never subsequently repealed or modified in any way) of the APA Board of Trustees, which stated that, "the APA, through its Board of Trustees, opposes the death penalty and calls for its abolition. The best available scientific and expert opinion holds it to be anachronistic, brutalizing, ineffective, and contrary to progress in penology and forensic psychiatry." Minutes of American Psychiatric Association Board of Trustees Meeting 54 (Dec. 12, 1969) (on file with the *New York Law School Law Review*), *noted in* Brief for American Psychiatric Association as Amicus Curiae at 3, Maxwell v. Bishop, 398 U.S. 262 (1970).

19. *See* H.R. 3, 104th Cong. § 111 (1995) (proposing limits on federal prisoners' ability to appeal on the grounds of habeas corpus, thereby expediting the execution process).

20. *See id.*

21. *See Overdose Doesn't Stop Inmate's Execution*, ERIE DAILY TIMES (Pa.), Aug. 11, 1995, at 2A.

22. *See id.*

resuscitated and not just left to die, stated that it was impermissible to allow this criminal to die by his own hand.[23] "[W]e're bound by the law, the same law that he violated,"[24] the Director continued.[25]

These developments present risks of increased physician participation in capital punishment.[26] For example, the concerted move on the part of many states to favor the employment of lethal injection, ostensibly to obviate charges of cruel and unusual punishment, may require the services of a physician with surgical skills.[27] The procedure often necessitates a cut-down to expose veins below the surface (in order to insert a catheter), in cases where condemned inmates have been narcotics addicts or are grossly obese.[28] Similarly, psychiatrists may be called upon to give opinions on competence to be executed or to treat disturbed death-row inmates for the purpose of restoring competence for execution.[29]

II. PROHIBITION OF PHYSICIAN PARTICIPATION

In 1980, the AMA CEJA published a report prohibiting physicians from participating in any aspect of capital punishment.[30] The Council considered all facets of the problem and concluded that physicians, as professionals, committed to the ethos *primum non nocere* ("first, do not harm"), could not ethically participate in executions.[31] Shortly after the issuance of this report, several other medical associations including the World Medical Association,[32] World Psychiatric Association,[33]

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

24. *Id.*

25. This is reminiscent of a scene in the magnificent 1928 film, directed by Carl Dreyer, entitled, *The Passion of Joan of Arc*. THE PASSION OF JOAN OF ARC (Société Générale de Films 1928). As time approaches for Joan's execution she becomes quite ill. *Id.* The commander of the English Forces shouts ferociously at the French clergy, who are in charge of Joan, that under no circumstances must she be permitted to die of her illness. *Id.* She must be burnt at the stake! *Id.* One would hope that such callousness could not influence physicians here in the United States.

26. *See Council Report*, *supra* note 1, at 365.

27. *See* R.D. Truog & T.A. Brennan, *Sounding Board: Participation of Physicians in Capital Punishment*, 329 NEW ENG. J. MED. 1346, 1348 (1993).

28. *See id.* at 1347.

29. *See Council Report*, *supra* note 1, at 367.

30. *See id.* at 365.

31. *See id.*

32. *See* World Medical Association, Resolution on Physician Participation in Capital Punishment (Dec. 1981) (on file with the *New York Law School Law Review*).

American College of Physicians,[34] American Public Health Association,[35] American Psychiatric Association,[36] British Medical Association,[37] medical societies of the nordic countries (Norway, Finland, Denmark, Iceland and Sweden),[38] and the Committee on Bioethical Issues of the Medical Society of the State of New York,[39] adopted policies prohibiting physician participation in executions.[40] This position is reflected in various standards and codes as well.[41]

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33. *See* WORLD PSYCHIATRIC ASS'N, DECLARATION ON THE PARTICIPATION OF PSYCHIATRISTS IN THE DEATH PENALTY (1989). The World Psychiatric Association, at the urging of the authors of this article, has specifically prohibited its members (which include the membership of the APA) from engaging in determinations of competency of Death Row inmates to be executed. Its ethical guidelines state that, "[u]nder no circumstances should psychiatrists participate in legally authorized executions nor participate in assessments of competency to be executed." WORLD PSYCHIATRIC ASS'N, DECLARATION OF MADRID (1996).

34. *See* AMERICAN COLLEGE OF PHYSICIANS ETHICS MANUAL (3d ed. 1994); American College of Physicians, *supra* note 12; AMERICAN COLLEGE OF PHYSICIANS ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES (1994) [hereinafter BREACH OF TRUST].

35. *See* AMERICAN PUB. HEALTH ASS'N, *8521: Participation of Health Professionals in Capital Punishment, in* AMERICAN PUBLIC HEALTH ASSOCIATION PUBLIC POLICY STATEMENTS: 1948-PRESENT, CUMULATIVE 360, 360-61 (1993).

36. *See* Board of Trustees, American Psychiatric Ass'n, *Position Statement on Medical Participation in Capital Punishment*, 137 AM. J. PSYCHIATRY 1487, 1487 (1980).

37. *See* BRITISH MED. ASS'N, MEDICINE BETRAYED: THE PARTICIPATION OF DOCTORS IN HUMAN RIGHTS ABUSES (1992). John Gunn, Professor of Forensic Psychiatry, Maudsley Institute of Psychiatry, London, comments:

> It is startling for Europeans to realise [sic] that psychiatrists . . . on the west side of the Atlantic are still employed to decide fitness for execution. Beck also tells us that some psychiatrists in the USA actually approve of the death penalty and presumably their role in it. It is startling partly because torture is the one human activity that is completely outlawed by the United Nations Charter. It is hard to believe that the ordeals which capital-sentenced prisoners suffer in the USA fall short of this forbidden activity. All other ethical problems pale into insignificance compared with this one.

John Gunn, *Commentary: Comparative Forensic Psychiatry, USA vs. UK*, 6 CRIM. BEHAV. & MENTAL HEALTH 45, 48 (1996).

38. *See* Kim Marie Thorburn, M.D., *Informed Opinion: Physicians and the Death Penalty*, 146 WEST. J. MED. 638, 640 (1987).

39. *See* Fred Rosner, M.D., et al., *Physician Involvement in Capital Punishment*, 91 N.Y. ST. J. MED. 15, 18 (1991).

40. *See Council Report*, *supra* note 1, at 365.

41. *See id.*

The *Standards of the National Commission on Correctional Health Care*[42] prohibits participation of prison health care staff in executions.[43] The AMA's *Code of Medical Ethics: Current Opinions*[44] states "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."[45] Similarly, in June 1980, the APA Board of Trustees issued a position paper stating:

> The physician's serving the state as an executioner, either directly or indirectly, is a perversion of medical ethics and of his or her role as healer and comforter.
>
> APA therefore strongly opposes any participation by psychiatrists in capital punishment, that is, in activities leading directly or indirectly to the death of a condemned person as a legitimate medical procedure.[46]

Likewise, every edition of the APA's *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry*[47] succinctly states "[a] psychiatrist should not be a participant in a legally authorized execution."[48]

III. DEFINING PARTICIPATION

On December 8, 1992, the AMA House of Delegates adopted a report of the AMA CEJA,[49] which stated that providing psychiatric information

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42. NATIONAL COMM'N ON CORRECTIONAL HEALTH CARE, STANDARDS FOR HEALTH SERVICES IN PRISONS (1992).

43. *See id.* at 10.

44. COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AMERICAN MED. ASS'N, CODE OF MEDICAL ETHICS: CURRENT OPINIONS § 2.06 (1992).

45. *Id.*

46. Board of Trustees, *supra* note 36, at 1487.

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

48. *Id.* § 1, ¶ 4.

49. *See Council Report, supra* note 1. This early report incorporated the specifics of a resolution entitled, *Defining Physician Participation in State Executions*, introduced by the American College of Physicians at the AMA House of Delegates meeting in December 1991, and a policy statement of the Medical Society of the State of New York. *See id.* at 366 & nn.11, 14. This policy statement defined participation as including, but not limited to the following behaviors: (1) selecting fatal injection sites; (2) starting intravenous lines as a port for a lethal injection device; (3) prescribing or administering pre-execution tranquilizers and other psychotropic agents and medications, injection drugs

to certify competence to be executed and psychiatric treatment to establish competence to be executed may be actions included in the definition of unethical participation.[50] The CEJA chose to postpone making a definitive statement of their position until it had a chance to confer with the ethics committee of the APA.[51] The Chair of the APA Council on Psychiatry and Law, meanwhile, recommended that all references to psychiatry be removed from the report because, among other things, there was no consensus in psychiatry on the ethical status of these actions.[52] This division of opinion is further illustrated by the fact that the APA Assembly, in May 1993, failed to adopt an action paper prohibiting physician participation.[53] Instead, due to differences of opinion and the need for clarification, the action paper was referred to relevant sections of the APA for further deliberation and referral back to the APA Assembly.[54] Regrettably, neither the deliberations nor the referral ever took place.[55]

IV. EXEMPTION OF PSYCHIATRISTS

The APA Council on Psychiatry and Law viewed the language of the CEJA's first draft of the report, entitled *Physician Participation in Capital Punishment*, as "restrict[ing] the actions of psychiatrists to a considerable

or their doses or types; (4) inspecting, testing or maintaining lethal injection devices; (5) consulting with or supervising lethal injection personnel; (6) monitoring vital signs on site or remotely (including monitoring of electrocardiograms); (7) attending, observing or witnessing executions as a physician; (8) determining mental and physical fitness for execution; (9) providing psychiatric treatment to establish competence to be executed; (10) performing medical examinations during the execution to determine whether or not the prisoner is dead; and (11) soliciting or harvesting organs for donation by condemned persons. *See id.* at 366.

Participation in a legally authorized execution was not deemed to include the following actions: (1) serving as a witness in a criminal trial prior to the rendering of a verdict to determine guilt or innocence of an accused person; (2) relieving acute suffering of a convicted prisoner while he is awaiting execution; (3) certifying death, *provided that* the prisoner has been declared dead by someone else; and (4) performing an autopsy following an execution. *See id.*

50. *See id.* at 367.

51. *See id.*

52. *See* Letter from Paul S. Appelbaum, M.D., Chair, APA Council on Psychiatry and Law, to Oscar W. Clarke, M.D., Chair, AMA CEJA (June 16, 1992) (on file with the *New York Law School Law Review*).

53. *See* Rothstein, *supra* note 14, at 16.

54. *See id.*

55. *See id.*

extent."[56] The CEJA, responding to the APA's concern, amended the report by adding:

> Given the complexity of the ethical issues and the importance of the role of psychiatrists, the Council will defer guidelines on physician involvement in evaluations of [a prisoner's] competence to be executed until the Council has consulted further with the ethics committee of the American Psychiatric Association. The Council will also defer guidelines on the question of whether physicians may treat an incompetent prisoner to restore the prisoner's competence to be executed.[57]

Thus, the CEJA deferred action with regard to psychiatrists' participation in executions until it first consulted with the Ethics Committee of the APA. Mindful of the usual procedure of the APA,[58] one would expect an important issue of this type to be thoroughly discussed by the Assembly (which had already taken up this issue), as well as the Ethics Committee, the Committee on Human Rights, the Joint Reference Committee, and also the Board of Trustees.[59] Instead, the APA Council on Psychiatry and Law, persisting in its concern that the "early draft of the AMA report would place unreasonable restrictions on the actions of psychiatrists,"[60] drew up a draft statement in consultation with only the Ethics Committee,[61] and then transmitted it to the APA Board of Trustees in March 1993.[62] The Board of Trustees approved the draft statement[63] and forwarded it to the AMA CEJA.[64] Interchanges

56. Paul S. Appelbaum, M.D., *The Council on Psychiatry and Law*, 151 AM. J. PSYCHIATRY 323, 323 (1994).

57. Steven K. Hoge, M.D., *The Council on Psychiatry and Law*, 152 AM. J. PSYCHIATRY 323, 324 (1995).

58. *See* American Psychiatric Ass'n, The Constitution and Bylaws of the American Psychiatric Association 5-6 (1996) (on file with the *New York Law School Law Review*).

59. *See generally id.* (outlining the procedure for adopting APA policy).

60. Hoge, *supra* note 57, at 324.

61. *See* Letter from Paul S. Appelbaum, M.D., Chair, APA Council on Psychiatry and Law, to Ronald A. Shellow, M.D. (Feb. 24, 1993) (on file with the *New York Law School Law Review*) [hereinafter Shellow Letter]. It is the authors' understanding that the involvement of the Ethics Committee was minimal.

62. *See* Letter from Melvin Sabshin, M.D., APA Med. Dir., to Oscar W. Clark, M.D., Chair, AMA CEJA (Apr. 2, 1993) (on file with the *New York Law School Law Review*) [hereinafter Sabshin Letter].

63. *See* Minutes of American Psychiatric Association Board of Trustees Meeting (May 17, 1993) (on file with the *New York Law School Law Review*).

between the AMA CEJA and the APA Council on Psychiatry and Law followed with reciprocal acceptances, rejections, and modifications.[65] The CEJA Report that emerged, entitled, *Physician Participation in Capital Punishment: Evaluation of Prisoner Competence to be Executed; Treatment to Restore Competence to Be Executed*,[66] included elements of the March 1993 APA draft statement, but contained significant changes and additional material.[67] Serious objections to this report were raised at the meeting of the APA Board of Trustees in July 1995 because of the substance of, and major modifications in, the role of psychiatrists in legal executions made to the CEJA Report.[68] Consequently, the APA Board of Trustees passed a motion that refers the CEJA Report for reconsideration to the Council on Psychiatry and Law, the Committee on Human Rights, and any other appropriate components of the APA.[69] Thus, the final version of the CEJA report, adopted and approved by the AMA House of Delegates in June 1995,[70] cannot be looked upon as a valid AMA document because it includes only the draft statement of the APA. Consequently, the issue of psychiatric participation in capital punishment must be re-evaluated in depth and considered by all relevant components of the APA.

V. CRITICISMS OF THE CEJA REPORT

The CEJA Report is a mixed document that contained statements concordant with positions that have been held by medical and health organizations since the end of World War II. These statements are followed, however, by new and startling comments that completely negate the APA's prior position on psychiatric participation in capital

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64. *See* Sabshin Letter, *supra* note 62.

65. *See* Letter from Steven K. Hoge, M.D., Chair, APA Council on Psychiatry & Law, to John Glasson, M.D., Chair, AMA CEJA 1 (Mar. 24, 1995) (on file with the *New York Law School Law Review)*.

66. CEJA Report, *supra* note 2.

67. *See* Letter from F.M. Baker, M.D., Professor of Psychiatry, University of Maryland School of Medicine, et al., to Mary Jane England, President, and Officers and Members of the Board of Trustees of the American Psychiatric Association 1-2 (Sept. 14, 1995) (on file with the *New York Law School Law Review*) [hereinafter Baker Letter].

68. *See* Minutes of American Psychiatric Association Board of Trustees Meeting 18 (July 8-9, 1995) [hereinafter Minutes of Am. Psychiatric Ass'n] (on file with the *New York Law School Law Review*).

69. *See* Summary of July 1995 Board of Trustees Actions & Requests, Agenda Item 7 (Aug. 10, 1995) [hereinafter Summary of Actions & Requests] (on file with the *New York Law School Law Review*).

70. *See* Minutes of Am. Psychiatric Ass'n, *supra* note 68, at 18.

punishment.[71] It also introduces novel concepts that erode the prohibition against participation and may thrust the physician into a position of moral complicity with execution.[72]

As Truog and Brennan point out, "[m]edicine is at heart a profession of care, compassion, and healing. Physician-assisted capital punishment does not encompass these virtues. . . . The unacceptability of physicians' involvement in executions should be recognized as a mature principle of medical ethics."[73] Or, as appears in an editorial in *The Lancet*, "[t]he non-involvement of doctors should be total, and professional guidelines should say so. As for torture, so for capital punishment, and medical organizations should leave no room for ambiguity."[74] The 1995 CEJA Report departs sharply and explicitly from the above considerations and from the principle that physician participation in the administration of legal executions is unethical.[75] As previously stated, the *Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry* states simply and unequivocally, "[a] psychiatrist should not be a participant in a legally authorized execution."[76] The 1995 CEJA Report deviates from this succinctly stated principle.[77]

The CEJA Report confuses the propriety of a physician's testimony regarding a defendant's competence to stand trial with the ethically impermissible testimony regarding the competence of a condemned prisoner to be executed.[78] The question of competence to be executed arises only after a court sentences a person to death and not infrequently after the final decision to execute has been made.[79] As the CEJA Report points out,[80] and as the United States Supreme Court has held, incompetent prisoners cannot be executed.[81] The CEJA Report fails to distinguish these two actions and states, at the urging of the APA,[82]

71. *Compare* CEJA Report, *supra* note 2, at 2, *with* Board of Trustees, *supra* note 36, at 1487, *and Council Report*, *supra* note 1, at 365.

72. *See* Baker Letter, *supra* note 67, at 4.

73. Truog & Brennan, *supra* note 27, at 1348-49.

74. Editorial, *Doctors and Death Row*, 341 LANCET 209, 209-10 (1993).

75. *See infra* notes 78-85 and accompanying text.

76. *See* AMERICAN PSYCHIATRIC ASS'N, *supra* note 47, at 4.

77. *See* CEJA Report, *supra* note 2, at 2.

78. *See id.*

79. *See Council Report*, *supra* note 1, at 367.

80. *See* CEJA Report, *supra* note 2, at 2.

81. *See* Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment bars execution of prisoners who are found to be incompetent).

82. *See* Sabshin Letter, *supra* note 62.

"[t]he concerns with physician participation in evaluations of competence raise difficult ethical issues, but in the end, physician participation appears more like than unlike physician participation in other forensic evaluations in capital cases. Participation in evaluation of competence to be executed therefore, is not unethical per se."[83]

Furthermore, the CEJA Report proposes a belief in forensic psychiatric exceptionalism, stating:

> Physician participation in the process can be justified on the basis of the importance of having physicians *assist in the administration of justice*. Physicians' participation in the proceedings *assist society* in assuring that individuals are treated fairly and punished only when it is appropriate. The important principle in this situation is that the physician is acting as an *advocate of justice*, not as a source of punishment. The physician is acting as an expert advisor, providing important information that assists in the pursuit of a just result.[84]

Finally, the CEJA Report endorses the role of "medical criteria" for determining whether execution is "appropriate," and it acknowledges that psychiatric testimony concerning competence for execution may "prove to be the decisive factor."[85] The medical ethicist, Professor Edmund Pellegrino,[86] cautions us to guard against so readily relaxing our ethical vigil to serve non-medical interests, stating "[h]istory teaches how important it is for a profession to protect its ethical integrity if it is not to become an instrument of political purposes. Professional ethics must be grounded in something more fundamental than social convention."[87]

VI. PHYSICIAN AS EXPERT ADVISOR—THE NON-MEDICAL FORENSICIST

The CEJA Report advocates the concepts that a psychiatrist is not a psychiatrist when performing evaluations for the state, particularly in the case of deciding competence to be executed,[88] and that psychiatrists have no ethical duty to concern themselves with the possibility that their actions may cause harm.[89] The notion that a psychiatrist is not a psychiatrist in

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83. *See* CEJA Report, *supra* note 2, at 2.

84. *Id.* (emphasis added).

85. *Id.*

86. Georgetown University Medical Center, Washington, D.C.

87. *See* Edmund D. Pellegrino, M.D., *Ethics*, 273 JAMA 1674, 1675 (1995).

88. *See* Appelbaum, *supra* note 4, at 249-59; CEJA Report, *supra* note 2, at 2.

89. *See* Appelbaum, *supra* note 4, at 257; CEJA Report, *supra* note 2, at 2.

the forensic setting is a recent concept in American psychiatric literature.[90] It is based on an article by Paul Appelbaum, M.D.,[91] entitled, *The Parable of the Forensic Psychiatrist: Ethics and the Problem of Doing Harm*,[92] which is referenced in the CEJA Report.[93] In the article, Appelbaum states:

> [T]he forensic psychiatrist in truth does not act as a physician . . . . If the essence of the physician's role is to promote healing and/or to relieve suffering, it is apparent that the forensic psychiatrist operates outside the scope of that role. . . . Were we to call such a person a "forensicist," or some similar appellation, it might more easily be apparent that a different—nonmedical—role with its own ethical values is involved.[94]

Dr. Appelbaum further states:

> What then of the psychiatrists who agonize over the harms their testimony may cause the persons they have evaluated? Although their anguish is understandable, particularly when the harms are severe, it cannot justifiably be ascribed to a failure to conform to ethical norms. For psychiatrists operate outside the medical framework when they enter the forensic realm, and the ethical principles by which their behavior is justified are simply not the same.[95]

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90. *See* Appelbaum, *supra* note 4, at 252.

91. Paul S. Appelbaum, Chair, APA Council on Psychiatry and Law; Chair, Department of Psychiatry, A.F. Zeleznik Professor of Psychiatry and Director, Law and Psychiatry Program, University of Massachusetts Medical School.

92. *See* Appelbaum, *supra* note 4, at 249.

93. *See* CEJA Report, *supra* note 2, at 5.

94. Appelbaum, *supra* note 4, at 252.

95. *Id.* at 258. Interestingly, in a debate held at the annual meeting of the American Psychiatric Association in 1987, Appelbaum, as reported by Professor R.D. Miller, argued that clinicians' involvement in evaluations of competency to be executed is problematic because (unlike other competency evaluations in the criminal justice process) it does not aid in the determination of justice, since the sentence has already been determined. He opposed such involvement because it would lead to psychiatrists being perceived as agents of the state in the execution process, and would relieve the judicial burden of decision making. Further, he argued that participation in the evaluation process presents psychiatry as an ally with the punitive forces of the criminal justice system. R.D. Miller, *Evaluation of the Treatment to Competency to Be Executed: A National Survey and an Analysis*, 16 J. PSYCHIATRY & L. 67, 74 (1988) (discussing

Dr. Appelbaum is joined by other members of the APA Council on Psychiatry and Law in this position.[96]

Other organizations, however, such as the American College of Physicians, Human Rights Watch, Physicians for Human Rights, and the National Coalition to Abolish the Death Penalty, were appalled by the assertion that the Hippocratic ethic of commitment to patient well-being is irrelevant to the work of forensic psychiatrists because, when doing forensic assessments, they do not function as physicians.[97] These organizations stated in their joint monograph, *Breach of Trust*:[98]

> This claim ignores the reality that forensic practitioners . . . are physicians in the eyes of the public, the courts, and even their examinees. The lines between therapeutic and forensic work are blurry, both in popular understanding and daily practice. Equally worrisome is the open-endedness of the claim that forensic physicians do not function as doctors. If psychiatrists who evaluate competence for execution can say that they are not acting as doctors, why can't internists who select lethal injection sites say the same?
>
> [Thus] clinical assessment of an inmate's competence to be executed is unethical . . . because it gives the medical profession a decisive role with respect to the final legal obstacle to execution. The proximity between this clinical role and the act of killing casts doctors metaphorically as hangman's aides. On this basis, clinical examination and testimony bearing on competence for execution can be distinguished from other forensic activities that result in harm to the subjects of evaluation.[99]

VII. EFFORTS TO SUPERIMPOSE LEGAL ETHICS ON MEDICAL ETHICS

Dr. Appelbaum's notion of the forensicist, which is reflected in the CEJA Report,[100] stems from a reliance on the view of non-physicians,

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remarks made by Dr. Appelbaum, P.S. Appelbaum et al., *Resolved, It Is Unethical for Psychiatrists to Diagnose or Treat Condemned Persons in Order to Determine Their Competency To Be Executed*, Debate Before the Annual Scientific Meeting of the APA (May 13, 1987)).

96. *See* Hoge, *supra* note 57; Shellow Letter, *supra* note 61.

97. *See* BREACH OF TRUST, *supra* note 34, at 44.

98. *Id.*

99. *Id.*

100. *See* CEJA Report, *supra* note 2, at 2.

primarily lawyers, and in particular, Professor R. J. Bonnie,[101] who is the author of *Dilemmas in Administering the Death Penalty.*[102] In his article, Bonnie, who sees no objection to psychiatrists performing death-penalty competency evaluations, apparently presumed to speak for psychiatrists as to their ethical responsibilities.[103] For example, Bonnie noted that, "[l]awyers and forensic clinicians share a professional commitment to the administration of justice."[104] Additionally, Bonnie takes pains to point out that "for a judge to decline, categorically, to impose a death sentence, or to vote always to set one aside on appeal, would be to nullify the law, setting his or her own moral preferences above the legislative policies judges are bound to administer."[105] He fails, however, to accept the fact that physicians are ethically committed to a code that is different from that of judges.[106] To suggest, as Bonnie does, that the ethical and moral obligations of a physician, when making competency evaluations of death-row inmates, should comport with what is required of judicial and administrative officers[107] leads directly to an attempt to categorize psychiatrists as non-medical "forensicists."[108] Again, as an advocate of psychiatrist participation in capital punishment, Bonnie gratuitously refers to participation as ethically permissible in the interests of justice as opposed to participation in the administration of punishment, which he considers (as do all physicians) ethically objectionable.[109] Regrettably, the APA members who prepared the APA position statement for the AMA seem to have arbitrarily adopted Bonnie's recommendations that some of the canons of ethics for lawyers be included in the code of ethics for psychiatrists.[110] Professor Bonnie has served as a consultant to the APA Council on Psychiatry and Law since

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101. Professor, Institute of Law, Psychiatry and Public Policy, University of Virginia.

102. Bonnie, *supra* note 18 (analyzing ethical arguments against conducting forensic evaluations of capital defendants or condemned prisoners and against treating prisoners found incompetent for execution, and considering the impact of widespread abstention by the medical profession on the legal system).

103. *See infra* notes 104-05 and accompanying text.

104. Bonnie, *supra* note 18, at 69.

105. *Id.*

106. *Compare* Truog & Brennan, *supra* note 27, at 1348-49 (discussing physicians' ethical considerations), *with* Bonnie, *supra* note 18, at 69-70 (discussing judicial ethical considerations).

107. *See* Bonnie, *supra* note 18, at 69.

108. *See* Appelbaum, *supra* note 4, at 252; Bonnie, *supra* note 18, at 79.

109. *See* Bonnie, *supra* note 18, at 80.

110. *See* CEJA Report, *supra* note 2, at 2.

1986 and was, therefore, in all likelihood, a great influence on this serious erosion of the medical ethics principles.[111]

It is evident that the positions advocated by Appelbaum and Bonnie invite a myriad of state and private decision-makers to employ "physicians' technical expertise . . . in pursuit of non-clinical ends, [thus] unrestrained by ethical resistance from the medical profession."[112] It is a matter of profound regret that neither Appelbaum nor the APA (nor indeed the AMA itself) heeded the CEJA Report's strong directive concerning the application of medical knowledge in capital punishment, which stated that, "physicians must not use their professional knowledge and skills to help cause the death of prisoners."[113]

The twentieth century offers too many tragic examples of what can happen in the absence of such restraint.[114] The disastrous consequences of such thinking are already evident as David A. Rothstein[115] points out:

> The assertion that a forensic psychiatrist is not acting as a physician, and, thus, not bound by medical ethics is not far from legislation recently passed in Illinois. The [Illinois] Medical Practice Act was amended to state that, "this Act does not apply to persons, who carry out or assist in the implementation of a court order effecting the provisions of Section 119-5 of the Code of Criminal Procedure. . . ." Section 119-5 referred to provides for the administration of "substances sufficient to cause death until death is pronounced by a licensed physician . . ," and further states that ". . . participation in, or the performance of ancillary or other functions pursuant to this Section, including but not limited to the administration of the lethal substance or substances required by this Section, shall not be construed to constitute the practice of medicine."[116]

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111. *See* Shellow Letter, *supra* note 61.

112. Baker Letter, *supra* note 67, at 3; *see* Appelbaum, *supra* note 4, at 253; Bonnie, *supra* note 18, at 68.

113. CEJA Report, *supra* note 2, at 2.

114. *See* Ernst, *supra* note 10, at 579-580; Rosner, *supra* note 10, at 55.

115. David A. Rothstein, M.D., Consultant to Warren Commission, 1964; Consultant to National Commission on the Causes and Prevention of Violence, 1968; Member of APA Assembly; Member of the House of Delegates of the Illinois Medical Society; Member of the AMA's Hospital Medical Staff Section.

116. David A. Rothstein, M.D., *Letter to the Editor*, 20 NEWSL. AM. ACAD. PSYCHIATRY & L. 111, 112 (1995) (footnotes omitted).

In a curious contradiction, the AMA has vigorously opposed this amendment despite the fact that it is logically consistent with the 1995 CEJA Report.[117] Rothstein further points out:

> [T]he law now declares that a physician participating in an execution is not practicing medicine, and, therefore, not subject to disciplinary action by the state licensing board. For our profession to endorse that view with respect to forensic psychiatry activities is perilously close to supporting it with respect to even more direct participation like starting intravenous lines for lethal injection or even giving the injection. Legislators and lay people are able to recognize when medical organizations seem less committed in supporting important ethical principles than when supporting economic interests.[118]

Although the Illinois State Medical Society opposes the lack of legislative action, criticism has been voiced that the Society's political pressure is not of the same strength and spirit as its actions regarding economic policy.[119] Illinois State Senator Arthur Berman, for example, charges that the failure to repeal the law was largely due to less than enthusiastic lobbying on the part of the Illinois State Medical Society.[120] "The key is whether the state's medical society, one of Illinois' most powerful and successful lobbying groups, will work as hard for its members on an ethical issue as it does on financial issues."[121] The AMA and others have vigorously denounced the actions of the Illinois legislature, stating "[t]his is a dangerous precedent. It amounts to a corruption of medical ethics to suit the convenience of lawmakers and bureaucrats."[122] However, the AMA itself, through its CEJA Report, undermines the code of medical ethics in a similar fashion and thus, in essence, provides a strong professional and philosophical underpinning for the Illinois decree.[123]

The evolution of such thinking into a further departure from long-standing ethical principles is well illustrated in a puzzling statement made

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117. *See* Editorial, *Convenient Corruption*, AM. MED. NEWS, July 24, 1995, at 17.

118. Rothstein, *supra* note 116, at 112.

119. *See* Darryl Van Duch, *Is There a Doctor in the Death House*?, NAT'L L.J., Sept. 4, 1995, at A6.

120. *See id.*

121. *Id.* (quoting Illinois State Senator Arthur L. Berman).

122. *Convenient Corruption*, *supra* note 117, at 17.

123. *See supra* notes 84-85 and accompanying text.

by Dr. Melvin Sabshin, the APA Medical Director in November 1995.[124] In his address as the 1995 Milton Greenblatt Memorial Lecturer at the APA's Institute on Psychiatric Services, Dr. Sabshin stated that "[i]n some circumstances where it is explicit, as in forensic psychiatry, it is appropriate for a psychiatrist to act as agent of the State . . . ."[125] It would be helpful if the "circumstances" where "it is appropriate for a psychiatrist to act as agent of the State" were delineated and differentiated from participation in a legal execution.

Indeed, it is strange that just a few years ago psychiatrists in the former Soviet Union were condemned for acting as agents of the State.[126] At least in the case of the Soviet psychiatrists, they were obeying existing law and a compulsory code of ethics.[127] Here, we seem to be asked to retreat voluntarily from our moral and ethical principles.

VIII. COUNTER-REACTION

This rationale for a retreat from ethical standards, however, is not without opposition. In May 1994, the APA Assembly approved an action paper in which the authors contended that, "anyone acting in a capacity that requires a psychiatrist's education, judgment, and experience is, in that role, practicing psychiatry."[128] Additionally, Professor Pellegrino has stated, "I am particularly distressed by Dr. Appelbaum's declaration that the psychiatrist is no psychiatrist when he is using psychiatric knowledge in the service of the court or the institution."[129]

As pointed out, when objection was raised at the APA Board of Trustees meeting in July 1995—particularly to the concept that, as a "forensicist," a psychiatrist is not a psychiatrist—the Board passed a motion to refer the CEJA Report to the concerned components of the APA for their critical consideration and report.[130]

124. *See Sabshin Urges Cautious Use of Professional Authority*, *supra* note 9, at 1.

125. *Id.*

126. *See id.* (noting that "psychiatrists in the Soviet Union were . . . compliant with . . . [government] abuses").

127. *See id.* (noting that an authoritarian state "has a much greater opportunity to force the professional to serve the state rather than the patient").

128. Rothstein, *supra* note 14, at 17.

129. Letter from Edmund D. Pellegrino, M.D., to Abraham L. Halpern, M.D. (June 20, 1995) (on file with the *New York Law School Law Review*).

130. *See* Summary of Actions & Requests, *supra* note 69, at 18.

IX. RESTORING COMPETENCE TO BE EXECUTED

The CEJA Report becomes even more contradictory when it discusses psychiatric treatment that restores competence to be executed. As Dr. M. Gregg Bloche[131] and the authors of this article illustrated in a letter signed by some thirty members of the medical and legal profession, including prominent psychiatrists and medical ethicists, "the [CEJA] [R]eport's only clearly-stated proscription in this regard is limited to 'treatment . . . *primarily directed* to restore competence to be executed' . . . ."[132] However, the CEJA Report also states that treatment is justified in cases of extreme suffering.[133] "Extreme suffering" should be more rigorously defined since relief of suffering could be facilely invoked by psychiatrists or prison physicians to effectuate the restoration of competence and thus facilitate execution.[134] The CEJA Report is further weakened and rendered ambiguous by the blanket assertion that when death-row inmates "lack competence to provide informed consent to treatment, therapeutic interventions, including the use of psychotropic medications, can be provided in accordance with ethical principles and state law."[135] It is clear that an inmate who is incompetent to give informed consent would certainly be incompetent to be executed.[136] Thus, the pathway is open to provide psychopharmacologic therapy, restoring competence and hastening execution.

X. CONCLUSION

Psychiatrists today are indeed torn between traditional ethical principles and strong pressures from society (particularly certain segments of the legal profession) to ethically compromise and become collaborators with the demands of the law.[137] Whatever the motivation, significant voices in psychiatry are urging a retreat from long-standing ethical standards to new rationalizations that define forensic psychiatrists as exempt from such principles, going so far as to label them "agents of the

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131. M. Gregg Bloche, M.D., Professor, Georgetown University Law Center; Board of Directors, Physicians for Human Rights.

132. Baker Letter, *supra* note 67, at 4 (emphasis in original).

133. *See* CEJA Report, *supra* note 2, at 3.

134. *See* Baker Letter, *supra* note 67, at 3.

135. CEJA Report, *supra* note 2, at 3.

136. *See* Baker Letter, *supra* note 67, at 4.

137. *See* Barbara A. Ward, *Competency for Execution: Problems in the Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 68-99 (1986).

State."[138] The history of the twentieth century gives us many examples of how compromises lead us down a slippery slope to disaster and abandonment of ethical principles.[139] The rationale that physicians should assist in the administration of justice, insofar as capital punishment is concerned, is frighteningly reminiscent of how German physicians justified their involvement in the torture and killing of thousands of innocent human beings and carried out the Nazi programs of sterilization and "euthanasia" by murdering countless children and adults.[140]

Rather than look for compromises, one must return to traditional concepts. Medicine and psychiatry are, at heart, a profession of care, compassion, and healing. This is a time for the restatement of the resolutions adopted by the world's foremost psychiatric and medical associations, including the AMA. Psychiatrists cannot avoid the consequences of their actions. There is a tendency in the profession to evade responsibility and justify actions by stating that the psychiatrist only advises, and it is the judge who decides. Even the CEJA Report concedes that the psychiatrists' testimony may well prove to be the decisive factor.[141] There are ways of managing the physician participation problem, and all physicians, especially psychiatrists, should unite in insistence on the enactment of legislation such as that instituted by the State of Maryland.[142] Under Maryland law, the sentence of an incompetent death-row inmate who requires treatment is commuted to life imprisonment without parole.[143] We commend the AMA and the APA for the joint amicus curiae brief filed in *Perry v. Louisiana*[144] speaking in support of the Maryland approach.[145]

Psychiatrists and other physicians must join in the struggle to uphold ethical and moral principles, or they will in time reap a whirlwind of

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138. *See Sabshin Urges Cautious Use of Professional Authority*, *supra* note 9, at 23.

139. *See supra* note 10 and accompanying text.

140. *See supra* note 15 and accompanying text.

141. *See* CEJA Report, *supra* note 2, at 2.

142. *See* MD. CODE ANN., art. 27, § 75A (1987).

143. *See id.*

144. 498 U.S. 38 (1990).

145. *See* Brief for the American Psychiatric Association and the American Medical Association as Amici Curaie in Support of Petitioner, Perry v. Louisiana, 498 U.S. 38 (1990) (No. 89-5120); *see also* Paul S. Appelbaum, M.D. & Steven K. Hoge, M.D., *Psychiatrists and Capital Punishment: Evaluation and Restoration of Competence to be Executed*, 20 NEWSL. AM. ACAD. PSYCHIATRY & L. 14, 15 (1995) (stating that Maryland's approach of commuting an incompetent prisoner's death sentence to life imprisonment without parole, would allow psychiatrists to care for prisoners without the risk that competence for execution will be restored).

public condemnation. Unfortunately, there is no unanimity in the ranks of physicians,[146] so it can be expected that a number of them will act as agents of the state and play a role in legally authorized executions. Nevertheless, the conclusion that such actions, despite the rationalizations, still remain as complicity in immoral and unethical behavior is compelling.

146. *See* Truog & Brennan, *supra* note 27, at 1349.