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How the Medicate-to- Execute Scheme Undermines Individual Liberty, Offends Societal Norms, and Violates the Constitution

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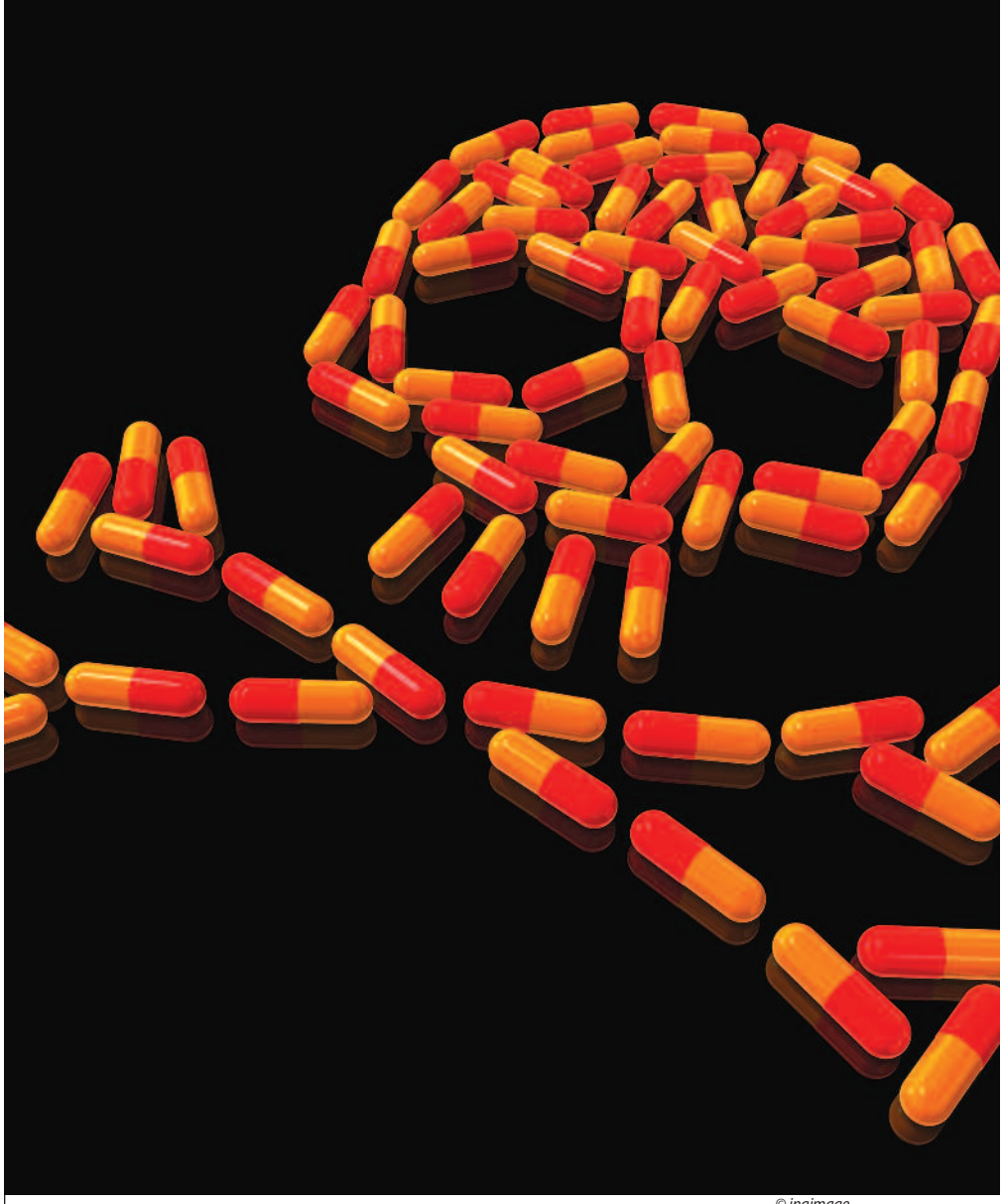

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"The blind think I'm playing a game. They deny me, refusing my existence, but everybody takes the place of another. I will come forth as you go."[1]

BY CAITLIN STEINKE

Introduction

As of January 2013, there are a total of 3,125 inmates on death row in the United States.[2] And while it is difficult to obtain accurate statistics, it is estimated that five to ten percent of all inmates on death row suffer from mental illness.[3] In 1986, the U.S. Supreme Court ruled, in *Ford v. Wainwright*, that it is unconstitutional to execute the insane.[4] Put succinctly, "[t]here is something unseemly about sending a person who is floridly psychotic to his death, when he has no knowledge of what is coming."[5] What about the severely mentally ill individual whose symptoms do not, at the moment of the competency determination, indicate that the individual is "floridly psychotic"?

The American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the American Bar Association share the opinion that inmates with severe mental illness, even those who are not "floridly psychotic," should not be executed.[6] The symptoms of mental illness often fluctuate in response to environmental stressors and "triggers," as well as in response to treatment; for example, the symptoms of an individual's schizophrenia may go from being severe and obvious to hardly noticeable.[7] Thus, someone showing symptoms of severe mental illness may be deemed incompetent one day and then competent as soon as the symptoms have dissipated. It is for this reason that the American Bar Association has recommended that an inmate found incompetent for execution should automatically receive a lesser punishment, rather than allowing the inmate to be executed if and when competency is restored.[8] Yet states wishing to continue executing mentally ill inmates have used the reality that symptoms of severe mental illness wax and wane in order to develop a creative way around the restriction imposed by *Ford*: forcing a mentally ill death row inmate to take antipsychotic drugs, with the hope that the medication will restore the inmate to the level of competency required for a constitutional execution.

This article sets forth two arguments why states should be prohibited from forcibly medicating mentally ill inmates in order to achieve competency for execution. First, the state does not have an important governmental interest in executing an individual who cannot be constitutionally executed. Second, such forcible medication

violates the Eighth Amendment because it is left purely to chance whether antipsychotic medication will restore a mentally ill inmate to competency.

In order to place the involuntary medication of death row inmates within the larger context of forcibly medicating mentally ill individuals, this article begins by addressing the state's interest in forcibly medicating inmates and criminal defendants, as well as the legal standards that must be met in order to do so. It then examines the U.S. Supreme Court's prohibition on the execution of the insane, and the competency standard that has developed as a result. This article then presents two arguments that defense counsel should make when the state wishes to forcibly medicate a mentally ill death row inmate in order to restore competency for execution.

The State's Interest in Forcibly Medicating Inmates and Criminal Defendants

For someone suffering from mental illness, antipsychotic drugs have the potential to alleviate psychosis and allow the individual to regain normal functioning.[9] However, such intense medication can also have serious side effects, such as tardive dyskinesia and type 2 diabetes.[10] It is thus understandable why there is resistance to allowing the state to forcibly medicate mentally ill individuals any time it would benefit the state. Nonetheless, exceptions have been made in the context of the criminal justice system, in which the role of the state is unique. This section examines two situations in which the state has been deemed to have a legitimate interest in forcibly medicating a mentally ill individual: when the individual is an inmate and when the individual faces criminal charges and is to stand trial.

A. An Inmate's (Limited) Right To Refuse Medication

The Bureau of Justice Statistics reported in 2006 that more than half of all men and women housed in America's prison systems had a mental health problem.[11] The number is so high that the three largest inpatient psychiatric facilities in the country are prisons, not treatment centers or hospitals.[12] In fact, seriously mentally ill individuals in jails and prisons outnumber those in hospitals three to one.[13] Besides shining light on the increasingly common criminalization — rather than treatment — of mental illness, these staggering statistics raise the very real dilemma of how the prison system should confront its responsibility to take care of sick inmates. Inmates have a right to medically necessary care, and prison physicians have a legal and ethical duty to provide such care, which includes psychiatric treatment.[14] The U.S. Supreme Court has even held that the deliberate indifference to an inmate's medical needs violates the Eighth Amendment.[15] But when the most effective form of treatment available is the administration of antipsychotic drugs, both substantive and procedural due process are certainly implicated. Thus, a state must reconcile its obligation to effectively care for the inmates over whom it has custody and control with its duty not to unnecessarily intrude on the personal autonomy of those same inmates.

In 1990, the U.S. Supreme Court was faced with balancing these competing concerns in *Washington v. Harper*, which presented the scenario of a state forcibly medicating a mentally ill inmate.[16] After the inmate refused to take antipsychotic drugs, a committee developed to address such situations determined that the prison could forcibly administer the medication.[17] Walter Harper's appeal reached the U.S. Supreme Court, and a fundamental component of the Court's opinion was the holding that individuals have a "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs."[18] However, instead of ruling that the state could not forcibly medicate Harper unless he was first found to be incompetent to make his own medical decisions — the position advanced by Harper — the Court held that the liberty interest at stake must be analyzed within the context of Harper's imprisonment.[19]

The policy of the state of Washington only allowed the forcible medication of a mentally ill inmate if there was first a medical finding of a mental disorder that is likely to cause harm if untreated; then, the medication had to be prescribed by a psychiatrist and approved by a reviewing psychiatrist.[20] The Court held that this system satisfied procedural due process because it ensured that antipsychotic drugs would only be forcibly administered when it was in the prisoner's medical interests as well as the interests of the state in maintaining a secure prison environment.[21] And because of the inherently medical nature of the significant liberty interest, the Court held that it might be more appropriate for a medical professional, rather than a judge, to make the final decision of whether to forcibly medicate the mentally ill inmate.[22]

Ultimately, the Court held that a state can administer antipsychotic drugs against the will of an inmate only when (1) the inmate poses a danger to himself or others *and* (2) the medication is in the inmate's medical interests.[23] But as the Court stressed in its decision, it framed its legal analysis solely within the realities of the prison context.

B. Forcibly Medicating a Defendant in Order to Achieve Competency To Stand Trial

The U.S. Supreme Court held in *Dusky v. United States* that a defendant is not competent to stand trial unless he has both a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[24] Thus, the standard for competency to stand trial includes both an assistance element and a cognitive element. And with more than 20 percent of criminal defendants suffering from mental illness,[25] meeting the *Dusky* standard becomes relevant for thousands of people in the criminal justice system.

Two years after *Harper* was decided, the Court heard *Riggins v. Nevada*, a case in which a criminal defendant, who wanted to show the jury his "true mental state," filed a motion to cease taking his antipsychotic medication until the end of his trial.[26] After being charged with murder, David Riggins complained of suffering from auditory hallucinations and an inability to sleep, so the prison psychiatrist decided to treat Riggins with antipsychotic drugs.[27] After court-appointed psychiatrists evaluated the medicated Riggins, the judge found him competent to stand trial; Riggins then requested a court order suspending the administration of his antipsychotic medication until after the trial had ended.[28] He argued that the medication's effects on his mental state and demeanor during his trial violated due process because it denied him the opportunity to show the jury his "true" mental state.[29] The trial court denied Riggins' request, instead continuing to forcibly administer the antipsychotic medication until the completion of his trial.[30]

On appeal, the U.S. Supreme Court was confronted with how to apply its

ruling from *Harper* to the situation presented by *Riggins*. The Court began by reaffirming the principle that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."[31] It then held that the same factors that allow for the forcible medication of an inmate must exist in order to justify the forcible medication of a defendant; therefore, after Riggins filed his motion, the state had the duty to demonstrate that the continued use of the antipsychotic medication was both necessary and medically appropriate.[32] What is striking, however, is that while *Harper* held that it was necessary for a state to establish that an unmedicated inmate was dangerous to himself or others, the Court's decision in *Riggins* made no mention of a requisite finding of dangerousness before the state can forcibly medicate a mentally ill defendant.[33] Thus, instead of having to meet the two-prong test laid out in *Harper*, the state could simply have shown that it would not have been possible to determine Riggins' guilt or innocence through the use of less intrusive means.[34]

In 2003, the Court had the opportunity to clarify whether a state wishing to forcibly medicate a mentally ill defendant in order to restore competency to stand trial had to first establish that the unmedicated defendant was a danger to himself or others.[35] The case, *Sell v. United States*, involved a mentally ill criminal defendant being tried for multiple counts of insurance fraud, a nonviolent crime.[36] Following the indictment, however, Charles Sell's mental health deteriorated, and he began to experience more psychotic episodes involving hallucinations and paranoia; Sell made several statements to his treating psychiatrist that suggested that Sell might harm FBI agents, and he was subsequently indicted with attempted murder.[37] After the two cases were joined, the trial judge determined that Sell was not competent to stand trial, and ordered that Sell be hospitalized for four months and then re-evaluated.[38] Sell then refused to take the antipsychotic medication recommended by the hospital staff, raising the question of whether the state could forcibly medicate Sell in order to try and restore him to competency to stand trial.[39]

The Court's analysis in *Sell* culminated in a four-prong test to determine whether the state may forcibly administer medication in order to restore a criminal defendant to competency: (1) there must be important governmental interests at stake, (2) involuntary medication must significantly further those interests, (3) involuntary medication must be necessary to further those interests, and (4) the medication must be medically appropriate.[40] The Court pointed out that the state certainly has an important interest in bringing the accused to trial and ensuring that all trials are fair,[41] and defined "medically appropriate" as "the patient's best medical interest in light of his medical condition."[42] And most importantly, the Court's holding in *Sell* made it clear that a finding of dangerousness is *not* required.

Achieving Competency To Be Executed

While the U.S. Supreme Court has yet to hold that it is unconstitutional to execute mentally ill individuals, its decision in *Ford v. Wainwright* did prohibit the execution of insane inmates as a violation of the Eighth Amendment.[43] Since then, the Court has been refining the competency standard that must be met in order for an insane inmate to be exempt from execution. This section addresses that evolving standard, and then examines the three major court decisions that have analyzed the permissibility of forcibly medicating mentally ill inmates in order to achieve competency for execution.

A. Searching for a Clear Standard

In *Ford v. Wainwright*, the Court articulated several possible justifications for the prohibition on executing the insane: executing an insane person offends humanity; the punishment has no deterrence value or retributive value; it is "uncharitable" to send an individual into the afterlife when that individual does not have the capacity to prepare for such a transition; and insanity is its own punishment.[44] Without relying on any particular justification, the Court determined that states must have adequate procedures in place that will protect the constitutional right of insane inmates not to be executed. However, the Court did not clearly define how a state should determine competency for execution; instead, the plurality left behind a rather vague and cryptic ruling: the state cannot constitutionally execute an inmate "whose mental illness prevents him from comprehending the reasons for the penalty or its implications."[45] Since this opinion essentially left it to the states to create their own specific standards for competency, lower courts have turned to Justice Powell's concurrence for guidance.

In his concurring opinion, Justice Powell articulated a more narrow holding, stating that the Eighth Amendment only forbids executing "those who are unaware of the punishment they are about to suffer and why they are to suffer it."[46] So while the standard for competency to stand trial includes both an assistance element and a cognitive element,[47] Justice Powell's test only measures the cognitive ability to understand the punishment and why it is being carried out.

The U.S. Supreme Court recently revisited this standard in 2007, in *Panetti v. Quarterman*.[48] Scott Panetti claimed that the Fifth Circuit had misapplied *Ford* in holding that a death row inmate is competent to be executed when the inmate is aware (1) that he is going to be executed and (2) why he is going to be executed.[49] At first blush, this standard appears to be in line with that articulated by Justice Powell. However, as the Supreme Court emphasized, this standard would allow for the execution of a mentally ill inmate who is aware that he is being executed for murder, but whose mental illness renders him unable to appreciate the connection between his crime and his execution. In other words, the Fifth Circuit's standard "treats a prisoner's delusional belief system as irrelevant if the prisoner knows that the state has identified his crimes as the reason for his execution."[50]

This ruling only muddied the waters with respect to a clear competency standard. For example, an inmate can be *Ford*-competent by knowing that he is to be executed and knowing the reason for it, but may not necessarily also be *Panetti*-competent if the inmate's delusions interfere with his ability to rationally appreciate his situation.[51] One of the problems with the *Panetti* decision is that the Court did not explain what is required to have a "rational understanding."[52] Nonetheless, it is significant that the Court expressed an understanding that an inmate who suffers from delusional beliefs can be aware of the state's rationale for execution while still lacking the requisite rational understanding.[53]

B. Rulings Addressing Forcible Medication to Achieve Competency for Execution

While the U.S. Supreme Court has yet to address whether a state can forcibly medicate a prisoner in order to

achieve competency for execution, two state supreme courts and the Eight Circuit have confronted this issue and have reached different outcomes.

i. Louisiana Supreme Court

In 1992, the Louisiana Supreme Court held that forcibly medicating a death row inmate in order to achieve competency for execution violated the Louisiana Constitution.[54] The court noted that without medication, the inmate was "incurably insane and incompetent for execution," yet was "sometimes … able to function at a minimum level of rationality" when he was being treated with antipsychotic drugs.[55] In evaluating the legal arguments before it, the court made several determinations. The court stressed that forcibly medicating a mentally ill inmate, and then executing him while he was still under the influence of the drugs that had restored his competency, was a direct circumvention of the long-recognized prohibition on executing insane inmates.[56] Additionally, the court held that forcing a mentally ill inmate to ingest antipsychotic drugs cannot possibly be in the inmate's best medical interest because medicating to restore competency for execution is not a form of medical treatment.[57]

The court also viewed this type of forcible medication as impermissible punishment, rather than medical treatment that meets the *Harper* standard by serving the inmate's medical interests as well as the state's interests in maintaining safety.[58] The Louisiana Supreme Court stayed the inmate's execution, and held that the state could only apply for a modification of the stay of execution if the inmate "achieves or regains his sanity independently of and without the influence of antipsychotic drugs."[59]

ii. South Carolina Supreme Court

One year later, the South Carolina Supreme Court held that forcibly medicating an inmate solely to facilitate execution violates the South Carolina Constitution.[60] The court noted that experts had testified that the inmate's brain was so damaged that not only would it be highly unlikely that antipsychotic medication would restore him to competency, but he would likely experience harmful side effects as a result of the forced treatment.[61] After analyzing the holdings from *Harper*, *Riggins*, and the Louisiana Supreme Court case, the South Carolina Supreme Court held that "justice can *never* be served by forcing medication on an incompetent inmate for the sole purpose of getting him well enough to execute."[62] The court held that the violation of the inmate's right to remain free from unwanted medical treatment cannot be justified simply by the broad penological interest of the state, and that the state must still satisfy the two-prong test established by *Harper:* the inmate must pose a danger to himself or others *and* the medication must be in the inmate's best medical interest.[63]

iii. Eighth Circuit

In 2003, the Eighth Circuit addressed the "medicate-to-execute" scheme in *Singleton v. Norris*, which involved an inmate suffering from paranoid schizophrenia.[64] Three years before Charles Singleton's execution was scheduled, Arkansas placed him on an involuntary medication regime after determining that he met the two-prong test established by *Harper*.[65] Yet once an execution date was set, Singleton claimed that the state was barred from forcibly medicating him to render him competent for execution.[66] The essence of Singleton's argument was that treatment with antipsychotic medication is no longer in the inmate's medical interests when execution looms.[67]

Nonetheless, the Eight Circuit emphasized that the state interests must still be considered, and that the state certainly has an interest in carrying out lawfully imposed punishments.[68] The court then weighed the state's interests against those of Singleton, and found that the state's interests were stronger, since not only had Singleton expressed a preference in being medicated rather than in a psychotic state, but because the medication had caused no substantial side effects.[69] Ultimately, the court held that antipsychotic drugs were medically necessary to alleviate Singleton's psychosis and that there was no less intrusive medical treatment through which the state could restore Singleton to competency.[70] According to the Eighth Circuit, even though Singleton claimed that continuing to be forcibly medicated was not in his medical interests, the reality was that it was the eligibility for execution — and not any medical consequence of the antipsychotic drugs — that Singleton wished to avoid.[71] The U.S. Supreme Court declined to hear the case,[72] and Singleton was executed on Jan. 6, 2004.[73]

The Failings of the Medicate-to-Execute Scheme

States should not be allowed to forcibly medicate mentally ill death row inmates in order to achieve competency for execution for two reasons. First, the state does not have an important governmental interest in executing an individual who cannot be constitutionally executed. Second, the medicate-to-execute scheme violates the Eighth Amendment because it is completely arbitrary, since not all mentally ill individuals can be restored to competency through forced medication.

A. The Lack of an Important State Interest

Because forcing an inmate to ingest antipsychotic drugs violates a significant liberty interest, the *Harper* Court required that the state first show that (1) the inmate poses a danger to himself or others *and* (2) the medication is in the inmate's medical interests.[74] The Court made it clear that its decision reflected the balance of the state's and the inmate's interests within the context of a prison, and that the state has an interest in maintaining a safe prison environment.[75] However, the Court subsequently removed the dangerousness requirement in the context of restoring a defendant's competency to stand trial, instead holding that the state has an important interest in bringing the accused to trial and ensuring that all trials are fair.[76] This article does not argue that forcibly medicating a death row inmate must be predicated upon a finding of dangerousness.[77] Even without applying the strict test from *Harper* to the medicate-to-execute scenario, and instead applying the much more state-friendly test from *Sell*, the state still cannot meet its burden.

As the U.S. Supreme Court held in *Sell*, the state may only forcibly medicate a mentally ill criminal defendant if the state first demonstrates that it has an important governmental interest in doing so.[78] The state can meet this burden by showing that it has an important governmental interest in bringing the accused to trial and ensuring that the defendant's trial is fair.[79] However, there is no similar interest at stake when a state is seeking to forcibly medicate a mentally ill inmate in order to restore competency for execution. Some argue that prohibiting states from executing inmates made competent through involuntary medication

would undermine the state's ability to ensure that lawfully imposed punishment is being carried out.[80] Yet when the mentally ill prisoner does not have the competency required for a constitutional execution, it does not matter whether the sentence of death was lawful — the execution of someone who is incompetent is not lawful. And the state certainly does not have an important governmental interest in executing an individual that the Constitution forbids the state from executing. It is helpful to analogize to the way in which the U.S. Supreme Court has viewed the constitutional constraints on the treatment of mentally retarded criminals.

In 2002, the U.S. Supreme Court held, in *Atkins v. Virginia*, that executing mentally retarded prisoners violates the Eighth Amendment.[81] In reaching its conclusion, the Court emphasized the inherently mitigating nature of mental retardation; because intellectual disability diminishes the individual's capacity to engage in logical decision-making, the individual is prone to engage in impulsive behavior that ignores past experiences and consequences.[82] Thus, while such deficiencies do not excuse criminal behavior, the criminal sanctions imposed must be proportional to the inmate's personal culpability.[83] The Court ruled that mentally retarded inmates must be exempt from execution for two reasons.

First, neither retribution nor deterrence is achieved by executing such individuals.[84] Retribution represents society's interest in ensuring that those who commit crimes are punished, yet the severity of the punishment must be in proportion to the culpability of the criminal. And since the death penalty is a sanction reserved for only the most culpable criminals, individuals whose personal culpability is necessarily diminished by intellectual disability must be exempt from such a sanction.[85] Similarly, a criminal sanction as severe as the death penalty can only serve to deter those who would otherwise deliberately plan to commit murder; since mental retardation inhibits impulse control, any deterrent value of the death penalty is lost on an individual who makes decisions based on impulse rather than premeditation.[86] Second, the reduced capacity of mentally retarded individuals renders them less likely to be able to assist in their own defense.[87] Intellectual disability makes it far more difficult for the defendant to communicate with his or her attorney, to testify as a witness, and to even appear to the jury as a remorseful person.[88]

Once again, the Court's ruling in *Atkins* does not exempt the mentally retarded from criminal liability, as it remains perfectly acceptable to try and convict such individuals for murder. Instead, the Court simply emphasized the essential proportionality between the severity of the criminal sanction and the culpability of the offender. This clearly signifies that while the state continues to have an important interest in ensuring that even the mentally retarded are held accountable for the ways in which they harm society, any similar government interest in executing mentally retarded inmates is trumped by "evolving standards of decency that mark the progress of a maturing society."[89]

While mental retardation generally manifests at or near birth, mental illness usually does not develop until early adulthood or later.[90] It might seem that the death penalty exemption for mentally retarded inmates is based on the recognition that their underlying crimes were committed under the influence of mental retardation, a justification that would not apply to an inmate who only became mentally ill subsequent to his crime and conviction. However, the death row prisoner at issue in *Ford v. Wainwright*, the landmark case that prohibited the execution of the insane, did not begin to show signs of his mental illness until eight years after being sentenced to death.[91] Therefore, the justification behind prohibiting his execution had nothing to do with his culpability at the time of his crime, or his mental state at the time of his trial and sentencing. Instead, the Court focused solely on his mental capacity at the time at which he was due to be executed, and held that the Eighth Amendment prohibits executing the insane, "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[92]

The state does not have an important governmental interest in executing mentally retarded prisoners. Even if doctors developed medication that could temporarily increase someone's cognitive functioning, the state could not force a mentally retarded death row inmate to ingest the medication in order to lawfully execute the inmate because it has no important governmental interest in executing someone that the Constitution forbids the state from executing. Likewise, the prohibition on executing the insane must not be circumvented by forcibly medicating mentally ill prisoners in order to restore

competency for execution. By the time the mentally ill inmate is on death row, the state has already achieved its interest in bringing a criminal case against the defendant and garnering the support of the judge or jury. The state has already satisfied its goal of carrying out lawful justice for the community, whose members feel wronged by criminal behavior and want to see the criminal punished. But the state's interest does not extend as far as to force a mentally ill prisoner to ingest antipsychotic drugs in the hopes that the medication will restore competency and allow the state to execute the prisoner.

It is important to note that the state could still achieve its interest in carrying out justice by changing the inmate's sentence to life without the possibility of parole, which would also allow the inmate to pursue voluntary treatment without triggering his execution.[93] The change in sentence could be permanent or temporary. For example, the state could grant the inmate a permanent stay of execution, or it could implement the rule from the Louisiana Supreme Court and refrain from executing the inmate until the inmate is restored to competency without the aid of antipsychotic medication.[94]

B. Effective Antipsychotic Medication as a Lightning Bolt

Antipsychotic medication does not always work. A recent study shows that antipsychotic drugs do help many people suffering from schizophrenia, and can decrease the risk of relapse by 60 percent.[95] Yet the effectiveness of such medication depends entirely on the individual, and there is no cure for schizophrenia.[96] Therefore, the state's ability to execute a mentally ill inmate relies solely on whether the antipsychotic medication does, in fact, restore the individual to competency. The execution of a mentally ill inmate whose competency has been restored through forcible medication thus becomes "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[97]

Singleton was executed by the state of Arkansas simply because his medication was able to restore him to the level of competency required for a constitutional execution.[98] The antipsychotic drugs forced upon him by the state restored his ability to understand that he was to be executed and why that was his fate, even though Singleton was only able to understand this when he was being forcibly medicated.[99] Even while he was on his medication for schizophrenia, Singleton continued to hear voices, some of which talked about killing him.[100] Singleton's schizophrenia was severe, and by the late 1980s — on the heels of the Court's decision in *Ford* — it was clear that he did not possess a rational understanding of his execution; Singleton expressed the belief that his execution would simply stop his breathing, but that the judge could then start his breathing again.[101] He was taking antipsychotic medication by the early 1990s, but any time his medication was increased or changed, or when Singleton failed to take his medication, his symptoms would worsen.[102] Arkansas then put Singleton on an involuntary medication regimen,[103] and executed him while he was under the influence of the drugs.[104]

Judge Heaney wrote a vigorous dissent in Singleton's case, in which he explained his disbelief with the majority's ability to justify the state's medicate-to-execute scheme:

> Based on the medical history in this case, I am left with no alternative but to conclude that drug-induced sanity is not the same as true sanity. Singleton is not "cured"; his insanity is merely muted, at times, by the powerful drugs he is forced to take. Underneath this mask of stability, he remains insane. *Ford*'s prohibition on executing the insane should apply with no less force to Singleton than to untreated prisoners.[105]

Why is being executed after responding positively to involuntary antipsychotic medication like being struck by lightning? Consider the following scenario. Two co-defendants, both of whom suffer from severe schizophrenia, are convicted of murder and sentenced to death. Both are found incompetent to be executed in their current mental state. The state secures permission to forcibly medicate both prisoners in hopes of restoring them to competency for execution. Only one of the prisoners responds positively to the medication; the other continues to suffer from paranoia and auditory hallucinations, and has no rational understanding of his pending execution. Despite the state's attempt to restore the second prisoner to competency through the use of various antipsychotic drugs, the prisoner remains incompetent and continues to deteriorate. Therefore, the state can only execute the first prisoner — whose competency has been restored through forcible medication — and not the second prisoner, who remains unresponsive to forcible medication.

The U.S. Supreme Court, in *Furman v. Georgia*, placed a temporary moratorium on the death penalty systems across the country after finding that Georgia's legal procedure for sentencing defendants to death was cruel and unusual because it allowed for prejudice and discrimination to determine the fate of people who faced the death penalty.[106] If it is arbitrary for one co-defendant to be sentenced to death because he is Black or poor, but for the other co-defendant to be spared such a sentence because he is White or rich, surely it is just as arbitrary and unfair to allow the execution of a mentally ill prisoner simply because the antipsychotic medication forced upon him by the state happened to ease his suffering and restore him to competency.

Because there can be no guarantee that any mentally ill death row inmate can be restored to competency through the administration of antipsychotic drugs, states must not be allowed to forcibly medicate mentally ill inmates in

order to restore competency for execution. To otherwise allow such an option permits states to operate a legal process that imposes death upon inmates in a way that is completely arbitrary and violates the Constitution's ban on cruel and unusual punishment.

Conclusion

Mental illness is a brain disease. It is not a choice, a reflection of poor moral judgment or bad character, and it is often unpleasant. Society has already determined that while mental illness does not necessarily excuse bad behavior — especially criminal behavior that causes harm to others — it can decrease one's culpability. Additionally, society frowns upon taking the life of someone whose mental defects are so serious as to prevent that person from recognizing the harm he has done to others and the punishment he faces as a result. States must not be allowed to circumvent the prohibition on executing the insane by forcing ill prisoners to ingest medication that makes it possible for those who suffer from grave diseases of the mind to temporarily regain healthy brain functioning. Not only does the state have a weak interest in doing so, but it is not guaranteed that every forcibly medicated inmate will be restored to competency.

The tragic irony is that only individuals whose bodies respond positively to the antipsychotic drugs — which were developed to ease the pain and suffering of mental illness — will be executed by the state. This does not serve society's interests. Instead, it interferes with a fundamental liberty interest of the inmate, and it delivers state-sanctioned death in a way that violates the Eighth Amendment's prohibition on cruel and unusual punishment. As Judge Heaney wrote in his dissent to the Eighth Circuit's decision to allow Arkansas to execute Singleton, "I believe that to execute a man who is severely deranged without treatment, and arguably incompetent when treated, is the pinnacle of what Justice Marshall called 'the barbarity of exacting mindless vengeance.'"[107]

Notes

1. The last words of Charles Singleton, who was executed while being forcibly "treated" with antipsychotic drugs by the state of Arkansas. Kate Randall, *Mentally Ill Inmate Put to Death After Medical 'Treatment' Prepares Execution*, Ctr. for Cognitive Liberty & Ethics (Jan. 8, 2004), *available at* http://www.cognitiveliberty.org/dll/singleton_executed.html/.

2. *Death Row Inmates by State*, Death Penalty Info. Ctr. (last visited Aug. 6, 2013), *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

3. *Position Statement 54: Death Penalty and People With Mental Illnesses*, Mental Health Am., *available at* http://www.nmha.org/go/position-statements/54/.

4. *See Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

5. Melissa McDonnel and Robert T. M. Phillips, Symposium Article, *Physicians Should Treat Mentally Ill Death Row Inmates, Even If Treatment Is Refused*, 38 J.L. Med. & Ethics 774, 779 (2010).

6. *Facts About the Death Penalty*, Death Penalty Info. Ctr., (last updated Aug. 6, 2013), *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf. Furthermore, a 2002 poll revealed that, of the 1,012 American surveyed, 75 percent opposed executing mentally ill inmates. Julie D. Cantor, *Of Pills and Needles: Involuntarily Medicating the Psychotic Inmate When Execution Looms*, 2 Ind. Health L. Rev. 119, 162 (2005).

7. *Schizophrenia*, Nat'l Inst. of Mental Health (last visited Aug. 6, 2013), *available at* http://www.nimh.nih.gov/health/publications/schizophrenia/index.shtml.

8. ABA Recommendation 122A 18, *available at* http://www.deathpenaltyinfo.org/documents/122AReport.pdf.

9. Margarita Tartakovsky, *Illuminating 13 Myths of Schizophrenia*, Psych Central, http://psychcentral.com/lib/2010/illuminating-13-myths-of-schizophrenia/.

10. Manu Matthews & David J. Muzina, *Atypical Antipsychotics: New Drugs, New Challenges*, 74 Cleveland Clinic J. Med. 597, 597 (2007).

11. Doris J. James & Lauren E. Glaze, Bureau of Justice Statistics, Mental Health Problems of Prison and Jail Inmates 1 (2006).

12. NPR, *Nation's Jails Struggle With Mentally Ill Prisoners* (Sept. 4, 2011), http://www.npr.org/2011/09/04/140167676/nations-jails-struggle-with-mentally-ill-prisoners.

13. E. Fuller Torrey et al., *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States*, Treatment Advocacy Ctr., May 2010, *available at* http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf.

14. Charles Patrick Ewing, *'Above All, Do No Harm': The Role of Health and Mental Health Professionals in the Capital Punishment Process*, *in* America's Experiment with Capital Punishment 597, 607 (James R. Acker et al. eds., 2d ed. 2003).

15. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

16. *Washington v. Harper*, 494 U.S. 210 (1990).

17. *Id.* at 216-17.

18. *Id.* at 221.

19. *Id.* at 222.

20. *Id.*

21. *Id.* at 222-23.

22. *Id.* at 231.

23. *Id.* at 227.

24. *Dusky v. United States*, 362 U.S. 402, 402 (1970).

25. Gerald E. Nora, *Prosecutor as 'Nurse Ratched'? Misusing Criminal Justice as Alternative Medicine*, 22 Crim. Justice 18, 19 (2007).

26. *Riggins v. Nevada*, 504 U.S. 127, 130 (1992).

27. *Id.* at 129.

28. *Id.* at 130.

29. *Id.*

30. *Id.* at 131.

31. *Id.* at 134 (quoting *Washington v. Harper*, 494 U.S. 210, 229 (1990)).

32. *Id.* at 135.

33. As Justice Kennedy pointed out in his concurrence, "Here the purpose of the medication is not merely to treat a person with grave psychiatric disorders and enable that person to function and behave in a way not dangerous to himself or others, but rather to render the person competent to

stand trial." *Id*. at 140 (Kennedy, J., concurring).

34. *Id*. at 135.

35. *See Sell v. United States*, 539 U.S. 166 (2003).

36. *Id*. at 170.

37. *Id*.

38. *Id*. at 171.

39. *See id*.

40. *Id*. at 180-81.

41. *Id*. at 180.

42. *Id*. at 181.

43. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

44. *Id*. at 407-08.

45. *Id*. at 417.

46. *Id*. at 422 (Powell, J., concurring).

47. *See Dusky v. United States*, 362 U.S. 402, 402 (1970) (requiring both a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him").

48. 551 U.S. 930 (2007).

49. *Id*. at 956.

50. *Id*. at 958.

51. Howard Zonana, Symposium, *Physicians Must Honor Refusal of Treatment to Restore Competency by Non-Dangerous Inmates on Death Row*, 38 J.L. MED. & ETHICS 764, 769 (2010).

52. Dora W. Klein, *The Mentally Disordered Criminal Defendant at the Supreme Court: A Decade in Review*, 91 OR. L. REV. 207, 234 (2010).

53. *Id*.

54. *State v. Perry*, 610 So. 2d 746, 747 (La. 1992). Because the court could rule on the merits without addressing the federal question, the court's analysis did not implicate the Eight Amendment of the U.S. Constitution.

55. *Id*. at 749.

56. *Id*.

57. *Id*. at 751.

58. *Id*. at 753.

59. *Id*. at 747.

60. *Singleton v. State*, 437 S.E.2d 53, 89 (S.C. 1993).

61. *Id*.

62. *Id*. at 90 (emphasis added).

63. *Id* at 89.

64. *Singleton v. Norris*, 319 F.3d 1018, 1024 (8th Cir. 2003).

65. *Id*. at 1021.

66. *Id*.

67. *Id*. at 1023.

68. *Id*. at 1025 (citing *Moran v. Burbine,* 475 U.S. 412, 426 (1986)).

69. *Id*.

70. *Id*.

71. *Id*. at 1026.

72. *See Singleton v. Norris*, 540 U.S. 832 (2003).

73. Kevin Drew, *Executed Mentally Ill Inmate Heard Voices Until End*, CNN (Jan. 6, 2004), http://www.cnn.com/2004/LAW/01/06/singleton.death.row/.

74. *Washington v. Harper*, 494 U.S. 210, 227 (1990).

75. *Id*. at 222-23.

76. *Sell v. United States*, 539 U.S. 166, 180 (2003).

77. Nevertheless, death row inmates are generally kept in isolation, so they pose little danger to others, even though they may pose some danger to themselves. Holland Sergent, Comment, *Can Death Row Inmates Just Say No?: The Forced Administration of Drugs to Render Inmates Competent for Execution in the United States and Texas*, 35 TEX. TECH L. REV. 1299, 1314 (2004).

78. *See Sell,* 539 U.S. at 180.

79. *Id*.

80. *See, e.g.*, Robert Hill, Comment, *Forcible Medication Resulting in Execution — Why* Singleton v. Norris *Is Necessary to Ensure Governmental Efficiency*, 26 T. JEFFERSON L. REV. 65, 65 (2003) (arguing that the weightiest factor to consider in medicate-to-execute cases is the state's interest in being able to carry out its lawfully imposed sentences).

81. *See Atkins v. Virginia*, 536 U.S. 304, 318-21 (2002).

82. *Id*. at 318.

83. *Id*.

84. *Id*. at 318-19.

85. *Id*. at 319.

86. *Id*. at 319-20.

87. *Id*. at 320-21.

88. *Id*.

89. *See Trop v. Dulles*, 356 U.S. 86, 101 (1958).

90. *What Everyone Should Know About Mental Retardation*, SUBSTANCE ABUSE MENTAL HEALTH INFO., http://samhi.mimh.edu/.%5Ccache%5Cmentalretardation%5CWhat%20everyone%20should%20know%20about%20Mental%20Retardation.htm (last visited Apr. 25, 2013).

91. *Ford v. Wainwright*, 477 U.S. 399, 401-02.

92. *Id*. at 410.

93. This is the solution advocated by the American Bar Association. *See* ABA RECOMMENDATION 122A, *supra* note 8.

94. *See State v. Perry*, 610 So. 2d 746, 747 (La. 1992).

95. *Antipsychotics Do Help Many With Schizophrenia*, US NEWS (May 3, 2012), *available at* http://health.usnews.com/health-news/news/articles/2012/05/03/antipsychotics-do-help-many-with-schizophrenia-study-finds/.

96. NAT'L INST. OF MENTAL HEALTH, *supra* note 7.

97. *See Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

98. The determination that Singleton was "competent" for execution seems dubious in the context of the other decisions he made after being "restored" to competency. And as is unfortunately rather common in cases involving defendants with severe mental illness, the competency of Singleton's counsel raises additional problems with allowing states to execute severely mentally ill inmates. Once Singleton's appeal was pending before the Eighth Circuit, Singleton decided that he did not want to pursue further appeals, and instead volunteered for execution. Zonana, *supra* note 51, at 769. There is no indication that his counsel ever litigated Singleton's competency to decide not to pursue further appeals or to volunteer for execution. Furthermore, while evaluations of Singleton were conducted by mental health professionals working at the state facilities at which he was being held, there is no indication that Singleton's counsel ever engaged the services of a mental health professional. *See Singleton v. Norris*, 319 F.3d at 1032 (mentioning evaluations conducted by two psychologists in the Forensic Evaluation Unit, but making no mention of any evaluations ever being conducted by a mental health expert at the behest of Singleton's counsel).

99. Drew, *supra* note 73.

100. *Id*.

101. Randall, *supra* note 1.

102. *Id*.

103. *Id*.

104. Drew, *supra* note 73.

105. *Singleton v. Norris*, 319 F.3d 1018, 1034 (8th Cir. 2003) (Heaney, J., dissenting).

106. *See Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

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

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