

INVOLUNTARILY MEDICATING CONDEMNED INCOMPETENTS FOR THE PURPOSE OF RENDERING THEM SANE AND THEREBY SUBJECT TO EXECUTION

The federal government, the military, and forty-one states currently use capital punishment.¹ Beginning during the Great Depression, the United States has witnessed a persistent trend away from capital punishment. This evolution culminated in 1972 when the Supreme Court held in *Furman v. Georgia*² that under existing law the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.³ Since the reinstatement of capital punishment in the late 1970s,⁴ however, the trend has reversed. Over 160 convicted criminals have been executed since the 1970s, and 2600 more currently sit on "death row" awaiting execution.⁵

The controversy accompanying capital punishment has shifted from ethics to expediency. In recent decisions, the Supreme Court has curtailed the appeal process for those receiving capital sentences by narrowing the grounds for appeal,⁶ limiting the appellant group,⁷ and expanding

1. In 1986, Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, West Virginia, and Wisconsin did not have death penalty statutes. Barbara A. Ward, *Competency for Execution: Problems In Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 107 (1986).

2. 408 U.S. 238 (1972).

3. *Id.* at 239. The Court considered the imposition of the death penalty on three defendants; one was convicted of murder and two were convicted of rape. The Court held that the imposition of the death penalty in each case would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

4. See Ward, *supra* note 1, at 37 (noting that after *Furman v. Georgia*, 408 U.S. 238 (1972), state legislatures refined their capital sentencing statutes). See also *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding revised state capital punishment laws of Florida, Georgia, and Texas).

5. DEATH ROW, U.S.A. 1 (NAACP Legal Defense and Educational Fund, New York, N.Y.), Spring 1992, at 279. Of the 168 executions, 157 have been carried out since 1983. *Id.* at 282.

6. See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a new, more lenient rule governing evidence required for prima facie case of racial discrimination in use of preemptory challenges did not apply retroactively).

7. See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149 (1990) (holding that second death row inmate lacked standing to challenge validity of first death row inmate's death sentence when first death row inmate waived his right to appeal).

the condemnable class to include minors⁸ and mentally retarded persons.⁹

The Supreme Court has recognized as a general rule that an incompetent cannot commit a crime,¹⁰ stand trial,¹¹ plead guilty,¹² be sentenced, and be punished.¹³ However, the Court has also demonstrated a willingness to strengthen the capital punishment tool by allowing a case-by-case determination of competency, notwithstanding previous common law protection of certain individuals or classes.¹⁴

8. *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court followed the two-part Eighth Amendment analysis outlined in *Penry v. Lynaugh*, 492 U.S. 302 (1989), decided the same day. See *infra* note 9. First the Court found that because the common law embraced the execution of those under 17, the punishment was not cruel and unusual at the time the Bill of Rights was adopted, and therefore it was constitutional. *Stanford*, 492 U.S. at 368. Second, the Court examined several objective factors and determined that the executions of minors were not contrary to the "evolving standards of decency that mark a maturing society." *Id.* at 369 (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

9. *Penry v. Lynaugh*, 492 U.S. 302 (1989). The common law prohibited the execution of "idiots." While this could indicate that capital punishment was cruel and unusual, here the defendant was adjudged competent to stand trial; subsequently the jury rejected his insanity defense. *Id.* at 331-33. The Court further found no objective evidence of an emerging national consensus against the execution of the mentally retarded. *Id.* at 334-35.

10. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 332 (1989) (citing MODEL PENAL CODE § 4.02(1) (Proposed Official Draft 1962)). "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Id.*

11. See *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). The test to determine competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

12. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."). See also *Saddler v. United States*, 531 F.2d 83, 85 (2d Cir. 1976); *Sieling v. Eyman*, 478 F.2d 211, 214-15 (9th Cir. 1973); *Schoeller v. Dunbar*, 423 F.2d 1183 (9th Cir.), cert. denied, 400 U.S. 834 (1970).

13. See *Saddler*, 531 F.2d at 86 (explaining that defendant's right of allocution would be meaningless if he were incompetent at sentencing). See also 18 U.S.C. § 4244 (1988) (providing for hearing on the present mental condition of convicted defendant prior to sentencing); *Gord v. Wainwright*, 477 U.S. 399 (1986). See *Ward*, *supra* note 1, at 49.

14. See *Stanford v. Kentucky*, 492 U.S. 361 (1989) (no blanket prohibition on executing minors); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (no blanket prohibition on executing a mentally retarded individual). Reshaping the condemnable class is easier than redefining the substantive legal and ethical foundations of capital punishment.

The scope of this Note is limited to the appropriateness of involuntarily medicating incompetents for the purpose of rendering them competent and thereby subject to execution. For a detailed discussion of the procedural implications of *Ford v. Wainwright* upon competency determinations, see Robert F. Schopp, Note, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential*

Capital punishment has always generated fervent debate.¹⁵ The procedure and evaluation of capital offense cases has fluctuated persistently but never at the level of activity seen recently.¹⁶ Moreover, medication of an individual absent or contrary to his consent has evoked passionate pleas and similar elements of consideration.¹⁷ The identification, treatment, and handling of incompetents is continuously changing.¹⁸ The Supreme Court has yet to address the issue of the involuntary medication of condemned incompetents.¹⁹ This Note argues that the Court will have difficulty overcoming the inherent practical, ethical, and legal problems of state determination of a condemned's competence through involuntary medication. Therefore, involuntarily medicating condemned incompe-

Significance of the Competency to Face Execution Requirement, 51 LA. L. REV. 995 (1991); Paul F. Enzina & Jana L. Gill, *Capital Punishment and the Incompetent: Procedures for Determining Competency to be Executed after Ford v. Wainwright*, 41 FLA. L. REV. 115 (1989).

15. See Joseph M. Giarratano, "To The Best of Our Knowledge, We Have Never Been Wrong": Fallibility vs. Finality in Capital Punishment, 100 YALE L.J. 1005 (1991) (arguing that the inescapable risk of executing even one innocent individual should be enough to abolish capital punishment entirely).

16. See, e.g., *Ford v. Wainwright*, 477 U.S. 399 (1986) (requiring procedural safeguards to determine competency of inmate), *aff'd*, 891 F.2d 807 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 222 (1990). But see *Martin v. Dugger*, 686 F. Supp. 1523, 1557 (S.D. Fla. 1988) (calling *Ford* a precedential quagmire because no real holding on required procedures), *aff'd*, 891 F.2d 807 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 222 (1990).

17. See, e.g., *Washington v. Harper*, 494 U.S. 210 (1990) (Due Process Clause permits the state to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's best interest).

18. MARVIN E. LICKEY & BARBARA GORDON, *MEDICINE AND MENTAL ILLNESS* (1991). Drugs used in the treatment of schizophrenics and other incompetents include clozapine, chlorpromazine, haloperidol, fluphenazine, and thiothivene. *Id.* at 380. See also Claudia Wallis & James Willwerth, *Pills for the Mind*, TIME, July 6, 1991, at 52-60.

19. The significance of the issue of involuntarily medicating condemned incompetents is a product of the Court's changing view of capital punishment. *Ford v. Wainwright* represents the most recent significant decision in this area. In *Ford*, the Court declared that the insane may not be executed, but failed to define who is insane. The result was a legal quagmire. See *supra* note 16. The declaration restricting capital punishment in certain instances is a pyrrhic promise to protect the incompetent. Because the Court left the definition of incompetency open, it subjects the protected class to erosion beyond that found at common law. An illustration of this possibility appeared in *Stanford v. Kentucky*, 492 U.S. 361 (1989). The Court noted in *Stanford* that the executions of a 16 and 17 year old "did not violate evolving standards of decency" and therefore survived the cruel and unusual punishment standards of the Eighth Amendment. *Id.*

In 1990, the Supreme Court vacated a Louisiana trial court order to forcibly administer antipsychotic drugs to a condemned prisoner. *Perry v. Louisiana*, 111 S. Ct. 449 (1990). The trial court reinstated its order on remand. The Louisiana Supreme Court reversed on the forcible medication issue, but affirmed the trial court's holding that the prisoner was not competent to be executed. The court held that the state's use of involuntary medication in order to execute was unconstitutional. *State v. Perry*, 1992 WL 296230, at *3 (Oct. 19, 1992).

tents in order to render them sane and thereby subject to execution is neither plausible nor constitutionally permissible.

Part I defines incompetence by examining the different methodologies and the disparate goals of the legal and psychiatric professions. Part II examines the traditional rule that incompetents are exempt from execution, tracing the evolution of that policy from its inception at common law and its development under the Eighth Amendment, to current treatment of the mentally incompetent. Part III discusses the general legal issues concerning involuntary medication and informed consent. Part IV examines the limitations of the psychiatric profession and their influence over the involuntary medication of incompetents. Part V discusses the role of cognitive and affective understanding in the punishment process and its relationship to involuntary medication. Part VI concludes that too many problems exist to permit a policy which would authorize a state to involuntarily medicate death row inmates for the purpose of rendering them competent to stand execution.

I. COMPETENCY

The law presumes that a criminal defendant is competent unless it appears to the defense counsel, next friend,²⁰ prosecution, or court that he is in fact mentally impaired.²¹ If evidence of significant mental incapacity is presented,²² the court must address the issue of competency; failure

20. Use of a "next friend" to litigate occurs often in habeas corpus litigation, because of the inmate's inability to act on his own behalf due to his detention. To litigate as a "next friend" of a condemned prisoner, one must: (1) provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the inmate cannot appear on his own behalf to prosecute the action; (2) be truly dedicated to the inmate's best interests; and (3) demonstrate some significant relationship with the inmate. *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990).

21. 3A *LAWYERS' MEDICAL CYCLOPEDIA OF PERSONAL INJURIES AND ALLIED SPECIALTIES: PSYCHIATRY AND THE LAW* § 17.38, at 72 (Charles J. Frankel ed., 3d ed. 1983) [hereinafter *PSYCHIATRY AND THE LAW*]. A "mental disorder" is "conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress (a painful symptom) or disability impairment in one or more important areas of functioning or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom." *AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL* (3d ed. rev. 1987) [hereinafter *DSM-III-R*].

22. Jurisdictions differ on the issue of who may initiate proceedings to determine the competency of a condemned inmate. Some provide by statute that only designated officials, such as those exercising control over and custody of the prisoner, have the power to petition for a competency hearing. *See, e.g., Shank v. Todhunter*, 75 S.W.2d 382, 383 (Ark. 1934) (superintendent of state penitentiary may initiate competency hearing); *People v. Riley*, 235 P.2d 381, 383 (Cal. 1951) (en banc) (warden must notify a local attorney regarding petitions for competency hearings); *Commonwealth v. Barnes*, 124 A. 636, 637 (Pa. 1924) (superintendent, jail physician, warden, or other chief

to answer the competency question may be grounds for subsequent reversal of a conviction.²³ Notwithstanding public and judicial concerns of undue delay,²⁴ it is unlikely and even unusual²⁵ that feigned mental illness²⁶ would present an obstacle to implementing execution decrees.²⁷

executive officer of the institution or other responsible person may apply for commitment to mental hospital).

In jurisdictions with no statute, a particular individual need not raise the competency issue. Rather, the defense counsel, next friend, or the court may initiate the process. *See, e.g., State v. Nordstrom*, 58 P. 248 (Wash. 1899) (inmate and his counsel initiated process for competency determination), *aff'd* 181 U.S. 616 (1901); *Grossi v. Long*, 238 P. 983 (Wash. 1925) (competency hearing initiated by "next friend"); *Baughn v. State*, 28 S.E. 68 (Ga. 1896) (court has discretion to dismiss petition of inmate or "next friend" for competency hearing), *aff'd sub nom. Nobles v. Georgia*, 168 U.S. 398 (1897).

23. PSYCHIATRY AND THE LAW, *supra* note 21, § 17.38, at 72. The Supreme Court has held that deliberate indifference to the serious medical needs of a prisoner violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). Subsequent circuit court decisions concluded that mental illness may be categorized as a serious medical need. *See, e.g., Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986); *Wellman v. Faulkner*, 715 F.2d 269, 272 (7th Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

24. A criminal judgment necessarily includes the sentence imposed upon the defendant. *See Flynt v. Ohio*, 451 U.S. 619, 620 (1981). Collateral challenges to a capital sentence delay its enforcement and decrease the possibility of finality that accompanies the end of litigating a matter. *Cf. Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting) ("[A]ttention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.") *Cf. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, CAPITAL PUNISHMENT 1990 10* (1988) (during the period of 1977-1990, the average time from sentencing to execution was six years and 10 months). *But see Demosthenes v. Baal*, 495 U.S. 731, 738 (1990) (Brennan, J., dissenting) (citing JUDICIAL CONFERENCE OF THE UNITED STATES, AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 6 (1989)) (acknowledging in the Conference's proposal for streamlined review in capital cases that a prisoner is entitled, at a minimum, to one complete and fair course of collateral review in the state and federal system free from the temporal pressure of an impending execution).

25. A defense attorney may be reluctant to request evaluation and perhaps treatment of his mentally ill client by a psychiatrist. Most criminal defendants do not wish to be recognized or categorized as mentally ill. Hence, usually the prosecutor will file the request for evaluation following an informal agreement with the defense attorney, enabling the defense attorney to retain the trust of the defendant. PSYCHIATRY AND THE LAW, *supra* note 21, § 17.38, at 72.

26. Malingering and a factitious disorder are not the same. A factitious disorder is "characterized by physical or psychological symptoms that are produced by the individual and are under voluntary control." DSM-III-R, *supra* note 21, at 360. However, though the symptoms are faked, the motivation for the conduct is unknown. Thus, "behavior under voluntary control is used to pursue goals that are voluntarily adapted." *Id.* On the other hand, a malingerer exhibits symptoms that are faked with a clearly recognizable goal in mind. For example, malingering includes feigning an illness to avoid incarceration or indoctrination into the armed forces. *Id. See also PSYCHIATRY AND THE LAW, supra* note 21, § 17.18.

27. A capable prison mental health team of consulting psychiatrist should be available and trained to distinguish malingering from a true mental illness. PSYCHIATRY AND THE LAW, *supra* note 21, § 17.38, at 76.

In *Ford v. Wainwright*,²⁸ although the Supreme Court recognized that the Eighth Amendment prohibits a state from executing a prisoner who is insane, the majority did not attempt to formulate a comprehensive definition of insanity or incompetence.²⁹ Medical competency is a functional concept measured by one's ability to participate in relationships and productive activity.³⁰ Legal competency, however, is specific to each case.³¹

A. Legal Competency

The legal test for determining incompetency in the execution context is not the M'Naghten right and wrong rule,³² which is applied most frequently in determining responsibility for a criminal act.³³ Nor is the test used to determine competency to stand trial the appropriate measure of the individual's capacity. That test requires only a reasonable degree of rational understanding³⁴ and fluctuates with the complexity of the crime and trial proceedings.³⁵ Rather, the proper test of competency at the time of punishment weighs a number of factors.

A condemned individual must have sufficient mental capacity to understand the nature of the proceedings against him, for what he was tried, the purpose of the punishment, and his impending fate. Furthermore, he must exhibit sufficient understanding to recognize and compre-

28. 477 U.S. 399, 409-10 (1986).

29. *Ford*, 477 U.S. 399, 418 (1986). In his concurrence, Justice Powell provided his definition of insanity. "[T]he Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 421-22.

30. See *infra* part I.B.

31. See LICKEY & GORDON, *supra* note 18, at 373-76.

32. M'Naghten's Case, 8 Eng. Rep. 718 (1843). The M'Naghten rule states that every person is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until proved otherwise. To establish a defense on the ground of insanity, a defendant must prove that at the time of the act, he was laboring under such defect of reason as not to know the nature and quality of his act, or, if he did know it, that he did not know that he was doing wrong. *Id.* at 722. The "right and wrong" label given to the M'Naghten test stems from the latter portion of the rule, which examines whether, at the time of the act, the accused knew the difference between right and wrong.

The M'Naghten test is often criticized for failing to address the situation in which the accused understood his action but was incapable of controlling it. See *People v. Drew*, 583 P.2d 1318, 1322-23 & n.7 (Cal. 1978) (citing *Wade v. United States*, 426 F.2d 64, 66-67 (9th Cir. 1970)).

33. *Commonwealth v. Moon*, 117 A.2d 96, 99 (Pa. 1955).

34. See *supra* note 11.

35. The mental capacity required to stand trial correlates to the complexity and variability of the crime and trial itself. Thus, as the complexity of the trial increases, the mental ability required to participate in that trial by, for example, assisting with cross-examination or following testimony also increases. PSYCHIATRY AND THE LAW, *supra* note 21, § 17.38, at 74.

hend any existing fact which might render his punishment unjust or unlawful, and he must show the intelligence necessary to convey such information to his attorney or the court.³⁶ The legal determination whether an individual is competent for execution is a complex, fact-intensive question.³⁷ Factors evaluated in determining competency include psychiatric evaluations, previous mental diagnoses, and contradictory affidavits.³⁸

B. Medical Competency

The medical or clinical test of competency has more structure but is arguably even more uncertain than its undefined³⁹ legal counterpart. The Diagnostic and Statistical Manual of Mental Disorders ("DSM-III-R")⁴⁰ has standardized the diagnostic nomenclature of American psychiatry.⁴¹ DSM-III-R lists precise criteria for each mental disorder, many of which are derived from verifiable facts in the patient's history or contemporaneous behavior conduct.⁴² DSM-III-R thus eliminates much diagnostic ambiguity.

However, DSM-III-R has not standardized the basic theoretical frameworks used in competency determinations.⁴³ Four theories have traditionally dominated the field of mental competency:⁴⁴ psychoanalysis,⁴⁵ behaviorism,⁴⁶ interpersonal psychiatry,⁴⁷ and biologic psychia-

36. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-5.6(b) (1989).

37. See *Hamilton v. Texas*, 110 S. Ct. 3262, 3263 (1990) (Brennan, J., dissenting from denial of application for stay of execution).

38. See *Demosthenes v. Baal*, 495 U.S. 731, 736-37 (1990).

39. See *Ford v. Wainwright*, 477 U.S. 399, 418 (1986) (Powell, J., concurring in part) (the full Court did not attempt a comprehensive definition of insanity or incompetence). See also *supra* note 29 and accompanying text.

40. DSM-III-R, *supra* note 21.

41. PSYCHIATRY AND THE LAW, *supra* note 21, § 17.10, at 11.

42. *Id.*

43. *Id.* The document is extensive but not universally popular. The drafts were a product of compromise between various viewpoints rather than a consensus of the psychiatric profession. *Id.*

44. *Id.* § 17.3, at 3-4.

45. Psychoanalysis explains psychologic functioning as a series of developmental stages. An individual either successfully masters and transcends these stages or suffers psychological arrest and is impeded from mature personality development. Psychoanalysis stems from the work of Sigmund Freud and posits the existence of the unconscious mind and the superego (id) and ego. A psychoanalyst treats the patient by examining his thoughts, emotions, and behavior. He does not use medication in treating the patient. *Id.* § 17.4, at 4.

46. Behaviorism studies objective signs (behaviors) and is only slightly concerned with unobservable motivation, the crux of psychoanalysis. *Id.* § 17.5.

47. Interpersonal psychiatry examines and interprets an individual's behavior according to his

try.⁴⁸ The differences between these theories are greatest in their disparate methods of investigation and approaches to treatment.⁴⁹ Thus, psychiatrists agree only on the diagnostic *procedure*, not the interpretation, origin, or treatment of the problem.⁵⁰ Moreover, even if the psychiatrists' perspectives were the same, the consideration of competency alone is insufficient.⁵¹ As in law,⁵² the clinical determination of competency must be associated with a specific task or behavior.⁵³ The more difficult or complex the situation, the higher the level of mental capacity necessary to be deemed competent.⁵⁴

II. INCOMPETENT INDIVIDUALS ARE EXEMPT FROM EXECUTION

The justification for establishing and maintaining capital punishment primarily derives from the valid penological purposes of retribution and deterrence.⁵⁵ Generally, if a sentence makes no measurable contribution to acceptable goals of punishment or is grossly out of proportion to the severity of the crime, it is unconstitutional.⁵⁶ In *Coker v. Georgia*,⁵⁷ the Supreme Court noted that when evaluating a person to determine whether punishment is disproportionate or excessive, a court must consider historical developments, legislative judgments, international opin-

environmental and interpersonal context. Practitioners generally train in one of the other three fields and subsequently turn their application of that method of analysis from the individual to the individual's relationships. *Id.* § 17.6.

48. Biologic psychiatry studies mental process and illness from an organic viewpoint, seeking anatomic and electrochemical explanations for normal and abnormal functioning. Consequently biologic psychiatrists are the most prolific users of medication in treatment. The practitioner's evaluation includes physical, neurological, and mental status examinations in addition to the compilation of a pervasive patient history. *Id.* § 17.7.

49. *Id.* § 17.25, at 50-51. Psychiatric practitioners use a general theory consisting of the theories of two schools: the dynamic approach and the descriptive-organic approach. The dynamic approach relies on psychoanalytic and psychologic theory to explain mental phenomena. The descriptive-organic approach views mental symptoms as resulting from anatomic or physiologic disturbance. Modern psychiatry and the legal system favor the descriptive-organic approach because it uses more objective evidence to support its conclusions. *Id.*

50. *See id.* § 17.10.

51. *See id.* § 17.33, at 58.

52. *See supra* note 35 and accompanying text.

53. PSYCHIATRY AND THE LAW, *supra* note 21, § 17.33, at 58.

54. *Id.*

55. *See* *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

56. *See* *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

57. 433 U.S. 584 (1977).

ion, and jury sentencing decisions.⁵⁸ Thus, an examination of the historical antipathy at English common law regarding the execution of incompetents is warranted in order to fully understand its development and current standing in this country.

The common law prohibited the punishment of "idiots" and "lunatics."⁵⁹ Though the common law test for insanity for a condemned prisoner is open to some dispute,⁶⁰ the prohibition against execution generally applied to persons totally lacking in reason and understanding.⁶¹ Many different rationales support this proposition,⁶² but the primary basis is threefold: practical, religious, and humane.⁶³

As a practical matter, execution of an incompetent has questionable retributive and deterrent value. Executing an insane person has no value of *general deterrence*, as distinguished from *specific deterrence* or *incapacitation*.⁶⁴ Nor can the execution of an incompetent serve as an example to others.⁶⁵ A prohibition against the execution of incompetents will

58. *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)).

59. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 24-25 (1809)). "[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities . . . [A] total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses." *Id.*

60. One test is whether the defendant was aware of the fact that he had been convicted and was about to face execution. Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 394 (1962). Others argue, however, that the standard could only have been the kind of insanity recognized when the rule was originally developed, a standard requiring a kind of "obvious frenzy or imbecility." See J.D. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 MELB. U. L. REV. 434, 467 (1964).

61. Feltham, *supra* note 60, at 467.

62. See *Ward*, *supra* note 1, at 49-57. As many as six justifications exist for the common law competency rule: (1) a competent prisoner might have been able to make allegations which would stay judgment or execution; (2) the madness or incompetency is punishment itself; (3) an incompetent person is unfit to make peace with God; (4) an insane person's execution has no general deterrent value; (5) the execution of an insane person is inhumane; and (6) there is no retributive value in executing an insane person. *Id.*

63. See *Ford v. Wainwright*, 477 U.S. 399, 406-10 (1986).

64. *Ward*, *supra* note 1, at 51. Of course, the execution of an insane person would accomplish specific deterrence. *Id.*

65. *Id.* (citing EDWARD COKE, THIRD INSTITUTE 6 (1680)). But see *Solesbee v. Balkcom*, 339 U.S. 9, 17-18 (1950) (Frankfurter, J., dissenting) ("[I]f he fell mad after judgment, he shall not be executed: tho I do not think the reason given for the law in that point will maintain it, which is, that the End of Punishment is the striking a Terror into others, but the execution of a Madman had not that effect, which is not true, for the Terror to the living is equal, whether the Person be mad or in his senses.") (quoting John Hawles, *Remarks on the Tryal of Charles Bateman*, in 3 STATE TRYALS 651, 652-53 (1719)).

not affect a sane person. He will be executed regardless of the incompetents' punishment and therefore perceives no additional deterrent value if they are executed.⁶⁶ Alternatively, an incompetent prisoner by definition is incapable of understanding the activity relating to him, and therefore cannot receive any deterrent value from the execution of a fellow incompetent.⁶⁷

The retribution theory⁶⁸ does not support the execution of incompetents. The theory is predicated upon an assumption that a punitive act of equal quality must avenge every wrong act.⁶⁹ Society's interest in imposing the death penalty, therefore, must not be less than the prisoner's suffering—the anticipation of imminent death.⁷⁰ Yet, an individual's mental illness prevents him from suffering this requisite anticipation.⁷¹ Thus, executing an incompetent exacts a punishment less valuable than the crime itself and fails the retribution test.⁷² In addition, society has traditionally perceived the execution of incompetents as offensive to humanity.⁷³ Finally, the prohibition against the execution of incompetents was predicated on the ground that the individual was unfit to make peace

66. Critics of this school of thought warn of a flood that insane death row inmates will occur. These criticisms are unfounded. Notwithstanding the criticism of psychiatric evaluation discussed *infra* part IIIA, psychiatry is sufficiently capable of distinguishing between actual and feigned mental illness. See *supra* notes 26-27 and accompanying text.

67. See generally Hazard & Louisell, *supra* note 60, at 386 n.17.

68. Retribution is "the application of the pains of punishment to an offender who is morally guilty." H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968). See also Hazard & Louisell, *supra* note 60, at 386-87 (retribution is the theory "that each wrong must be offset by a punitive act of the same quality.").

69. Ward, *supra* note 1, at 54.

70. If retribution is an expression of society's moral outrage, society's goal is necessarily frustrated when the force of the state is brought to bear against one who cannot comprehend its significance. Absent this requisite comprehension, retribution must fail by definition. *Id.* at 55 (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 459 (1967)).

71. See *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

72. See Ward, *supra* note 1, at 55; Hazard & Louisell, *supra* note 60, at 386-87. See also *supra* note 68.

73. See Ward, *supra* note 1, at 52-54. Coke explained, for example, that the execution of the prisoner is not offensive; but, when a madman is executed, society is outraged. Rather, the latter is "a miserable spectacle against the law and of extreme inhumanity and cruelty." *Id.* at 52 (citing EDWARD COKE, THIRD INSTITUTE 6 (1680)). However, some argue that this rationale applies to the death penalty generally. See Ward, *supra* note 1, at 52 (citing Henry Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 641, 652 (1951)). Weihofen noted that the quintessential issue in executing the incompetent is "whether it is less humane to execute a guilty criminal while he is insane than it is to postpone the execution until we make sure he understands what we mean to do to him—and then kill him." *Id.*

with God.⁷⁴ For all of these reasons, common law exempted incompetents from execution.

The Eighth Amendment⁷⁵ similarly prohibits barbaric punishments and sentences that are disproportionate to the crime committed.⁷⁶ Both principles were deeply rooted in common law jurisprudence,⁷⁷ expressed in the Magna Carta,⁷⁸ and applied by the English courts for centuries.⁷⁹ When the framers adopted the language of the English Bill of Rights in drafting the Eighth Amendment,⁸⁰ they adopted these basic English principles.⁸¹ The Supreme Court has recognized explicitly the principle of

74. "[I]t is inconsistent with religion, as being against Christian Charity to send a great Offender quick, as it is stil'd into another World, when he is not of a capacity to fit himself for it." *Solesbee v. Balkcom*, 339 U.S. 9, 18 (1950) (Frankfurter, J., dissenting) (quoting John Hawles, *Remarks on the Tryal of Charles Bateman*, in 3 STATE TRYALS 651, 652-53 (1719)). See also Ward, *supra* note 1, at 50-51.

75. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

76. See, e.g., *Solem v. Helm*, 463 U.S. 277 (1983) (holding the imposition of a life sentence for uttering a "no account" check for \$100 was disproportionate and therefore in violation of the Eighth Amendment); *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (imposing the death penalty, under discretionary statutes, on defendants convicted of murder and rape was inequitable and constituted cruel and unusual punishment in violation of the Eighth Amendment). See also *Solem*, 463 U.S. at 284 ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

77. See *Solem*, 463 U.S. at 284. The principle of proportionality, as set forth in the Magna Carta, was repeated and extended in the First Statute of Westminster. See *id.* at 284-85. When incarceration became the normal criminal sanction, as opposed to amercements, see *infra* note 78, the common law recognized that it too must be proportional. *Id.* at 285 (citing *Hodges v. Humkin*, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("[I]mprisonment ought always to be according to the quality of the offence.")).

78. Three chapters of the Magna Carta were devoted to the rule that amercements could not be excessive. An amercement, similar to a modern-day fine, represented the most common criminal sanction in thirteenth century England. *Solem*, 463 U.S. at 284 & n.8. Chapter 20 of the Magna Carta stated that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." *Id.* at 284 n.9.

79. The royal courts relied upon the principles of proportionality and barbaric punishments to invalidate disproportionate punishments. *Solem*, 463 U.S. at 285 (citing *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. 2 pl. 4 (1316), reprinted in 52 Selden Society 3 (1934)). For example, the House of Lords declared a £30,000 fine imposed by the court of King's Bench to be "excessive and exorbitant, against magna charter, the common right of the subject, and against the law of the land." *Id.* (citing *Earl of Devon's Case*, 11 State Trials 133, 136 (1689)).

80. The Eighth Amendment was based directly upon Article I, § 9 of the Virginia Declaration of Rights, which itself had adopted verbatim the language of the English Bill of Rights. *Solem*, 463 U.S. at 285 n.10. The English Bill of Rights stated that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and usuall Punishments inflicted." *Id.* at 385 (citing 1 W. & M., sess. 2, ch. 2 (1688)).

81. One of the consistent themes of the revolutionary era was that Americans possessed all the rights of English subjects. *Solem*, 463 U.S. at 286. The United States' Bill of Rights was designed in

proportionality for almost a century⁸² and has applied it in several cases to invalidate criminal sentences.⁸³ Similarly, the Supreme Court has held that the Eighth Amendment precludes the execution of incompetents.⁸⁴

In *Ford v. Wainwright*,⁸⁵ the Court explained that the common law reasons proscribing the execution of an incompetent have equal logical, moral, and practical force today.⁸⁶ Moreover, it is well established that the Eighth Amendment's proscriptions are not limited to those practices condemned by the common law.⁸⁷ Instead, the Court's Eighth Amendment analysis of cruel and unusual punishment applies a two-prong test which can extend, but not restrict, interests which it protects. First, the Eighth Amendment prohibits punishment considered cruel and unusual at the time of the adoption of the Bill of Rights.⁸⁸ Second, punishment contrary to the evolving standards of decency that mark the progress of a maturing society violates the Eighth Amendment.⁸⁹ Two recent Supreme Court decisions have narrowed the protection of the Eighth Amendment.

In *Penry v. Lynaugh*,⁹⁰ the Court held that the Eighth Amendment does not categorically prohibit the execution of mentally retarded individuals.⁹¹ The Court concluded that the proscription against executing

part to preserve those rights, notwithstanding the revolution. The use of the language of the English Bill of Rights established that the framers intended to provide at least the same protection afforded by its English counterpart. *Id.*

82. In 1910, the Supreme Court held that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that a 15-year sentence of "cadena temporal," imprisonment which included hard labor and permanent civil disabilities, for the falsification of public documents violated the Eighth Amendment). See also *Robinson v. California*, 370 U.S. 660 (1962) (holding that a 90-day sentence imposed for status of being addicted to narcotics violated the Eighth Amendment).

83. In its proportionality analysis, the Court uses several objective criteria, including: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction, *i.e.*, whether more serious crimes are subject to similar or less serious penalties than the crime at issue; and (3) the sentences imposed for the commission of the same or similar crimes in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 290-92 (1983).

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

85. 477 U.S. 399 (1986).

86. *Ford*, 477 U.S. at 409.

87. See *Solem v. Helm*, 463 U.S. 277, 286 (1983) "Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection." *Id.* See also *Ford*, 477 U.S. at 405-06.

88. *Ford*, 477 U.S. at 405-06.

89. *Id.* at 406 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

90. 492 U.S. 302 (1989).

91. *Penry*, 492 U.S. at 330-35. The court rejected the petitioner's assertion that imposing the

incompetents precluded executing profoundly or severely retarded individuals.⁹² In contrast, Penry was only mildly to moderately retarded and had been certified competent to stand trial.⁹³

In *Stanford v. Kentucky*,⁹⁴ decided the same day as *Penry*, the Court held that the death penalty was not cruel and unusual punishment for individuals of sixteen and seventeen years of age.⁹⁵ The Court found no common law proscription against the execution of sixteen and seventeen year olds.⁹⁶ Moreover, the Court found no evidence that such an execution was contrary to the evolving standards of decency that mark the progress of a maturing society.⁹⁷

III. INVOLUNTARY MEDICATION AND INFORMED CONSENT

It is well established that a doctor may not treat a patient unless the patient consents.⁹⁸ The issue of consent with respect to incompetence raises several problems. First, a valid contract for treatment is formed between physician and patient upon the patient's informed consent.⁹⁹ This requires that the patient both seek the doctor's advice and possess the capacity to form a contract.¹⁰⁰ An incompetent satisfies neither requirement.¹⁰¹ Because he lacks the legal capacity to incur even voidable contractual duties,¹⁰² an incompetent cannot form or be bound by con-

death penalty on a mentally retarded individual constituted cruel and unusual punishment. Penry was mildly moderately retarded. *Id.* at 307-08. The jury found him competent to stand trial. Moreover, the jury rejected Penry's insanity defense and found him guilty of capital murder. *Id.* at 308, 310. Ultimately, Penry was sentenced to death. *Id.* at 311.

92. *Penry*, 492 U.S. at 333. There are five levels of mental retardation, four of which are measured by IQ level: (1) mild, 50-70; (2) moderate, 40-50; (3) severe, 25-40; (4) profound, below 25; (5) unspecified. DSM-III-R, *supra* note 21, at 32-33.

93. *Penry*, 492 U.S. at 333. *See supra* note 91.

94. 492 U.S. 361 (1989).

95. *Stanford* involved two cases of capital sentences for minors both convicted of murder. *Id.* at 365-66. In both cases, the defendants were tried as adults. *Id.* at 365, 367.

96. *Id.* at 368. Neither petitioner claimed that the common law considered executions of 16 and 17 year olds cruel and unusual.

97. *Id.* at 369-80. The court examined legislative enactments, the rarity of capital sentences below age 18, and public opinion polls. *Id.*

98. *See, e.g.,* *Mohr v. Williams*, 104 N.W. 12, 13 (Minn. 1905).

99. LICKY & GORDON, *supra* note 18, at 371.

100. *Id.*

101. *Id.*

102. RESTATEMENT (SECOND) OF CONTRACTS § 12(2)(c) (1979). "A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is . . . mentally ill or defective."

tract.¹⁰³ In addition, because competency is a functional concept measured by one's ability to participate in relationships and productive activity¹⁰⁴ and an incompetent is unable to understand the nature and consequences of his conduct, he will not seek out a psychiatrist's advice or assistance.¹⁰⁵ Clearly, the incompetent cannot consent to medication.

Second, in a state-ordered examination to determine competency for trial, the incompetent must be informed that he has the right to remain silent.¹⁰⁶ Imposition of that same standard for execution competency examinations might serve to erect an impenetrable wall.¹⁰⁷ Absent at least minimal interaction with the proposed patient, a psychiatrist will have difficulty formulating an accurate or valuable assessment of the individual's mental status.¹⁰⁸ The incompetent's silence would shield him from evaluation and execution, regardless of subsequent medical treatment.

Finally, the successful but involuntary medication of an incompetent may itself yield additional problems. Specifically, a now-competent defendant may subsequently refuse further medication. The prisoner may refuse to consent to continued medication and thereby voluntarily produce incompetency in an effort to circumvent or frustrate the legal process.¹⁰⁹

103. "No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties." *Id.* § 12(1).

104. *See supra* part I.B.

105. LICKEY & GORDON, *supra* note 18, at 371.

106. *Estelle v. Smith*, 451 U.S. 454 (1982). In *Smith*, a psychiatrist who had examined the defendant in the pretrial competency determination phase subsequently testified against the defendant in the capital sentencing stage. *Id.* at 457, 459-60. The Supreme Court found that the psychiatrist was an agent of the state, which entitled the defendant to full protection under the Fifth and Sixth Amendments. *Id.* at 467, 471. The Court held that a defendant must be informed both of his right to remain silent and that his statements could be used for sentencing purposes. *Id.* at 468.

107. *See Ward, supra* note 1, at 78 ("Because a psychiatrist examining an inmate for competency to be executed, like the psychiatrist in [*Estelle v. Smith*], does not have a neutral status, *a fortiori*, the same protections prescribed in *Smith* should be afforded in an execution competency examination.").

108. A mental status examination is an essential part of any psychiatric evaluation. The examination includes an evaluation of the following functions of the patient: (1) general appearance; (2) motor activity and behavior; (3) speech and communication; (4) mood; (5) organization and content of thought; (6) perception; (7) level of awareness, orientation, and concentration; (8) memory, recall, and fund of knowledge; (9) abstract thinking and judgment; and (10) an understanding of his own condition, *i.e.*, insight. D.G. Langsley, *The Mental Status Examination*, in *PSYCHIATRY IN GENERAL MEDICAL PRACTICE* (G. Usdin et al. eds., 1979). At least four of these criteria require verbal interaction between the patient and practitioner. *PSYCHIATRY AND THE LAW, supra* note 21, § 17.8, at 8.

109. Courts addressing this issue have concluded that "a criminal defendant may not voluntarily confound the legal process to his own advantage." *Id.* § 17.38, at 75.

The right to refuse treatment, however, is not absolute. In the traditional involuntary medication test,¹¹⁰ the Supreme Court has held that a court must weigh the interests of the state against the individual's liberty interest.¹¹¹ Before the state can forcefully medicate an individual, it must demonstrate a threat to its interests in public safety and security.¹¹² Moreover, unless the court determines that without medication the patient presents an immediate threat of violence that cannot be avoided through use of less restrictive alternatives¹¹³ and that the treatment is in the inmate's medical interest,¹¹⁴ no justification exists for the forced medication.¹¹⁵ Frequently, the state must prove an immediate threat to the patient's self or others beyond a reasonable doubt.¹¹⁶ However, the inability of psychiatrists to accurately predict future behavior dictates that only those who are already dangerous may satisfy this criterion permitting involuntary medication.¹¹⁷ Balancing the interests of the individual and the state creates difficulty when analyzing the constitutionality of the involuntary medication of condemned incompetents.

In this context, the individual's interest is paramount. There can be no greater interest retained by an individual than that which bears directly upon his life.¹¹⁸ A state's interest is more varied and detailed, but nonetheless undeniably great.¹¹⁹ The state has a substantial and legitimate

110. *Washington v. Harper*, 494 U.S. 210 (1990). In *Washington*, the Court held that the state could involuntarily medicate an inmate if it was reasonably related to legitimate penological interest. *Id.* at 227.

111. "Respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." *Id.* at 221-22 (citing *Vitek v. Jones*, 445 U.S. 480, 491-94 (1980); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982); *Parham v. J.R.*, 442 U.S. 584, 600-01 (1979)).

112. In *Washington*, the Court held that the state's interests in prison safety and security were well established. *Washington*, 484 U.S. at 223 (citing *Turner v. Saftey*, 482 U.S. 78 (1987); *O'Lane v. Estate of Shabazz*, 482 U.S. 342 (1987)).

113. See *Washington*, 494 U.S. at 225. "[T]he absence of leading alternatives is evidence of the reasonableness of a prison regulation,' but this does not mean that prison officials have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.'" *Id.* (quoting *Turner v. Saftey*, 482 U.S. 78, 90-91 (1987)).

114. *Riggins v. Nevada*, 112 S. Ct. 1810, 1815 (1992).

115. Frequently, the Court applies a narrow definition of "dangerous" when determining whether an individual is imminently likely to become so violent that he will inflict bodily harm upon himself or others. LICKEY & GORDON, *supra* note 18, at 370.

116. *Id.*

117. *Id.* The standard of proof is extremely stringent, requiring almost 90% certainty of violence. Absent an existing state or history of violence (e.g., credible violent or suicidal attempts) the requisite proof is unattainable by psychiatrists and psychologists.

118. See *Furman v. Georgia*, 408 U.S. 238, 359 n.141 (1972) (Marshall, J., concurring).

119. *Martin v. Dugger*, 686 F. Supp. 1523, 1559-60 (S.D. Fla. 1988) (citing *Ford v. Wainwright*,

interest in taking the petitioner's life as punishment for his crime.¹²⁰ The Court has determined that the appropriate involuntary medication analysis is a balance of the individual's and state's interests in the context of the condemned incompetent.¹²¹ The Court has not, however, determined which interest is greater.

IV. LIMITATIONS OF THE PSYCHIATRIC PROFESSION

A potential obstacle to the involuntary medication of incompetents for the purpose of execution is in the field of psychiatry itself. The problem has two aspects. First, the psychiatric fields of diagnosis, treatment, and evaluation are uncertain and unpredictable.¹²² In addition, the psychiatrists themselves face extremely serious ethical difficulties. Either of these may prove to undermine, *inter alia*, a proposed policy medicating condemned incompetents involuntarily.

A. Uncertainty

As previously discussed, the psychiatric profession has no uniform theories with respect to evaluating incompetents.¹²³ This uncertainty may become so acute that the legal system will no longer comfortably rely on psychiatric evaluations when determining an inmate's competency for execution.¹²⁴ The problem will also occur when the state desires to medicate an individual prior to execution: without a reliable method of determining competency, how can the legal system proceed to execute anyone?

477 U.S. 399 (1986), *aff'd*, 891 F.2d 807 (11th Cir. 1989), *cert. denied*, 111 S. Ct. 222 (1990)). The state is compelled by society's retributive demand and the effectuation of its own rule making authority. Moreover, the state has afforded the prisoner a full trial and all its attendant rights. It has provided opportunity in the appellate process to challenge the conviction, to make a collateral challenge to both the conclusions of liability and the imposition of sentence, and to determine his competency. *Id.*

120. *Ford*, 477 U.S. at 425 (Powell, J., concurring).

121. *Washington v. Harper*, 494 U.S. 210 (1990). See *supra* notes 110-17 and accompanying text.

122. In 1980, the American Psychiatric Association published the *Diagnostic and Statistical Manual of Mental Disorders*, Third Edition (DSM-III) which marked a significant advancement in psychiatric diagnosis. A revised version (DSM-III-R) was issued in 1987 and another (DSM-IV) was due in 1992. LICKEY & GORDON, *supra* note 18, at 37-39, 47.

123. See *supra* part I.B.

124. See Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Dale A. Alfers et al., *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U. L. REV. 11 (1976).

In response to this argument, however, is the fact that today the legal system does determine competency to stand trial, plead guilty, and be sentenced.¹²⁵ Notwithstanding ambiguities in the medical profession, the law has developed standards of legal competency.

B. Ethics

The difficulty of determining competence with a satisfactory level of assurance is complicated by the ethical role of the mental health professional. A psychiatrist bases his judgment of a defendant's competency upon numerous, but not necessarily commonly shared or commonly valued, factors.¹²⁶ Psychiatrists face the dilemma of reconciling their ethical obligation to treat the mentally ill with the realization that restoring an inmate to competency facilitates his execution.¹²⁷ Unguided psychiatrists may refuse to cooperate in the medication of an incompetent for his execution.¹²⁸

V. COGNITIVE AND AFFECTIVE UNDERSTANDING

An incompetent defendant lacks the cognitive or affective understand-

125. See *supra* notes 10-13 and accompanying text.

126. ELLSWORTH A. FERSCH, JR., *LAW, PSYCHOLOGY, AND THE COURTS; RETHINKING TREATMENT OF THE YOUNG AND THE DISTURBED* (1979). An incompetent's evaluation depends upon his psychiatrist's notion of the law, vision of the counsel-client relationship, interest in protecting the defendant from the harshness of the criminal justice system, tendency to view mentally ill people as unable to care for themselves, attitude toward the relation between mental health care and civil liberties, tolerance for deviant behavior in the community, and interest in judicial economy and speedy trials. *Id.* A psychiatrist's views toward the legal system represent the most important factor of the analysis. If he renders a definitive judgment removing the defendant from the authority of the judge, he may move the incompetent from the punitive criminal justice system to the therapeutic mental health system. See *id.* at 99-100.

127. The ethical dilemma facing a physician or psychiatrist is twofold: "First, should the psychiatrist agree to treat the inmate to make him ready for execution? Second, should he participate in a recertification process, assuring the state that the inmate is indeed competent for execution?" Ward, *supra* note 1, at 90.

128. One model that was developed to analyze the ethical dilemmas facing the psychiatrist in an execution competency examination identified four distinct positions: (1) the principled approach opposes any psychiatric participation at all; (2) the consequentialist approach directs psychiatric participation on the ground that the failure to provide evaluation and treatment for the mentally ill on the principled approach leaves such evaluations to those favoring the death penalty; (3) the empirical approach allows the psychiatrist to examine and report the prisoner's degree of mental disorder, but avoid the ultimate issue of competency for execution; and (4) the psycholegal approach directs an examination, diagnoses, and opinion regarding competency for execution. Ward, *supra* note 1, at 85-87 (citing Michael Radelet & George Barnard, Ethics and the Psychiatric Determination of Competency to be Executed (Nov. 20, 1984) (unpublished manuscript)).

ing of his crime, punishment, and death to be executed. Generally, an *affective* understanding refers to an *emotional* understanding, while a *cognitive* understanding is an *intellectual* one.¹²⁹ It is unclear whether psychiatric treatment sufficiently corrects these deficiencies,¹³⁰ thus, even involuntary medication may not be sufficient to support the execution of an individual.¹³¹

An illustration of the distinction between cognitive and affective knowledge appears in *United States ex rel. Donham v. Resor*.¹³² In *Donham*, the United States District Court for the Southern District of New York determined that a West Point cadet who had completed three years at the Military Academy, preparing for war, was not sincere in his beliefs as a conscientious objector. The cadet claimed that while he had an intellectual knowledge that he had undertaken his training in anticipation of war, he did not have an emotional understanding of that fact.¹³³ The court noted the frequently large gap between intellectual and emotional understanding and accepted the point as substantial,¹³⁴ but nevertheless upheld the finding of the military review board that Donham's beliefs were not sincere.¹³⁵

Similarly, in *Neely v. Hollywood Marine, Inc.*¹³⁶ and *Ray v. Defelice Marine Contractors, Inc.*,¹³⁷ Louisiana courts held that a determination of a personal injury victim's competence to accept a settlement offer from the defendant, required consideration of the injured party's emotional

129. See DSM-11-R, *supra* note 21, at 391 (defining "affect" as "a pattern of observable behavior that is the expression of a subjectively experienced feeling state (emotion)"); *United State ex rel. Donham v. Resor*, 318 F. Supp. 126, 132 (S.D.N.Y. 1970), *rev'd on other grounds*, 436 F.2d 751 (2d Cir. 1971).

130. Psychiatrists often confuse their own hopes (for clear diagnostic evaluations and for being able to cure incompetents) with facts. This demonstrates that much treatment does not work, especially when forced, and that diagnoses are very confused at best. FERSCH, *supra* note 126, at 99-100. "Despite discouraging research on the results of their work, psychologists and psychiatrists continue to say that they can do much more than it has been proved they can do and to take on whatever is asked of them." *Id.* at 100.

131. Even medicated, the individual may still be legally incompetent.

132. 318 F. Supp. 126 (S.D.N.Y. 1970), *rev'd on other grounds*, 436 F.2d 751 (2d Cir. 1971).

133. The cadet claimed that "actual combat duty was four years away, distant enough to make it seem much less important than the day-to-day struggle of New Cadet Barracks." *Donham*, 318 F. Supp. at 127.

134. *Id.* at 132.

135. *Id.* at 133. The court found that the cadet's surprise at having to learn to use a bayonet at a military academy was unrealistic. It further held that his claim that it took him two years to realize that people actually die in wars was an incredible assertion of naivete. *Id.*

136. 530 So. 2d 1116 (La. 1988), *cert. denied*, 489 U.S. 1080 (1989).

137. 439 So. 2d 1102 (La. Ct. App. 1983), *cert. denied*, 469 U.S. 819 (1984).

reaction.¹³⁸ This includes not only an intellectual understanding but also an emotional understanding.¹³⁹

Underlying principles of the death penalty require that the condemned possess an affective knowledge of his crime and punishment.¹⁴⁰ Therefore, for execution competency purposes, a prisoner must have an affective knowledge of the facts surrounding his crime and punishment. An individual who lacks the requisite affective understanding cannot comprehend society's moral outrage, and is arguably incompetent for execution.

VI. CONCLUSION

The courts cannot permit the involuntary medication of incompetents for the purpose of rendering them sane and thereby subject to execution. American criminal law has long established that a defendant's moral guilt is critical to the degree of his culpability.¹⁴¹ The execution of an individual who lacks sufficient cognitive or affective knowledge of his predicament has no support from either of the primary justifications for capital punishment—retribution and deterrence. Retribution fails because society cannot exact a measure of punishment commensurate with the crime from one who cannot understand his punishment either intellectually or emotionally.¹⁴² Deterrence fails because the only possible deterred class, incompetents, cannot comprehend what is happening anyway.¹⁴³

Moreover, limitations on the diagnosis and treatment procedures of the psychiatric profession give rise to serious questions concerning their efficacy and certainty.¹⁴⁴ The ethical problems faced by practitioners implementing any such policy further compounds this problem and increases an already unacceptable level of uncertainty.¹⁴⁵ Error in capital

138. The fact that plaintiffs in both cases were seamen with special status as wards of the court dictated the inquiry to some extent. *Neely*, 530 So. 2d at 1123.

139. *Ray*, 439 So. 2d at 1105.

140. See *Ward*, *supra* note 1, at 54-56. One of the principle justifications for the death penalty is that it permits society to exact retribution upon individuals meriting punishment. See *supra* notes 68-72 and accompanying text.

141. See *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975).

142. See *supra* notes 68-72, 140 and accompanying text.

143. See *supra* notes 64-67 and accompanying text.

144. See *supra* notes 123-25 and accompanying text.

145. See *Enzinna & Gill*, *supra* note 14, at 124 (reducing the risk of erroneous decisions). See *supra* notes 126-27 and accompanying text.

punishment matters is irrevocable and unforgivable.¹⁴⁶ Therefore, the fallibility of psychiatry and its practitioners similarly militates against the forcible medication of condemned incompetents.

Finally, a policy of medicating incompetents for execution is contrary to established Supreme Court doctrine. The Court has taken extraordinary measures to ensure that the prisoner sentenced to death is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.¹⁴⁷ In light of the previously discussed clinical, ethical, and practical difficulties, one cannot ensure the validity of a capital punishment policy which includes the execution of involuntarily medicated incompetents.

The Supreme Court has stated that incompetents are exempt from execution.¹⁴⁸ This statement and its foundation in seven centuries of law should not be cast aside by medicating individuals for the pain of one and the benefit of none. Some may argue that the realization of the state's interest in carrying out a sentence benefits society. However, the true societal benefit would have been forcible medication prior to the crime which brought the imposition of this death sentence. Society would thereby save a life, that of the victim, instead of taking one, that of the criminal incompetent.

Matthew S. Collins

146. See *Lockett v. Ohio*, 438 U.S. 586, 620 (1978) (Marshall, J., concurring) ("Where life itself is what hangs in the balance, a fine precision in the process is what must be insisted upon.").

147. *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See also *California v. Ramos*, 463 U.S. 992, 998-99 (1983).

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