

**MENTAL ILLNESS, ANTI-PSYCHOTIC MEDICATION, AND THE DEATH PENALTY:
DOES EXECUTING AN INMATE WHO HAS BEEN FORCIBLY MEDICATED CONSTITUTE CRUEL AND
UNUSUAL PUNISHMENT?**

an Honors Project submitted by

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Chapter One

The Death Penalty and the Eighth Amendment

Introduction

To a discerning eye;
Much madness is divinest sense
Much sense the starkest madness.

'Tis the majority
In this, as all, prevails.
Assent, and you are sane;
Demur, -- you're straightway dangerous,
And handled with a chain.

-Emily Dickinson

Throughout the course of history, capital punishment has been employed as a way to punish those guilty of committing serious offenses. Death penalty laws date as far back as the Eighteenth Century B.C. in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes. The death penalty was also part of the Fourteenth Century B.C.'s Hittite Code; in the Seventh Century B.C.'s Draconian Code of Athens, which made death the only punishment for all crimes; and in the Fifth Century B.C.'s Roman Law of the Twelve Tablets (deathpenaltyinfo.org). When settlers arrived from Europe to the United States, they brought their ideas of capital punishment with them. The founding fathers adopted the British laws regarding capital punishment. Since then, the death penalty has been a functional part of our justice system, serving the purposes of retribution and deterrence.

Many people disagree that the death penalty has any value in our judicial system in the areas of retribution and deterrence. In the United States, thirty-five states currently have the death penalty, while 16, including the District of Columbia, have abolished its use (deathpenaltyinfo.org). Since the 1970s, the U.S. Supreme Court has placed restrictions on the implementation of capital punishment by finding that certain practices violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. For instance, it is unconstitutional to execute defendants who are mentally retarded, mentally insane, and who were under the age of eighteen at the time they committed the crime. Most states have also limited its use to cases involving aggravated murder. New issues continue to arise regarding capital punishment as it has continued to be a controversial issue in our government and legal system. A contemporary issue deals with forcibly medicating death row prisoners in order for them to be considered competent, so that they can constitutionally be executed.

My honors project will anticipate a Supreme Court ruling on the question of whether forcibly medicating death row inmates with the intention of execution violates the Eighth Amendment. First, there will be a discussion of the Eighth Amendment and how the Court has interpreted the meaning of “cruel and unusual punishment” over the years. Then, some background case law will be given, which can give insight into the precedent that will be considered by the current justices. Next, there will be a discussion of the medical and ethical background concerning mental illness and anti-psychotic medication and how the legal and medical communities are dealing with this issue. Finally, the current composition of the Supreme Court and how each justice’s judicial ideology will affect a ruling will be analyzed. All of these components are crucial when attempting to anticipate a Supreme Court ruling.

The Eight Amendment & Evolving Standards of Decency

The Constitution, which was ratified in 1789, guides the decisions of the United States Supreme Court. The 220 year old document has been adapted through the years to comply with modern ideas and technology. For this reason, our Constitution is said to be a “living Constitution” as it changes with the times. When studying the death penalty, it is necessary to examine the Eighth Amendment and how the Court has interpreted the Cruel and Unusual Punishment Clause and its application over the years.

The Eighth Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Even though on the surface this Amendment is short, concise, and to the point, the way in which the Amendment is interpreted is controversial and difficult. There are different ways in which the Supreme Court and other judges have interpreted the Eighth Amendment throughout history.

The first way the Eighth Amendment has been interpreted is by a more traditionalist approach, in which courts rule based on the intent of the framers. Using this approach, the courts would look perhaps at the Annals of Congress and see that “some questioned the inclusion of the Eighth Amendment, fearing that the government might be prevented from inflicting corporal punishments, such as whipping, hanging, and even amputation,” (Bacharach 22). Early in the Supreme Court’s history, the justices used this traditional method when interpreting the Eighth Amendment. In cases such as *Wilkinson v. Utah* (99 U.S. 130 (1878)) and *In Re Kemmler* (136 U.S. 436 (1890)) the Court determined whether a punishment was cruel and unusual based on the standards of 1789 (Bacharach 33).

The second approach to interpretation is a more modern view, in which the courts acknowledge the changing times and interpret the Constitution accordingly. Since 1910, the Supreme Court has used this modern approach when interpreting the Eighth Amendment. In

Weems v. United States (217 US 349 (1910)), the Court noted that the Eighth Amendment interpretation “cannot be only of what has been but of what may be” (*Weems v. United States*; 217 US 349 at 217 (1910)). This case was the first in which the Court stated that the Eighth Amendment’s protections extended beyond those acts which were considered cruel and unusual at the time of the adoption of the Constitution.

In *Trop v. Dulles* (356 U.S. 86 (1958)), Chief Justice Earl Warren wrote that “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” (*Trop v. Dulles*; 356 U.S. 86 at 101 (1958)). This would become the new standard for identifying what constitutes cruel and unusual punishment under the Eighth Amendment. The Court determined that there is an elasticity and flexibility in the Cruel and Unusual Punishment Clause that allows it to be interpreted with the changing times. The justices looked both at public opinion as well as international opinion, citing polls and the United Nation’s Universal Declaration of Human Rights. The evolving standards of decency have continued to guide the Court in their Eighth Amendment decisions.

In the landmark case *Furman v. Georgia* (408 U.S. 238 (1972)), the Court ruled the death penalty was unconstitutional as it was being applied by the states. The Justices focused on the arbitrary nature with which death sentences were being imposed. During this time, the Court found that there were often indications of a racial bias against black defendants. This case was significant because it forced states and Congress to rethink their statutes for capital offenses to assure that the death penalty would not be administered in a capricious or discriminatory manner.

All nine Justices wrote opinions in the five to four ruling. Two sources of public opinion used to determine evolving standards of decency were most prominent in these opinions: state legislation and jury sentencing. The opinions did not focus on public opinion polls, as the polls

did not support their decision. “According to three major polls conducted in 1972, while support for the death penalty ranged from 50% (Gallup poll taken in March) to 57% (Gallup poll taken in November), opposition never surpassed 42% and was as low as 32% in one Gallup poll, with the remaining respondents undecided,” (Bacharach 38). So, it is apparent that polling plays only a small part in the standard. What seems to be more important in establishing evolving standards of decency is public opinion demonstrated through state action and public action through jury convictions and sentencing.

Following *Furman*, state legislatures responded by changing their laws to make them compatible with new standards. After just four years, the Supreme Court ruled in *Gregg v. Georgia* (408 U.S. 238 (1976)) that the death penalty was not inherently unconstitutional and that for certain, extreme cases the death penalty could again be used as punishment. Georgia's death penalty statute assured that the death penalty would be properly imposed by requiring a bifurcated proceeding where the trial and sentencing would be conducted separately. The state also required a comparison of each capital sentence's circumstances with other similar cases. Another part of the ruling focused on the fact that thirty-five state legislatures and Congress had enacted new death penalty statutes that addressed concerns laid out in *Furman*. The Court considered the infrequency of death penalty sentences handed down by juries, and concluded that since individuals were sentenced to death infrequently by judges and juries, it was a valid means of punishment reserved for the most extreme cases.

Two Justices, William Brennan and Thurgood Marshall, still believed that the death penalty itself was unconstitutional. Brennan stated in *Furman* that “the objective indicator of society’s view of an unusually severe punishment is what society does with it,” (*Furman v. Georgia*; 408 U.S. 238 at 300 (1972)). Similarly, Justice Marshall stated, “Even if capital

punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States,” (*Furman*; 408 U.S. 238 at 360 (1972)).

Brennan stated that the death penalty was barbaric, excessive, severe, and degrading to human dignity (*Furman*; 408 U.S. 238 (1972)). Brennan and Marshall believed that the death penalty was inherently unconstitutional.

One year later, the Court used the standards which had been established in *Furman* and *Gregg* to strike down another death penalty law in *Coker v. Georgia* (433 U.S. 584 (1977)). In determining that a punishment of death was disproportionate for the crime of rape, the Court looked at state laws, jury sentencing, and international opinion. The Court noted that nearly all states at that time declined to impose such a harsh penalty, with Georgia being the only state that authorized death for the rape of an adult woman. According to the evolving standards of decency, the Court ruled that the death penalty would not be appropriate punishment for rapists under the Eighth Amendment. Because rape did not involve the taking of another human life, the death penalty was excessive "in its severity and revocability" (*Coker v. Georgia*; 433 U.S. 584 at 598 (1977)). This ruling further solidified this standard as precedent for Eighth Amendment cases.

In addition to considering state laws, jury sentencing, and public and international opinion, the Court has also accepted scientific evidence and evidence from other national organizations in interpreting the Eighth Amendment with changing times and changing information. In *Penry v. Lynaugh* (492 U.S. 302 (1989)), Penry, a retarded man with the mental competency of a seven-year-old, was convicted of murder and sentenced to death. The sentence was challenged by Penry because the jury was not instructed that it could consider the mitigating circumstances of Penry's mental retardation in imposing its sentence. The Supreme Court agreed

that the jury was improperly instructed and should have been told that it could have considered Penry's mental deficiencies when imposing its sentence. However, the Court did not agree to create a categorical ban and state that the Eighth Amendment did not allow death sentences for mentally retarded defendants.

The main evidence presented for the prohibition of executing mentally retarded criminals was not state legislation or jury action, but was information from the American Association on Mental Retardation (AAMR), the country's largest organization of professionals that worked with the mentally retarded and who opposed execution of those with a decreased ability to reason logically and understand the punishment. Even though the Supreme Court did not rule for Penry, this case paved the way for *Atkins v. Virginia* (536 U.S. 304 (2002)). For the thirteen years in between the cases, states began to pass legislation against the execution of mentally retarded. This movement of state opinion led the Court to conclude in *Atkins* that it is unconstitutional to execute the mentally retarded.

Daryl Atkins was convicted of capital murder. During the penalty phase of the trial, the defense presented Atkins's school records and the results of an IQ test carried out by clinical psychologist Dr. Evan Nelson confirmed that he had an IQ of fifty-nine. On this basis, they proposed that he was "mildly mentally retarded". Atkins was nevertheless sentenced to death. He appealed to the U.S. Supreme Court, who ruled in his favor.

In light of the "consistency of direction of change" toward a prohibition on the execution of the mentally retarded, and the relative rarity of such executions in states that still allowed it, the Court proclaimed that a "national consensus has developed against it" (*Atkins v. Virginia*; p. 315-16 536 U.S. 304 (2002)). In *Atkins*, the Court noted that thirty states had expressly prohibited the death penalty for the mentally retarded and declared that fact evidence of an

evolving consensus, stating that this was “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal,” (*Atkins*; 536 U.S. 304 at 316 (2002)).

The Court also cited evidence from jury convictions, international sources, and opinions from national organizations. “Unless it can be shown that executing the mentally retarded promotes the goals of retribution and deterrence, doing so is nothing more than purposeless and needless imposition of pain and suffering, making the death penalty cruel and unusual in those cases,” (*Atkins*; 536 U.S. 304 at 319 (2002)). The Court also reasoned that being mentally retarded meant that a person not only had substandard intellectual functioning but also significant limitations in adaptive skills such as communication, self-care, and self-direction (*Atkins*; 536 U.S. 304 (2002)). “The goal of retribution is not served by imposing the death penalty on a group of people who have a significantly lesser capacity to understand why they are being executed,” (*Atkins*; 536 U.S. 304 at 319 (2002)).

In their dissent, Justices Scalia, Thomas, and Rehnquist argued that in spite of the increased number of states which had outlawed the execution of the mentally retarded, there was no clear national consensus, and that even given if there was, there was no basis in the Eighth Amendment for using such measures of opinion to determine what is “cruel and unusual”. “Seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members,” (*Atkins*; 536 U.S. 304 at 338 (2002)).

This same methodology established in previous death penalty cases was followed as the Court determined that it was no longer acceptable to execute the mentally retarded. The same aspects in the *Atkins* opinion can be found in *Roper v. Simmons* (543 U.S. 551 (2005)), when the Court struck down the use of the juvenile death penalty. Christopher Simmons committed

murder at the age of 17 and was tried as an adult. At trial, the state introduced Simmons's confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and boasted of it later. The jury sentenced Simmons to death, despite his age at the time of the crime. The Supreme Court granted cert to hear the case.

In addition to citing testimony regarding public opinion, Justice Anthony Kennedy cited a body of sociological and scientific research that found that juveniles have a lack of maturity and sense of responsibility compared to adults. Adolescents were found to be overrepresented statistically in virtually every category of reckless behavior. The Court noted that in recognition of the comparative immaturity and irresponsibility of juveniles, almost every state prohibited those under age eighteen from voting, serving on juries, or marrying without parental consent. The studies also found that juveniles were also more vulnerable to negative influences and outside pressures, including peer pressure. They had less control, or experience with control, over their own environment.

Justices Scalia, Thomas, and Rehnquist again dissented, arguing that the appropriate question was not whether there was presently a consensus against the execution of juveniles, but whether the execution of such defendants was considered cruel and unusual when the Bill of Rights was ratified. The dissent also attacked the majority opinion as being fundamentally anti-democratic, saying that the Court was over-stepping its boundaries.

Conclusion

These cases have solidified how the Court has interpreted the standard used in Eighth Amendment cases, the evolving standards of decency. From all of these cases, we can determine the factors the Court would consider in a case involving forced medication and execution. First,

they will consider public opinion. This can be determined by state legislative action, public opinion polls, and jury behavior. Secondly, the Court will examine the opinions of the national organizations, such as the American Bar Association and American Medical Association, which should be submitted in amicus briefs.

The Court's well established use of the evolving standards of decency in Eighth Amendment cases has been well documented. These evolving standards of decency are to be measured by whether or not the imposition of the death penalty "serves two principal social purposes: retribution and deterrence" (*Gregg v. Georgia*; 428 U.S. 153 at 183 (1976) and meets the "objective factors to the maximum possible extent" (*Coker v. Georgia*; 433 U.S. 584 at 592 (1977)). "These objective factors primarily include, in order of importance, (1) state legislation, (2) sentencing decisions of juries, and (3) the views of entities with relevant expertise," (Ortiz). State legislation and standing precedent and the opinion of relevant national organizations will be discussed next.

Chapter Two

Relevant Legal Precedent

Introduction

Stare decisis is Latin for “to stand by decided matters” (www.merriam-webster.com). This is the principle that former Court decisions are to be considered as precedent and followed by the courts. “It is . . . a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices. This policy . . . is based on the assumption that certainty, predictability and stability in the law are the major objectives of the legal system; i.e., that parties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law,” (*Moradi-Shalal v. Fireman's Fund Ins. Companies*; 46 Cal.3d 287, 296 at 296 (1988)). The principle of stare decisis allows courts across the country at all levels to make rulings that are cohesive and congruent.

Even though this principle is important in the Supreme Court’s decision-making process, it is also important to note that this principle is not binding. There have been many instances over the years when the Court has overturned precedent. If we look back at prior death penalty cases, we can see several instances where the Court determined that the standards of decency had evolved enough since the previous case for the Court to reevaluate their previous decision: *Gregg v. Georgia* and *Furman v. Georgia*, *Atkins v. Virginia* and *Penry v. Lynaugh*, *Roper v. Simmons* and *Stanford v. Kentucky* (492 U.S. 361 (1989)). The standard used in Eighth Amendment cases, the evolving standards of decency, ensures that judicial precedent does not

bind the Court from acknowledging that past cases may no longer be the guiding standard for contemporary society.

This being said, it is still critical to know the standing judicial precedent regarding all areas of the issue at hand. In a prospective Supreme Court case in which a death row inmate is being forcibly medicated in order to be executed, cases involving forced medication in prisons, forced medication in trial, and the state cases in which a death row inmate is being forcibly medicated all must be discussed.

Forced Medication and the Death Penalty

Ford v. Wainwright (477 U.S. 399 (1986)) was the first case in which the Supreme Court established that executing the mentally insane constituted cruel and unusual punishment and was prohibited by the Eighth Amendment. The problem with this ruling was that the Court did not set a standard by which to determine whether or not an individual was competent. When Alvin Ford was convicted of murder in 1974 there was no suggestion that he was incompetent at the time of his offense, at trial, or at sentencing. In 1986, the Court was faced with two questions: (1) whether the Florida statute stipulating the competency procedure was constitutional, and (2) whether executing a mentally incompetent prisoner was constitutional. Justice Thurgood Marshall's opinion began with a discussion of the Eighth Amendment's broad effect on both the procedural and the substantive aspects of the death penalty. Marshall discussed the common law bar against executing a prisoner who has lost his sanity. This "bears impressive historical credentials; the practice consistently has been branded 'savage and inhuman,'" (*Ford v. Wainwright*; 477 U.S. 399 at 406 (1986)). No state in the United States permitted the execution of the insane. This fact, along with the common law history of execution, led Marshall to conclude

that the Eighth Amendment prohibited a State from carrying out a death sentence upon a prisoner who is insane. “Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment,” (*Ford*; 477 U.S. 399 at 410 (1986)).

Next, Marshall discussed the issues with Florida’s statute which dictated the procedure for determining competency. “Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether,” (*Ford*; 477 U.S. 399 at 410 (1986)). Even though the convicted individual no longer has all of the personal liberties allowed other citizens, not all of his or her Constitutional guarantees are lost.

Justices O’Connor, White, and Rehnquist concluded that the Eighth Amendment does not create a substantive right not to be executed while insane. Rehnquist stated in his dissent, “The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity. A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his execution,” (*Ford*; 477 U.S. 399 at 435 (1986)).

Since *Ford*, both lower courts and the Supreme Court have struggled with mental health-related questions because no concrete standard was set for states to use. As a result, cases have

continued to arise regarding mental illness and the death penalty. In *Panetti v. Quarterman* (551 U.S. 930 (2007)) the Court had an opportunity to re-visit its holding in *Ford*.

Panetti was convicted of capital murder in Texas and was sentenced to death, despite a history of mental illness. The Court addressed the Court of Appeals for the Fifth Circuit's incompetency standard, which was determined to be too restrictive to afford a prisoner Eighth Amendment protections. Justice Anthony Kennedy wrote in the majority opinion that, "Although the *Ford* opinions did not set forth a precise competency standard, the Court did reach the express conclusion that the Constitution 'places a substantive restriction on the State's power to take the life of an insane prisoner,' because, *inter alia*, such an execution serves no retributive purpose," (*Panetti v. Quarterman*; 551 U.S. 930 at 957 (2007)).

The Fifth Circuit's test allowed a prisoner to be executed as long as he was aware that the State had identified the link between his crime and the punishment to be inflicted, whether or not he had delusions or other symptoms. This position ignored the possibility that a severe mental disorder may put that awareness in a context so far removed from reality that the punishment can serve no proper purpose, "retribution and deterrence" as stated in *Gregg*. "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it," (*Panetti*; 551 U.S. 930 at 957 (2007)).

The dissent believed that the Court should defer to the state court's finding of competency and should not impose a new standard for determining competency. This dissenting opinion, joined by Justices Clarence Thomas, John Roberts, Samuel Alito, and Antonin Scalia, could prove significant in upcoming Eighth Amendment questions. Even though *Panetti* upheld the *Ford* decision, it was a close five to four ruling. If there is this much discussion as to

whether or not the mentally ill should be executed, the ruling as to whether medicated prisoners who are competent only through medication should also be particularly controversial.

Forced Medication by the State

Ever since the beginning of the 20th century in *Jacobson v. Commonwealth of Massachusetts* (197 U.S. 11 (1905)), the rights of the state as well as the good of the state have been balanced with individual liberty. In all of these cases, the Court must balance the recognized authority of the State and liberty interests of the individual. The State's *parens patriae* and police powers override individual liberty (Cantor). “Because both law and ethics recognize the importance of the rights to bodily integrity and autonomy that are necessarily invaded with involuntary psychiatric treatment, states have important due process regulations in place to protect the degree of invasion and guarantee advocacy for the mentally ill patient” (Cantor).

Forcibly medicating mentally ill prisoners is an important issue when looking at the number of inmates who suffer from various mental illnesses. As of five years ago, it has been estimated that one in five, or roughly twenty percent, of inmates suffer from severe mental illness (Cantor). States have tried to deal with this issue in different ways:

“For example, California recognizes that inmates have ‘a fundamental right against enforced interference with their thought processes, states of mind, and patterns of mentation’ In order to balance that right with the need for psychiatric care, California requires a court order to compel medication, and to receive that order, the health care team must show that the proposed therapy would be beneficial, a compelling

state interest supports its administration, no less onerous alternative therapies are available, and the therapy follows accepted medical-psychiatric practice.” (Cantor)

This California rule differed from the Ohio procedure at issue in *Steele v. Hamilton County Community Mental Health Board* (90 Ohio St.3d 176 (2000)) where the Ohio Supreme Court held, “When an involuntarily committed mentally ill patient, who does not pose an imminent threat of harm to himself or others, lacks the capacity to give or withhold informed consent regarding his treatment, the state’s *parens patriae* power may justify treating the patient with anti-psychotic medication against his wishes,” (*Steele v. Hamilton County Community Mental Health Board*; 90 Ohio St.3d 176 at 13 (2000)).

In *Washington v. Harper* (494 U.S. 210 (1990)), *Riggins v. Nevada* (504 U.S. 127 (1992)), and *Sell v. United States* (539 U.S. 166 (2003)), the Supreme Court evaluated different states’ competency standards and procedures for forcible medication. They created a three-prong test in *Harper* which has served as a standard for other decisions. “The decisions in both *Riggins* and *Sell* were based at least partially on *Harper’s* requirement that the medication be medically appropriate in order to outweigh the patient’s liberty interest, so as not to violate the Due Process Clause of the Fourteenth Amendment. By relying on *Harper*, the Court implied its reliance on the reasoning employed in that case. Namely, it is the ethical standards of the medical profession that ensure medical appropriateness,” (Lloyd). In order to forcibly medicate to execute, the standards set in these cases should still govern the procedures used by states attempting to implement capital punishment.

In *Washington v. Harper*, Walter Harper was sentenced to prison in 1976 for robbery. Both as an inmate and while temporarily on parole, he received psychiatric treatment. Later, he was forcibly medicated. When looking at the substantive issue, the Court did not doubt that the

prisoner had a significant liberty interest in avoiding unwanted medication. However, “The extent of a prisoner’s right under the Clause to avoid the unwanted administration of anti-psychotic drugs must be defined in the context of the inmate’s confinement,” (*Washington v. Harper*; 494 U.S. 210 at 222 (1990)). In this case, the State has to establish, by medical finding, that a mental disorder exists which is “likely to cause harm if not treated,” (*Harper*; 494 U.S. 210 at 222 (1990)). In addition, the medication must be prescribed by a psychiatrist and then approved by a reviewing psychiatrist; these procedures meet the demands of the Due Process Clause.

While Harper argued, and the Supreme Court agreed, that the Due Process Clause “possessed a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs”, this liberty interest must be examined in the “context of the inmate's confinement,” (*Harper*; 494 U.S. 210 at 221 (1990)). “Based on the State's great need to control dangerous individuals in the context of incarceration and the diminished standard of judicial scrutiny for prison regulations, the Court reasoned that the State, consistent with the Due Process Clause, may forcibly medicate a mentally ill inmate if the inmate is a danger to himself or others and medication is in the inmate's medical interest” (Quinlan 281).

This case is significant because the Court acknowledged that there are instances in which the state’s penological interests outweigh an individual’s liberty interests to remain free from involuntary medication. “In holding that the state's procedures for protecting the prisoner's liberty interest were adequate” (Lloyd), the Court explained that “the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement,” (*Harper*; 494 U.S. 210 at 222 (1990)).

Therefore, it seems that if a state has appropriate reviews and safeguards to ensure that the medication is truly in the medical interests of the individual, and if the individual does pose a threat to himself or others, the state may forcibly medicate.

In *Turner v. Safley* (482 U.S. 78 (1987)) and *O'Lone v. Estate of Shabazz* (482 U.S. 342 (1987)), the Court held that “the proper standard for determining the validity of a prison regulation claimed to infringe an inmate’s constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests,” (*Turner v. Safley*; 482 U.S. 78 at 89 (1987)). The Supreme Court ruled that the Washington Supreme Court erred in refusing to apply the standard of reasonableness.

In Justice Anthony Kennedy’s majority opinion, the Court created a three prong test to determine the reasonableness of a challenged prison regulation by using this case and *Turner*. First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. Second, a court must consider the impact that the regulation will have on the inmates, prison guards, and prison. Third, “the absence of ready 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,” (*Turner*; 482 U.S. 78 at 90 (1987)).

By using this rationale, the Court determined that when an inmate’s mental disability is the main cause of the threat he poses to the prison population, the State’s interest in protecting the prison environment encompasses an interest in providing him with medical treatment. The policy is a rational means of furthering the State’s legitimate objectives. However, the Court did distinguish this decision. “The drugs may be administered for *no purpose other than treatment*,

and only under the direction of a licensed psychiatrist,” (*Harper*; emphasis added, 494 U.S. 210 at 226 (1990)).

Next, the Court had to examine the procedural protections. They determined that the procedures in the existing policy of the mental illness center met the due process requirements. “It is an accommodation between an inmate’s liberty interest in avoiding the forced administration of antipsychotic drugs and the State’s interest in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others” (*Harper*; 494 U.S. 210 at 236 (1990)).

The opinion written by Justice Stevens is also significant in this case. Justices Stevens, Brennan, and Marshall believed that, “Every violation of a person’s bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death... And when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense,” (*Harper*; 494 U.S. 210 at 237 (1990)). This opinion also discussed that medication cannot be used as a form of punishment. This line of thought could be significant because the use of anti-psychotic medication would be a vital part of administering the punishment.

Whereas *Harper* and *Turner* focused on an individual who is already a part of the state judicial system, *Riggins v. Nevada* focused on a pretrial detainee. In *Riggins*, the Court decided that the forced administration of the anti-psychotic medication during trial violated his Sixth and Fourteenth Amendment rights.

The Court ruled that once *Riggins* made the motion to terminate treatment through medication, the State had the burden of proof to establish the need and medical appropriateness

of the anti-psychotic medication. The trial court, however, allowed the drug's administration to continue without making any determinations as to the need for the medication or any reasonable alternatives. As a result, there was a possibility that the decision to forcibly medicate affected Riggins' constitutionally protected right to a fair trial.

The Supreme Court agreed with Riggins, "holding that there were no grounds to forcibly medicate Riggins during his trial absent findings that there was an 'overriding justification' for forcible medication," (Quinlan 282). The Court relied on *Harper*, stating "that such action was unconstitutional because the state had failed to meet its obligation of showing that the treatment was necessary and medically appropriate," (Lloyd). The state failed to determine either that the medication was essential for safety reasons or that there were no less intrusive means of adjudicating guilt or innocence. Due Process requirements set forth in either the Fourteenth Amendment or *Washington v. Harper* were not met. The state failed to make "any determination of the need for this course [of action] or any findings about reasonable alternatives, and it failed to acknowledge Riggins' liberty interest in freedom from antipsychotic drugs," (*Riggins v. Nevada*; 504 U.S. 127 at 136 (1992)).

In these cases, the Court emphasized that the medication must be in the individual's best medical interest, the medication must be the least intrusive means of obtaining competence and sanity, and the person's liberty interest must be balanced with the interests of the state. Unfortunately, the Court did not go any further in setting forth other standards. The absence of any further standards left a few grey areas, leaving states and individuals unsure of how to proceed.

First, the Court's language suggested that a strict scrutiny standard would be appropriate by describing a balance of personal liberty interests with the interests of the state; however, they

denied adopting any standard. This will make it difficult when future cases arise in terms of how the Court should view the individual's interests in comparison with other interests. "Second, the Court did not decide 'the question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial,' because there was no evidence within the record to suggest that Riggins would become incompetent absent forcible medication," (Quinlan 284). The absence of a definitive standard on these issues spurred the debate in *Sell v. United States*.

Sell v. United States was a very important and controversial ruling. *Sell* was the first Supreme Court case involving the mental health rights of a non-dangerous pre-trial defendant (Schultz). *Sell*, a former dentist who had a history of mental illness, was charged with fifty-six counts of mail fraud, six counts of Medicaid fraud, and one count of money laundering. Based on his condition, *Sell*'s bail was revoked and he was deemed incompetent to stand trial. As a result, he was hospitalized for a period in order to regain competency. During his stay at the hospital, he was involuntarily medicated by the psychiatrists with the approval of a Magistrate. *Sell* appealed this decision, but the District Court determined that involuntary medication was the best hope of rendering him competent to stand trial, even though he was not deemed to be a violent threat and was not charged for a violent crime.

The Eighth Circuit affirmed, determining that the Government's interest in the fraud charges justified the need for forced antipsychotic medication (Schultz). The Eighth Circuit stated, "To involuntarily medicate a defendant to restore competency to stand trial, the government must present an essential state interest that outweighs the individual's interest in remaining free from medication, the government must prove that there is no less intrusive way of fulfilling its essential interest, and the government must prove by clear and convincing evidence

that the medication is medically appropriate. Medication is medically appropriate if it is likely to render the patient competent, the likelihood and gravity of side effects do not overwhelm its benefits, and it is in the best medical interests of the patient,” (*Sell v. United States*; 01-1862 at 11(8th Cir. 2002)). In this case, the government’s interest in restoring competency for trial was determined to be serious enough to override his liberty interest in refusing anti-psychotic medication.

In a six to three decision, the Supreme Court determined that Sell could not be forcibly medicated in order to be competent for trial. The majority opinion focused on the fact that Sell was not being involuntarily medicated because he was dangerous nor was he charged with a violent crime. The Court emphasized three main points in this case: there must be an important governmental interest at stake, the medication must be least intrusive and must be medically appropriate, and the medication must be substantially likely to restore competency.

The first parameter given by the Court was that there must be an "important" governmental interest at stake. This important governmental interest in bringing a defendant to trial exists when the charges include a serious crime against the person or a serious crime against property (*Sell v. United States*; 539 U.S. 166 (2003)). “Additionally, the majority warned courts not to determine whether to allow forcible medication on a categorical basis; instead, they instructed courts to consider the government's interest in light of the individual facts of each case,” (Quinlan 287). Each individual case needed to be viewed considering each specific set of facts.

As in *Harper* and *Riggins*, the Court held that the medication must also be the least intrusive means of treating the individual and must be “medically appropriate” (*Sell*; 539 U.S. 166 (2003)). Another stipulation states must follow when attempting to forcibly medicate in

order to restore competence for trial is that it must be “substantially likely” that the administration of the medication will render the defendant competent to stand trial but also be “substantially unlikely” that the administration of the medication will “interfere significantly with the defendant's ability to assist his attorney in putting on a defense,” (*Sell*; 539 U.S. 166 at 181 (2003)).

There have been many law review articles and critiques concerning the *Sell* decision. Most of these papers focus on the Supreme Court’s failure to establish legal precedent. The Court had the ability to make a more substantial ruling which would apply to more areas of law, but declined to do so. Had some of these determinations been made, it would be much easier to now determine how the Court would rule about a case involving forcibly medication an individual in order to execute.

“In light of the seriousness of the First Amendment right to freedom of thought at stake, the Court should have recognized that no governmental interest can outweigh a person's right to freedom of thought, especially when the defendant is non-dangerous and charged with non-violent crimes,” (Schultz). In *Aboud v. Detroit Board of Education* (431 U.S. 209 (1977)), the Court noted that “at the heart of the First Amendment is the notion that ... one's beliefs should be shaped by his mind and his conscience rather than coerced by the State,” (at 235). In *Ashcroft v. Free Speech Coalition* (535 U.S. 234 (2002)), the Court stated that “the right to think is the beginning of freedom” (at 253). The Court also stated that “the individual's freedom of conscious [is] the central liberty that unifies the various clauses in the First Amendment” in *Wallace v. Jaffree* (472 U.S. 38 at 50 (1985)). All of these cases could be used by the Court to establish that forcibly medicating and altering the mind of an individual violates his or her First Amendment protections.

The Court also did not determine that the defendant's interest in avoiding forcible medication is fundamental (Quinlan 294). Instead, the Court kept the same standard that was used in prior cases, in which the individual only has a “significant interest” in avoiding involuntary medication. The Court has in past cases deemed certain rights to be fundamental. In order to determine whether a right is fundamental, the Supreme Court has used the tests laid out in two milestone decisions. “The first of these decisions, *Palko v. Connecticut* (302 U.S. 319 (1937)), described fundamental liberties as those ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed.’ The second decision, *Moore v. City of East Cleveland* (431 U.S. 494 (1977)), characterized fundamental rights as those liberties that are ‘deeply rooted in this Nation's history and tradition,’” (Schultz). Since the right to privacy has been deemed a fundamental right derived from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments (*Griswold v. Connecticut*; 381 U.S. 479 (1965)), the ability to remain free from unwanted medication, some argue, should be included as part of our fundamental rights. “Derived from the right to privacy is ‘the right to choose to undergo or terminate medical treatment, even if the treatment is life-sustaining,’” (Schultz).

The right to privacy is a broad liberty which encompasses many different personal liberties. In 1923 in *Meyer v. Nebraska* (262 U.S. 390 (1923)), the Court described the right to privacy in this way:

“While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to

worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men," (*Meyer v. Nebraska*; 262 U.S. 390 at 398 (1923)).

The Court in *Sell* declined to determine whether or not to conclude that the right to privacy included a right to remain free from unwanted medications, despite the many cases which describe a personal autonomy which is protected by the Constitution in many different situations.

These three cases, *Harper*, *Riggins*, and *Sell*, are all particularly important Supreme Court opinions which have established situations in which the state may and may not forcibly medicate an individual. It is evident that the medication must be in the person's best medical interests, the person must pose a danger to themselves or others, there is no other less intrusive means that could be used, and a significant state interest is being furthered.

Possibly more important than what these cases do say is what they do not say. It will be important going forward to note that the Court has not yet established the use of a higher standard when they made their rulings. Additionally, the Court did not state, as they did with the right for a woman to have an abortion, that the ability to remain free from unwanted medication is a fundamental right protected by the right to privacy.

In all of the limitations that the Court placed on the state's ability to forcibly medicate an individual who is a part of the justice system, there are still loopholes which the states can employ to work around these regulations. In order for these loopholes to become smaller, the Court may determine that the protections of the right to privacy guarantee that a state must show a compelling interest and narrowly tailored means when they have burdened fundamental rights. Only if the individual poses a direct threat to themselves or others would the state be able to pass the strict scrutiny standard and forcibly medicate.

Medication, Mental Illness, and the Death Penalty

Three states have dealt with the complex issue of forcibly medicating in order to execute. In *Louisiana v. Perry* (610 So. 2d 746 (1992)) and *Singleton v. South Carolina* (437 SE2d 53 (1993)), the state supreme courts declared this to be unconstitutional, relying on the standards of the medical community in their determinations (Lloyd). In *Singleton v. Norris* (267 F.3d 859 (8th Cir. 2001)), a case arising in Arkansas, the Eighth Circuit determined that the procedure did not violate the Constitution.

The first case that dealt with this particular issue was *Louisiana v. Perry*. In 1992, Michael Perry, who had an extensive history of mental illness, was charged with the murder of his parents, nephew, and two cousins. Prior to the beginning of the trial, Perry was diagnosed with paranoid schizophrenia and was placed on an anti-psychotic medication regimen.

The Louisiana Supreme Court concluded that forcibly medicating a prisoner to bring him to competency for execution constituted “cruel and unusual punishment” under the Eighth Amendment by looking at the Court’s decision in *Harper*. They determined that the State failed to satisfy the due process test set forth in *Harper*. Under *Harper*, forcing anti-psychotic medication on a prisoner is “impermissible absent a finding of overriding justification and a determination of medical appropriateness,” (*Perry v. Louisiana*; 610 So. 2d 746 at 18 (1992)). In contrast to *Harper*, where the State’s intent was to “require a prisoner to accept appropriate medical treatment that was in his own best medical interest”, the Court distinguished *Perry* in that involuntary medication for execution cannot be justified under *Harper* because “forcible administration of drugs to implement execution is not medically appropriate,” (*Perry*; 610 So. 2d 746 at 18 (1992)). The court also stated that “forcing a prisoner to take anti-psychotic drugs to facilitate his execution does not constitute medical treatment but is anti-ethical to the basic

principles of the healing arts,” (*Perry v. Louisiana*; 610 So. 2d 746 at 18 (1992)). As a result, Perry was not executed.

The second case was congruent to the decision in Louisiana. In *Singleton v. South Carolina*, the South Carolina Supreme Court also held that the forced medication of an insane prisoner to facilitate execution would constitute a violation. Following Singleton’s sentencing, he was found incompetent for execution.

According to the court, forcibly medicating Singleton in order to enable execution violated the South Carolina Constitution provision which barred unreasonable invasions of privacy. “We find that justice can never be served by forcing medication on an incompetent inmate for the sole purpose of getting him well enough to execute,” (*Singleton v. South Carolina*; 437 SE2d 53 at 62 (1993)). Similar to other rulings, the Court also determined that the South Carolina Constitution as well as the federal Constitution’s due process guarantees required that inmates can only be forcibly medicated when the medication is in their best medical interest and if they are a danger to themselves or others.

Contrary to the first two cases, the court in *Singleton v. Norris* determined that Singleton was eligible for execution following forced medication. He had a long history of psychiatric problems, which worsened while he was incarcerated on death row and was on anti-psychotic medication while in prison. Singleton argued that his Fourth, Eighth, and Fourteenth Amendment rights prohibited the State from executing him as long as he was involuntarily medicated.

The Court of Appeals for the Eighth Circuit heard Singleton’s case and made its own determination in an en banc decision. The panel looked at the decisions made by the Supreme Court in *Ford v. Wainwright* as well as *Washington v. Harper*. This court took the standard set

by Justice Powell in his concurring opinion, when he stated, “The Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it,” (*Ford*; 477 U.S. 399 at 422 (1986)).

Then, the court turned to *Harper*. They held that Singleton satisfied the *Harper* test, stating that he was indeed a danger to himself and others and also that it was in his best medical interest to continue his anti-psychotic medication regimen. Other than his “artificial competence” theory, Singleton never argued, and in fact agreed repeatedly, that he was competent while he was medicated (*Singleton v. Norris*; 267 F.3d 859 (8th Cir. 2001)).

The Eighth Circuit panel considered Supreme Court precedent established in *Harper*, *Riggins*, and *Sell* when making their decision. Unlike the decision made in *Perry*, the Eighth Circuit Court rejected Singleton’s argument that once an execution date had been set, the forced medication was no longer in his best interest and should not be allowed. “Singleton’s argument regarding his long-term medical interest boils down to an assertion that execution is not in his medical interest. Eligibility for execution is the only unwanted consequence of the medication,” (Brunsvold). Singleton and his doctors conceded that the medication was in his best short-term interests and was also effective in controlling his symptoms.

As a result, the panel found that “the best medical interests of the prisoner must be determined without regard to whether there is a pending date of execution,” (*Singleton v. Norris*; 267 F.3d 859 at 870 (8th Cir. 2001)). All in all, according to this decision, a state does not violate the Eighth Amendment as interpreted by *Ford* when it executes a prisoner who became incompetent during his long stay on death row but who subsequently regained competency through appropriate medical care.

The United States Supreme Court did not grant certiorari in this case, so Singleton was executed in 2003. This case serves as an effective summary as it demonstrated how all of the previous cases come together to form an opinion, used by lower courts, to determine whether or not a state should be allowed to forcibly medicate in order to execute. The judicial precedent is important, but is not binding.

Conclusion

These cases demonstrate how the state is able to forcibly medicate prison inmates. These regulations are currently the standing precedent used by prisons and states when determining how to treat inmates with mental illnesses. These inmates have fewer rights, but they still have not lost all of their Constitutional guarantees, as can be seen in the final cases. The final three cases show how the lower courts have attempted to deal with the issue of attempting to forcibly medicate in order to execute. The standing precedent as well as the arguments posed in the state case will be significant in anticipating a High Court ruling on forcible medication for the purpose of execution.

Chapter Three

Impact of Amicus Briefs

Introduction

The Supreme Court wrote seventy-six full opinions during its 2009-2010 term according to the Harvard Law Review (“Statistics”). In each of these cases, the justices are presented with background information on the case, which includes amicus curiae briefs written by people or organizations that have an interest in the case. These amicus briefs assist the Justices in deciding cases by providing data and giving perspective as to the real-life impact of their decisions. Each Justice treats these briefs differently (Shapiro). Some read all which are filed, some read those which their clerks have chosen, some read passages their clerks have chosen, and some read the most important ones written by the Solicitor General or important organizations such as the American Bar Association (Shapiro). “Amicus curiae briefs were cited or referred to in 18 percent of the opinions rendered by the Court or by individual Justices over the last decade,” (Shapiro). This number differs each term but one can see that these briefs can be very useful to the justices. They can affect how the Court perceives public opinion and also how the Court is made aware of scientific evidence.

In *Roper v. Simmons*, the ABA submitted an amicus brief, along with the American Medical Association, American Psychiatric Association, American Academy of Psychiatry and the Law, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, National Mental Health Association, American Psychological Association, along with various church associations, child advocacy groups, and

state organizations and governments (www.abanet.org). Additionally, forty-eight countries submitted briefs asserting that the execution of persons below 18 years of age at the time of their offenses violates widely accepted human rights norms and the minimum standards of human rights set forth by the United Nations (www.abanet.org). This is just one example of a handful of the amicus briefs that were filed on behalf of Christopher Simmons in this Supreme Court case. If we looked at *Atkins*, *Ford*, or other controversial cases, we would see similar lists of briefs that were filed for the Court to consider. These briefs give justices insight into the national consensus, which is a critical part of establishing the evolving standards of decency.

Justice Stephen Breyer referred to the American Psychiatric Association's brief in the majority opinion in *Sell v. United States*. Also, when Justice Harry Blackmun wrote the opinion in *Roe v. Wade*, he considered the opinion of the medical field as he did additional research and visited clinics in order to study how the fetus developed so that he could create the trimester standard. In the same way, the Court will need to know more about anti-psychotic medication, how it works, and the effects they have on the human body and mind in creating competency. These briefs can be significant and persuasive and play an important role in the Court's decision making process.

Medical and Ethical Background

According to the National Alliance of Mental Illness, mental illnesses can be defined as "medical conditions that disrupt a person's thinking, feeling, mood, ability to relate to others and daily functioning," (www.nami.org). Serious mental illnesses include major depression, schizophrenia, bipolar disorder, obsessive compulsive disorder, panic disorder, post-traumatic

stress disorder, and borderline personality disorder. Any of these illnesses can significantly affect a person's decision making, ability to rationalize, and social skills.

There are several different approaches to treatment of mental illnesses. In addition to medical treatment, psychosocial treatment such as cognitive behavioral therapy, interpersonal therapy, peer support groups, and other community services can also be components of a treatment plan (www.nami.org). In prisons, medication seems to be the most prominent source of treatment. The National Institute of Mental Health Medications states that medications "treat the symptoms of mental disorders. They cannot cure the disorder, but they make people feel better so they can function," (www.nami.org). They go on to explain that medications work differently for different people. Some people get great results from medications and only need them for a short time. For example, a person with depression may feel much better after taking a medication for a few months, and may never need it again. For others, taking medication is a life-long process. People with disorders like schizophrenia or bipolar disorder, or people who have long-term or severe depression or anxiety may need to take medication for a much longer time.

According to the American Psychiatric Association's (APA) position statement on mental illness, "A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forego or terminate post-conviction proceedings available to challenge the validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case,"

(www.psych.org). In a more specific statement to the issue of forced medication to execute, the APA has stated:

Whether a person found incompetent to be executed should be treated to restore competence implicates not only the prisoner's constitutional right to refuse treatment but also the ethical integrity of the mental health professions. Some courts have decided that the government may forcibly medicate incompetent individuals if necessary to render them competent to be executed, on the ground that once an individual is fairly convicted and sentenced to death, the state's interest in carrying out the sentence outweighs any individual interest in avoiding medication. However, treating a condemned prisoner, especially over his or her objection, for the purpose of enabling the state to execute the prisoner strikes many observers as barbaric and also violates fundamental ethical norms of the mental health professions (www.psych.org).

Mental health professionals are nearly unanimous in the view that treatment with the purpose or likely effect of enabling the state to carry out an execution of a person who has been found incompetent for execution is unethical, whether or not the prisoner objects, except in two highly restricted circumstances (an advance directive by the prisoner while competent requesting such treatment or a compelling need to alleviate extreme suffering). Because treatment is unethical, it is not medically appropriate and is therefore constitutionally impermissible when a prisoner objects under the criteria set forth by the Supreme Court in *Sell v. United States* and *Washington v. Harper*. As the Louisiana Supreme Court observed in *Perry v. Louisiana*, medical treatment to restore execution competence “is antithetical to the basic principles of the healing arts (at 18),” fails to “measurably contribute to the social goals of capital punishment (at

4),” and “is apt to be administered erroneously, arbitrarily or capriciously (at 3),” (*Perry v. Louisiana*; 610 So. 2d 746 (1992)).

The American Bar Association (ABA) has also provided a position statement on the subject. The ABA similarly states that a defendant should not be executed if, at the time of the offense or following conviction, “they had a severe mental disorder or impairs his or her capacity to understand the nature and purpose of disability that significantly impaired their capacity (a) to the punishment, or to appreciate the reason for its imposition in the appreciate the nature, consequences or wrongfulness of their prisoner’s own case, the sentence of death should be reduced to the conduct, (b) to exercise rational judgment in relation to conduct, sentence imposed in capital cases when execution is not an option, or (c) to conform their conduct to the requirements of the law,” (www.abanet.org). The ABA has also used the same opinion as the APA regarding forced medication or even voluntarily taken medication. In their opinion, inmates who must be medicated in order to be competent should not be eligible for execution. This opinion was also adopted by the American Psychological Association and the National Alliance of the Mentally Ill.

With such a united, bold statement by these leading associations, the Court will be forced to consider this information when examining the evolving standards of decency. In addition, the justices will also need to consider the medical ethics and opinions of the medical community. By becoming involved in capital punishment cases, medical professionals are placed in a situation with their general societal position as healers. The American Medical Association and others have tried to reconcile the ethical dilemma by drawing a line short of a hands-on role at the execution. At this point, however they try to solve the dilemma, medical professionals are an intricate part of this process. If the Supreme Court allows forced medication to continue, these

professionals will also be forced to struggle with the ethical and moral obligations as healers in the community.

Conclusion

Amicus briefs are a central part of the process in which a case is heard by the Supreme Court. The opinions of these major medical and legal organizations have played a large role in other Eighth Amendment cases such as *Roper v. Simmons* and *Atkins v. Virginia* which have made major impacts on death penalty jurisprudence. There is a consistent opinion from these major organization that an inmate should not be forcibly medicated in order to be competent for execution.

Chapter Four

Ideology and the Supreme Court

Introduction

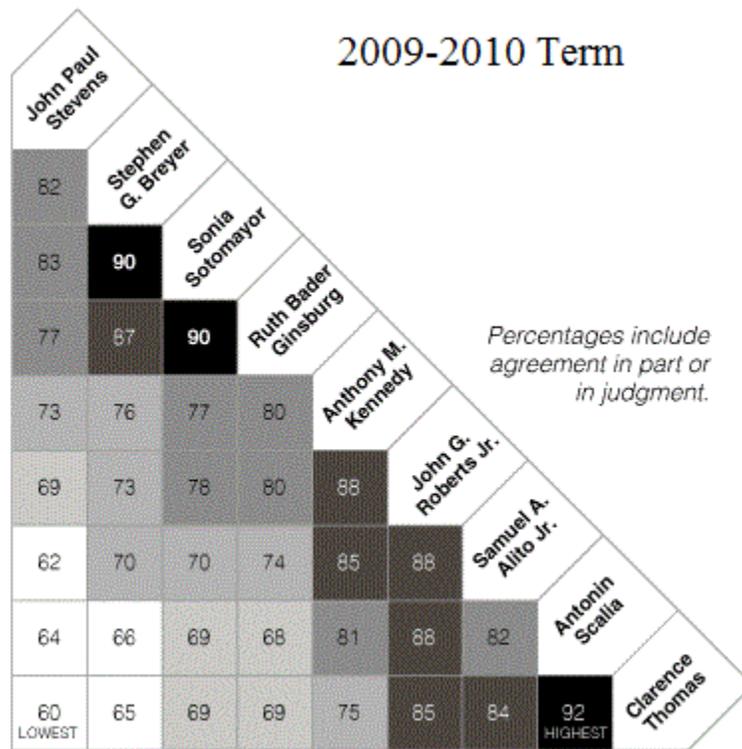
When looking at the history of the Supreme Court's death penalty jurisprudence, one can see different periods of time in which the Court limited the use of the death penalty and then periods in which the Court allowed states to have more freedom in making their own determinations regarding the death penalty. In those times when the Court was more conservative, the states were allowed more freedom in making their own interpretations whereas when the Court was more liberal, more restrictions were implemented. From 2001-2005, the Court made several important decisions which restricted the use of the death penalty. "The Court reversed its holdings permitting the executions of mentally retarded offenders and juvenile offenders, tightened standards for appellate review of the competence of capital defense attorneys, and invalidated sentencing procedures that seemed likely to produce arbitrary or discriminatory life-ending verdicts," (Haas 387). This period during Court history did not last long as the composition of the Court has changed dramatically since 2005.

The Current Supreme Court

Currently, the Court is composed of three women, Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan and six men, Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Stephen Breyer, Samuel Alito, and Chief Justice John Roberts, Jr. Four of these justices, Roberts, Alito, Sotomayor, and Kagan, have joined the Court in the past five years, which means that there is not a lot of significant Court precedent on important issues from this

current Court. We can certainly look at the blocs that have formed and look at each Justice’s ideology; however, we can only predict what may happen in regards to Court chemistry and decision-making.

The first step is examining how the Court aligned in its decision-making process in the last term. In this chart, we can see how frequently each justice voted with another.

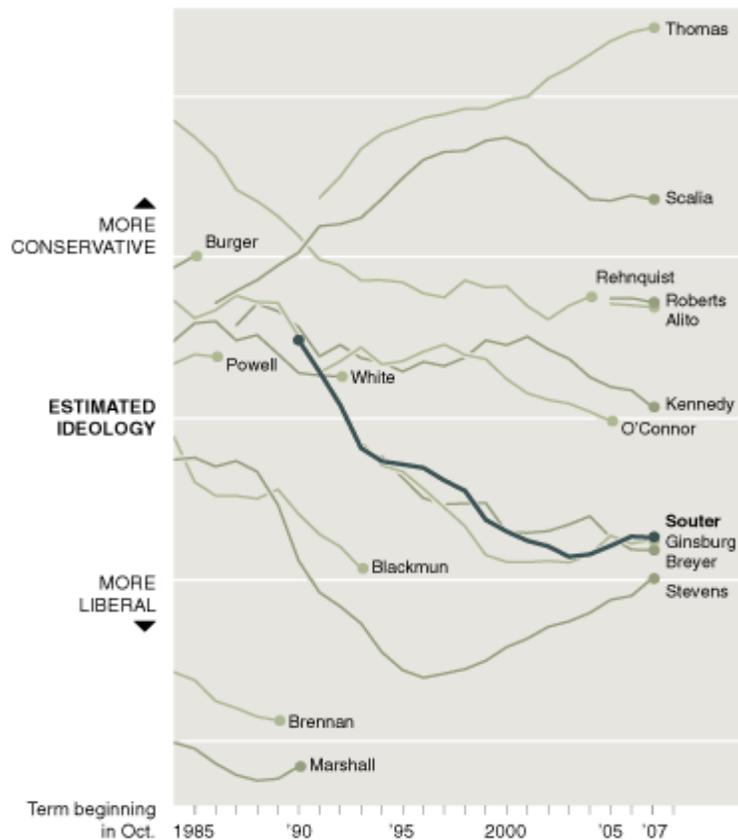


Sources: Supremecourtus.gov; SCOTUSblog

Statistics over the past five terms from the Harvard Law Review give similar results to those found in this chart. In statistics published in this chart and in the Harvard Law Review, Chief Justice John Roberts and Justice Samuel Alito vote together almost 90 percent of the time. Justices Antonin Scalia and Clarence Thomas also voted together 92 percent of the time. On the other half of the spectrum, Justices Stephen Breyer and Ruth Bader Ginsburg and Sonia

Sotomayor all three voted together ninety and eighty-seven percent of the time. These statistics give stability to the otherwise constantly changing Court judicial ideology (www.nytimes.com).

The individual ideology of the justices is also important. The overall ideology of the Court can give us clues into how each justice makes decisions and how he or she interprets the Constitution. Generally, conservative justices have a more historical approach to interpreting the Constitution and choose to stick closer to the original intent of the authors. This would indicate that these justices would stick with a traditionalist interpretation of the Eighth Amendment, choosing to rely on what was cruel and unusual at the time of the creation of the Bill of Rights. On the other hand, liberal justices are more likely to view the Constitution as a “living Constitution” in its fullest meaning, allowing for much more contemporary interpretation of the Eighth Amendment.



Source: Andrew D. Martin, Washington University in St. Louis and Kevin M. Quinn, Harvard (<http://mqscores.wustl.edu>)

Although this graph was created in 2009, one can see that the ideology of the justices is constantly changing as the justices spend more time on the Court, hear more cases, and make more rulings. The voting blocs usually match up with these ideological views (www.nytimes.com).

Conservative Justices

With the death of Chief Justice William Rehnquist and the retirement of Justice Sandra Day O'Connor, President George W. Bush was able to appoint another conservative Chief Justice and replace a moderate, Justice O'Connor, with a more conservative associate justice. Chief Justice John Roberts and Justice Samuel Alito have seemed to strengthen the conservative alliance. However, there is not too much information on their specific ideologies regarding the death penalty, although these Justices are considered to be among the most conservative in Supreme Court history (Liptak).

Chief Justice Roberts was confirmed as the newest Chief Justice five years ago. At that time, the available information on Roberts' views about capital punishment was “sketchy at best”, as he had not faced any capital punishment-related cases in his two years as a judge on the U.S. Court of Appeals for the D.C. Circuit (Lane). As a former clerk to Chief Justice Rehnquist, Roberts seems so far to share the same position regarding the death penalty. In Rehnquist's dissent in *Atkins*, he shared that the Court should in effect leave every state to its own standards of due process and cruel and unusual punishment (*Atkins v. Virginia*; 536 U.S. 304 (2002)). So far, it seems that the new Chief Justice will continue to make similar decisions as his predecessor, as he has continued to vote along the same conservative alliance as did Rehnquist.

While serving on the Court of Appeals for the Third Circuit, Justice Alito participated in ten cases regarding the death penalty. In five of those decisions, Alito strongly disagreed with his two other colleagues and in each of these cases ruled against the inmate. So even though O'Connor traditionally supported capital punishment, she has at times supplied a crucial vote in controversial cases in favor of greater vigilance and care in the application of the death penalty (Liu). These are the cases in which Alito's presence and O'Connor's absence will be most noticeable.

Whereas O'Connor had begun to vote to restrict the use of the death penalty, Alito has a strong record in upholding death penalty sentences. "...He dissents most often in areas where his views are least typical of the average judge: cases in which he has favored religion and largely sided against immigrants and one group of convicted criminals: prisoners facing the death penalty," (Goldstein). While serving on the appellate court, Alito voted against sparing the prisoner from execution all four times he was confronted with a capital punishment decision (Goldstein). Additionally, Alito has traditionally voted in favor of the government and in favor of the prosecution. In all areas, it seems that Alito maintains a conservative ideology and is the Court's most conservative member (Liptak).

Rounding out the conservative bloc of Justices are Justice Clarence Thomas and Justice Antonin Scalia. Justices Scalia and Thomas, who voted together ninety-two percent of the time, have traditionally voted with former Chief Justice Rehnquist in upholding death penalty rulings and allowing the states to apply capital punishment within the parameters of the Constitution. They dissented together in the past three major cases involving the death penalty, *Atkins*, *Roper*, and *Panetti*. They are viewed to be very conservative when it comes to death penalty issues, as

can be seen in these dissents. Their opinions demonstrated their wish to allow states to make their own decisions regarding implementation of the death penalty.

These four justices have created a solid, conservative bloc. According to the *New York Times*, this is the most conservative Court since the 1953 term (Liptak). “Four of the six most conservative justices of the 44 who have sat on the court since 1937 are serving now: Chief Justice Roberts and Justices Alito, Antonin Scalia and, most conservative of all, Clarence Thomas,” (Liptak). These justices are well aligned on the death penalty and many other issues. If a case regarding forcibly medicating to execute was brought before the Court, there is little doubt that these four would uphold the conviction.

In the past five years since these four justices have been on the Court together, they have voted together an average of 84% of cases during the 2005-2006 term, 80% of the cases during the 2006-2007 term, 76% of cases from 2007-2008, 80% of cases from 2008-2009 (“Statistics”). For the wide spectrum of cases heard, these percentages are indicative of a similar ideology among these justices.

The Liberal Justices

On the other hand, there is an equally strong alliance of four liberal justices who traditionally vote to protect the rights of the individual over the rights of the state. Justices Ruth Bader Ginsburg, David Souter, John Paul Stevens, and Stephen Breyer for years voted together on many controversial issues. However, Justices Souter and Stevens have recently retired, affecting the composition of the Court.

Justices Sonia Sotomayor and Elena Kagan are now Supreme Court Justices. Neither of these two women have much of an established judicial record when it comes to the death penalty

or even criminal procedure. Before joining the Supreme Court, Sotomayor had not written a decision in a case involving capital punishment. In 1998, she said, “We’re doing what the death penalty has always done historically, which is target minority people,” when she challenged a death penalty sentence to a federal judge (Weiser). This leads some to believe that she generally opposes the death penalty. Even though we do not have much concrete information regarding her ideology, “her record on the federal appeals court in New York suggests that her views are largely in sync with those of Justice Souter,” (Liptak). If this is indeed the case, we can expect Sotomayor to continue to vote with Justices Breyer and Ginsburg.

Similarly, we do not know much about Justice Kagan and how she will rule on capital cases. Kagan has never been a judge and has not published much scholarly or legal work; therefore, clues to her philosophy are rare. As a result, Supreme Court analysts are relying on her experience as a clerk for Justice Thurgood Marshall, one of the most liberal justices in Court history, as a clue into her judicial ideology. When asked if her position would differ from that of Marshall, for whom she clerked and staunchly opposed capital punishment, she replied, “...it would be, because I do believe that the constitutionality of the death penalty is settled precedent, going forward, and Justice Marshall did not believe that,” (Savage). She stated on day two of her confirmation hearing, “...the constitutionality of the death penalty generally is established law and entitled to precedential weight.” Since Kagan has not yet made any decisions on the Court, we will all have to wait and see how she will ultimately rule on all areas of law.

The liberal backgrounds of these two new justices suggest that they will most likely continue to rule with Ginsburg and Breyer in most death penalty cases. However, there is some speculation that Sotomayor could be more moderate in criminal law and death penalty cases

(Liptak). Only when these justices are presented with actual cases will we be able to determine and predict how they will rule.

Justices Ginsburg and Breyer have voted together in almost 1,050 cases over the past fifteen years together on the Supreme Court, according to CQ Researcher. If you consider that this averages out to approximately seventy cases per year, these two Justices agree on the great majority of cases heard by the Court. Both were nominated by President Bill Clinton and joined the Court in back-to-back years. Ever since, these two have voted together on almost all important issues, including capital punishment and forced medication. Just as Justices Scalia and Thomas have consistently ruled to allow states freedom to decide for themselves how to implement the death penalty, Ginsburg and Breyer have just as consistently ruled that the Eighth Amendment's Cruel and Unusual Punishments Clause implicitly places categorical bans on the death penalty per the evolving standards of decency.

Even though we do not know much yet about how Sotomayor and Kagan will vote, the established positions of Ginsburg and Breyer demonstrate how Justices with similar perceived ideology have voted on personal liberty issues. Based on this information, it seems that these four Justices will definitely determine that the inmate's personal interests outweigh those of the state.

Justice Kennedy

With the two sides aligned on opposite ends of the spectrum and deadlocked at four-four, it all seems to come down to Justice Anthony Kennedy. Kennedy, who was appointed by Reagan in 1988, has played the role of the "swing vote" ever since Justice Sandra Day O'Connor left the Court in 2005. "Because the court so far has shown itself to be strikingly -- and evenly --

divided on ideological issues, Kennedy holds enormous power in pivoting between the left and right, legal experts say. He stands alone in the middle -- and that enhances his importance,” (Barnes). On issues such as capital punishment Kennedy proves himself to be particularly important.

During Justice Kennedy’s 1987 confirmation hearings he stated, “The enforcement power of the judiciary is to insure that the word ‘liberty’ in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it,” (Dunn). One must try to determine whether or not he will see forcibly medicating to execute as deprivation of liberty or as the right of the state to carry out punishment for the betterment of society and to fulfill the goals of retribution and deterrence.

Kennedy wrote the *Harper* opinion and also a concurrence in *Riggins*. In *Harper*, Kennedy set forth guidelines for states to use and also emphasized that it would be extremely difficult. Also, his opinion in *Riggins* is worth noting. “Justice Kennedy authored a separate concurrence to emphasize his concerns that the Due Process Clause requires an extraordinary showing by a state before officials can forcibly medicate the defendant to achieve competency for trial. Furthermore, Justice Kennedy expressed doubt that a state could meet the evidentiary requirement given the present understanding and unpredictability of the properties of antipsychotic medication,” (DePanfilis).

In the latest case involving mental illness and the death penalty, *Panetti v. Quarterman*, Kennedy wrote for the majority in the close five to four decision. He sided with Justices Ginsburg, Breyer, Souter, and Stevens, stating that no deference needed to be afforded to the Texas court’s factual determinations about Panetti’s mental state, even though the Texas criminal justice system had given him a fair hearing to determine his competence. Kennedy and the rest

of the majority did not agree with the standard used by the Court of Appeals for the Fifth Circuit in determining that Panetti was competent enough to be executed. The Fifth Circuit had interpreted the standard set in *Ford* that a condemned defendant only needed to be aware that he is going to be executed and why he is going to be executed. Kennedy instead concluded that “a prisoner’s awareness of the State’s rationale for an execution is not the same as rational understanding of it,” (*Panetti*; p. 960 551 U.S. 930 (2007)). Additionally, he stated that, “Although the *Ford* opinions did not set forth a precise competency standard, the Court did reach the express conclusion that the Constitution ‘places a substantive restriction on the State’s power to take the life of an insane prisoner,’ because, *inter alia*, such an execution serves no retributive purpose,” (*Panetti*; p. 961 551 U.S. 930 (2007)). Even though Kennedy recognized that a standard needed to be set for determining competency, he declined to give a more workable definition.

The dissenters in *Panetti*, Justices Roberts, Thomas, Scalia, and Alito thought that the Court should rely on the state’s finding of competency. This trend will continue to be seen in many criminal procedure cases in which these Justices prefer to give preference to the states. *Panetti* served as an example of what we can expect to see from Justices Roberts and Alito as they vote in capital punishment and criminal procedure cases.

Another case that demonstrates how Kennedy and the liberal justices view Eighth Amendment cases is *Atkins v. Virginia*. Even though Justice Stevens, who is no longer on the Court, wrote this decision, it is still important to see how this new precedent was set in the decision joined by Kennedy. Even though twenty states retained laws permitting the execution of the mentally retarded, the majority claimed that “it is not so much the number of these States that is significant, but the consistency of the direction of change,” (*Atkins v. Virginia*; p. 368 536

U.S. 304 (2002)). The opinion also discussed the goals of retribution and deterrence, and how these goals were not achieved by executing people who have a diminished ability to understand the consequences of their actions. A similar conclusion could be met in a case in which medication is required to ensure that the convicted person is able to obtain a rational understanding of the punishment.

Similarly, much can be taken from Kennedy's majority opinion in *Roper v. Simmons*. As the majority did in *Atkins*, Kennedy again discussed the consistency of the direction of change. He also emphasized that social science studies indicate that juveniles are more likely to be immature, impetuous, and reckless than are adults. By citing scientific evidence along with state laws which give more responsibility to those over eighteen, Kennedy and the rest of the majority claimed this was enough to conclude that the goals of retribution and deterrence apply to juveniles with considerably less force than to adults (Haas 402).

Kennedy devoted six full paragraphs of the *Roper* majority opinion to international law. He cited Article 37 of the United Nations Convention on the Rights of the Child as expressly prohibiting capital punishment for crimes committed by juveniles under the age of eighteen. "He found it especially compelling that since 1990 only seven nations other than the United States had executed juveniles -- Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China -- and all of these countries now have renounced the practice, leaving the United States as 'alone in a world that has turned its face against the juvenile death penalty'" (Haas 403). When looking at executing the mentally ill, the United Nations has stated publicly three times in the past twenty-five years that any state which maintains the death penalty should not execute the mentally ill, according to Amnesty International. This could also play an important part in Kennedy's rationale.

Justices Scalia and Thomas did not agree with any part of the majority rationale in *Roper*. As the author of the dissenting opinion, Scalia criticized the majority for finding a national consensus despite the fact that twenty of the thirty-eight states with death penalty laws still authorized such executions. These justices also disagreed with taking the views of “the so-called international community” into account when interpreting the U.S. Constitution (Haas 403). This shows how differently the two groups analyze these controversial decisions. Five thought that a national and worldwide consensus had been reached and should be taken into consideration whereas four thought that international opinion should not play any part in the decision and a national consensus had not been reached.

Conclusion

The composition and chemistry of the nine Supreme Court Justices play very important parts when making important and controversial decisions. Each alliance or bloc of justices relies on different elements when making rulings. The liberal justices rely more on the social sciences, international opinion, and a consistent national movement while the more conservative justices prefer to give deference to the original meaning of the Bill of Rights and give lenience to the states to create their own standards and laws.

Chapter Five

Discussion and Conclusion

Introduction

When a case arises involving forcibly medicating a death row inmate with the intention of making him or her competent for execution, several issues will arise that the Supreme Court must deal with. The Court will have to consider the evolving standards of decency factoring in the amicus briefs, along with the precedent and the appropriate standard of review. Each justice's opinion as to how these elements fit together will then combine to create the Supreme Court opinion and establish the precedent by which the lower courts and states will abide. I believe that in a five to four decision, the Court will ultimately determine that a state cannot execute an inmate who is being forcibly medicated.

Evolving Standards of Decency

The Court has made significant strides toward placing limitations on the death penalty which are congruent with international and public opinion. *Roper* and *Atkins* both established new, conclusive precedents and created categorical exceptions to the implementation of the death penalty. These cases also demonstrated the willingness of the Court to reevaluate past precedent and establish categorical bans on state death penalty statutes which violated the Cruel and Unusual Punishments Clause.

With two state supreme courts already striking down the practice and with the state of Connecticut prohibiting forced medication to execute, there is already an adequate legal background for the Court to consider. In addition to looking at state opinions and international

opinions, which are considered by some justices, the Court will look at the most recent polls regarding the death penalty and the mentally ill. Also, the Court will consider the consistency of opinion of the medical and legal community. All of these components will need to come together in order for the Court to conclude that a consensus has developed and that the Eighth Amendment's protections include a protection against forcibly medicating an inmate in order to execute.

Thus far, only Connecticut has prohibited this explicitly by law. Other states, such as Florida, Tennessee, and Virginia have granted stays of execution and reduced punishments for inmates who have shown mental incompetence (deathpenaltyinfo.com). However, states such as Pennsylvania and Texas have continued to allow forced medication and have declined to declare inmates legally insane (deathpenaltyinfo.com). There have not been public polls regarding this issue, and since juries have no say, since these are convicted inmates who become insane once incarcerated on death row, there is no other public opinion information for the Court to consider. With the conflicting state Supreme Court rulings, currently, I believe that it will be difficult for the Court to conclude that there has been a national consensus against this practice.

The Court will also examine the opinions of the national organizations, such as the American Bar Association and American Medical Association, which should be submitted in amicus briefs. From this perspective, there is a consistent, united opinion from the different organizations. This information could be used to bolster the argument for a national consensus. The Court could also conclude that *Ford* protects mentally ill inmates, no matter at which point in the judicial process the symptoms arise.

I do not believe that enough material has arisen for the Court to be able to make a determination as to a change in public opinion as of yet. Even though a challenge might rely

almost completely on the opinions of the ABA, APA, and all of the other national organizations, I believe the Court would conclude, as it did in *Penry* when the defendant relied almost solely on the opinions of the medical organizations, that scientific evidence was not enough to establish a new national consensus and new standard for modern society. This is not to say that the scientific evidence and opinion of these organizations will not spark a movement among the states. In order for this to happen, a more significant movement must happen among the states, whether in the judicial system or with the state legislatures.

Relevant Legal Precedent

The evolving standards of decency is only one approach by which the Supreme Court will analyze this issue. The legal precedent that has been established which has created a heightened scrutiny standard must also be given deference. Each case that has been examined gives us insight into how different aspects of the case will come together.

First, *Washington v. Harper* established that a prisoner may only be involuntarily medicated if the treatment is justified by legitimate and sufficient state interest. The Court held that a “respondent possesses a significant liberty interest in avoiding unwanted administration of antipsychotic drugs,” (*Washington v. Harper*; 494 U.S. 210 at 221 (1990)). However, the Court also determined that the Due Process Clause allows a state to treat a mentally ill prisoner with antipsychotic drugs against his will “if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest,” (*Harper*; 494 U.S. 210 at 227 (1990)). The Court balanced the interests of the state and Harper, reasoning that since prisons are comprised of inmates with “a demonstrated proclivity for antisocial criminal, and often violent, conduct,”

(*Harper*; 494 U.S. 210 at 247 (1990)), the state has an obligation to maintain control and guarantee personal safety (DePanfilis).

The state will argue that a death row inmate would be one with the highest propensity toward violence and it would be in the best interests of the state to ensure that these prisoners are receiving medication to treat their symptoms of schizophrenia, bipolar disorder, or other mental illnesses. For example, Richard Taylor, a death row inmate in Tennessee suffering from severe mental illness, was convicted and sentenced to death for the killing of a prison guard in 1981 after the prison had stopped giving him his anti-psychotic medication (deathpenaltyinfo.org). Examples such as this show how necessary anti-psychotic medications are to ensure the safety of the prison community and the inmates themselves and will cause the Court to accept that the safety of the prison environment is a significant interest.

This problem is more complex when determining not that medication is necessary to ensure the safety of the prison, but is also necessary to achieve competency for execution. There have been a few cases in which the Court had to determine whether or not the state could forcibly medicate an individual. In *Washington v. Harper*, the Court determined that when an inmate's mental disability is the main cause of the threat he poses to the prison population, the State's interest in protecting the prison environment encompasses an interest in providing him with medical treatment. Justice Kennedy joined in this opinion, agreeing that there were instances in which the state could use medication as a legitimate means of furthering the state interest.

Riggins v. Nevada established a three-prong test for determining whether or not a defendant could be medicated to restore competency for trial. In order for the government to forcibly medicate an individual, the government must (1) present an essential state interest that

outweighs the individual's interest in remaining free from medication, (2) prove that there is no less intrusive way of fulfilling its essential interest, and (3) prove by clear and convincing evidence that the medication is medically appropriate (*Riggins v. Nevada*; 504 U.S. 127 (1992)). The Court concluded that the interests in giving the defendant a fair trial outweighed the state's interests in making him competent to stand trial. However, the case might have turned out differently if the state had gone through all of the proper procedures. Since in the prospective case which is being discussed, the defendant would have already stood trial, the interests at hand are not quite the same; however, the three-prong test used in *Riggins* will still be applicable.

The most important aspect of *Riggins* is the first prong of the test. The Court will have to determine whether or not the interests in personal autonomy which have been established by the penumbra of so many different Constitutional amendments outweigh the state's interests in preserving justice and fulfilling the goals of punishment: retribution and deterrence. In *Riggins* and in *Sell*, the Court ruled that a person's liberty interests outweigh the interests of the state in bringing the accused to trial.

It is also important to note Justice Kennedy's opinion in *Riggins*. Kennedy doubted that a state could meet the evidentiary requirement given the present understanding and unpredictability of the properties of antipsychotic medication (DePanfilis). Again, the Court was concerned about symptoms of the medication making a defendant seem uninterested and sluggish during trial and affecting the jury's impression of the defendant. These interests would not apply in the same way following the conviction.

The interests of the inmate would no longer include those protected by the Bill of Rights in having a fair trial. The interests of the inmate in being healthy and safe are in conflict with the interests in sustaining life. The medication that would free the inmate from his or her mental

illness would be the same medication that would restore competency for execution. Had it not been for the impending execution, the inmates would have no reason not to fully comply with the medication order of the psychologist.

In *Sell v. United States*, the Court dealt with a similar issue, in which a nonviolent defendant was being forcibly medicated to be competent to stand trial. The justices laid out four requirements for determining whether forcible medication is necessary to further a state's interest. First, there must be a finding of important state interests. In this case, the state's interests in justice, retribution, and deterrence can be deemed important state interests under *Sell*. Second, a court must conclude that forcing drugs on an inmate will significantly further the stated governmental interests. The state must demonstrate that the medication is medically appropriate and that there is a good chance that the defendant will be rendered competent by taking the medication. Third, there must be no alternative, less intrusive treatment approach likely to further those interests. After going through therapy and treatment, medication is most likely the final possible solution for death row inmates. Lastly, the medication must be found to be in the patient's best medical interest and medically appropriate after considering various side effects and the rate of success. This will be the tricky qualification for the Court to justify. The medication would be in the patient's best interest in order to reduce the symptoms of the mental illness, but restoring competency would make the inmate eligible for execution. I believe that the Court will reason that medication is in the best interests of both the inmate and the state. The medication will help the inmate control his or her illness and will protect themselves and others from potential harm. Additionally, the medication will further the state interests in carrying out the sentence imposed by a jury of the inmate's peers.

By looking at these three cases along with other previously discussed cases which demonstrate the state's ability to have more control over convicted inmates, I believe that the Court should allow death row inmates suffering from mental illness to be forcibly medicated. However, this is not the same as allowing these inmates who are being medicated to be executed. It all comes down to the state's need to ensure the safety of the prison environment. These inmates, who are in prison for violent crimes, according to the past cases need to be allowed to be medicated. In *Turner v. Safley*, the Court held that "the proper standard for determining the validity of a prison regulation claimed to infringe an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests," (*Turner v. Safley*, 482 U.S. 78 at 89 (1987)). Again, in *Washington v. Harper*, *Turner*, and *O'Lone v. Estate of Shabazz*, the Court has ruled that a state can forcibly medicate an inmate. Just because that inmate is on death row, does not change the state's interest in maintaining order in the prison.

The Court will have to determine whether the evolving standards of decency and the Eighth Amendment protect those with symptoms of mental illness who are being forcibly medicated to then be executed. The opinions have consistently stated that the inmates can be forcibly medicated, but will the competency restored by the anti-psychotic medication be enough to make them eligible for execution under the Eighth Amendment?

In *Ford v. Wainwright*, the Court determined that a defendant with a mental illness was not eligible to be sentenced to death, because executing the mentally ill has little to no educative or deterrent value. Additionally, "true retribution demands an understanding of what is happening as well as the reasons why, a requirement often not possessed by the mentally ill,"

(DePanfilis). Already, three cases have arisen which lower courts have been forced to rule on.

By looking at these cases, we can see the potential rationale of the Supreme Court.

In two of the cases the lower court stayed the execution, but in the other case, the court allowed the execution to go forward. There are merits to all three arguments. In *Perry*, the court pointed out that the objective was to forcibly medicate him in order to implement his execution. The Louisiana court stated that involuntary medication for execution cannot be justified under *Harper* because “forcible administration of drugs to implement execution is not medically appropriate,” (*Perry v. Louisiana*; 610 So. 2d 746 at 18 (1992)). Furthermore, the court reasoned that *Harper* implied that intrusive medication could not be used for punishment (DePanfilis). This is a very valid argument which could easily be accepted by the Supreme Court.

In *Singleton v. South Carolina*, the South Carolina court agreed with the Louisiana court, stating, “We find that justice can never be served by forcing medication on an incompetent inmate for the sole purpose of getting him well enough to execute,” (*Singleton v. South Carolina*; 437 SE2d 53 at 62 (1993)). Additionally, the court stated that allowing the state to forcibly medicate Singleton in order to enable execution violated protections against unreasonable invasions of privacy.

The Supreme Court has wrestled with determining how strong of an interest states must demonstrate to overcome claims by individuals that they have invaded a protected liberty interest. Decisions such as *Griswold v. Connecticut* (381 U.S. 479 (1965)) and *Roe v. Wade* (410 U.S. 113 (1973)) suggested that states must show a compelling interest and narrowly tailored means when they have burdened fundamental privacy rights. In *Griswold*, the Court explicitly stated that the right to privacy was protected under the penumbra of the Bill of Rights. Later cases such as *Cruzan v. Director, Missouri Department of Health* (497 U.S. 261 (1990)) have

suggested the burden on states is not so high by giving states more lenience in restricting an individual's privacy rights. In *Cruzan*, the Court held that while individuals enjoyed the right to refuse medical treatment under the Due Process Clause, incompetent persons were not able to exercise such rights, upholding the state's heightened evidentiary requirements.

The Court stated in *Wallace v. Jaffree*, "the individual's freedom of conscious [is] the central liberty that unifies the various clauses in the First Amendment," (*Wallace v. Jaffree*; 472 U.S. 38 at 50 (1985)). Even though the Court stated that this freedom of conscious thought is so fundamental, states have still been able to forcibly medicate when the state's penological interests have outweighed this interest in freedom of thought.

The future of privacy protection remains an open question. Justices Antonin Scalia and Clarence Thomas, for example, are not inclined to protect privacy beyond those cases raising claims based on specific Bill of Rights guarantees. Justice Anthony Kennedy and the liberal members of the Court, however, are much more likely to make this a right to privacy issue. Kennedy made a bold statement in *Lawrence v. Texas* in regards to the right to privacy.

"These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life....The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise

of the Constitution that there is a realm of personal liberty which the government may not enter.” (*Lawrence v Texas*; 539 U.S. 558 at 574 (2003))

With wording like this, it calls into question the ability of the state’s penological interests to override the individual’s interests in personal autonomy and also in life.

At the same time, the Supreme Court already ruled that there are instances in which the state can forcibly medicate an individual. If these other instances do not violate his or her right to privacy, it would not in this case. Unless, that is, the Court determines that forcibly medicating a death row inmate is different than forcibly medicating a regular inmate in that the balancing of state interests and personal interests is different. The conservative bloc of justices would not buy an argument like this; however, the liberal bloc and Justice Kennedy could possibly agree, when taking into account public, international, and medical opinion.

In *Singleton v. Norris*, the Eighth Circuit determined that Singleton could be forcibly medicated in order to restore competency and execute. Unlike *Perry* and *Singleton*, in this case it was determined that the *Harper* test was satisfied, that he was a danger to himself or others, and that it was in Singleton's best medical interest to be medicated. In addition, this court ruled that the *Riggins* test was satisfied, that the state's interests in executing sentences and prison security outweighed Singleton's liberty interest in remaining free from unwanted antipsychotic medication. The majority decision stated that “the state was under an obligation to administer antipsychotic medication, thus any additional motive or effect is irrelevant,” (*Singleton v. Norris*; 319 F. 3d 1018 at 1027 (8th Cir. 2003)). The state is responsible for furthering its own interests and also protecting the interests of its citizens. These interests include receiving proper medical care and deterring crime.

I would argue that if the state would forcibly medicate any inmate who is having symptoms of mental illness with the goal of restoring competency, how can the Court determine that they should not treat each inmate the same way? If the goal is to restore competency and relieve symptoms of mental illness for each inmate, the death row inmates should have just as much of an interest in receiving treatment than other individuals. If then the anti-psychotic medications relieve symptoms and competency is restored, the sentence rendered in a fair trial, by a jury of the inmate's peers should then be carried out and the convicted individual should then be executed.

The United States Supreme Court stated in *Harper* that “the drugs may be administered for no purpose other than treatment, and only under the direction of a licensed psychiatrist,” (*Washington v. Harper*; 494 U.S. 210 at 225 (1990)). The goal of the state is to treat the symptoms of the mental illness. Otherwise, the state would be forcing an inmate to live a solitary life confined by his or her own delusions. Then again, it is easy to see how the medication can be deemed a part of the punishment since its use would lead to execution. *Riggins* established that an essential state interest must be found which is being furthered by the forced medication. However, *Harper* states that forced medication cannot be used as punishment. Retribution and therefore punishment is one of the state interests being furthered by forcibly medicating.

To the extent the state seeks to force a prisoner to take antipsychotic drugs to render him or her competent for execution, “such forcible administration of antipsychotic medication seems at the very least inconsistent with the principles of *Harper*, *Riggins*, and even *Sell*” (Entzeroth). These cases allow a state to medicate a prisoner forcibly only where the state has a substantial interest and the forced medication is in the prisoner's best interest. “While the state may have a

substantial interest in carrying out a death sentence, how can forcing a prisoner to take drugs so the state can end his life be in the prisoner's best interest? Forcing someone to take medication so the state can kill him or her is qualitatively different from forcing a prisoner to take drugs so he or she will not hurt himself or herself or so he or she can stand trial competently," (Entzeroth.)

In my opinion, if competency is restored by the drugs, even by forced medication, and if the inmate is able to be taken off the drugs and maintain competency, he or she should be executed. However, as long as the individual is still on medication and is only competent while on medication, he or she should not be eligible for execution. This is where I believe each case must be determined on an individual basis and each situation will call for its own evaluation. I do not think that there should be a categorical ban against forcibly medicating to execute.

The Supreme Court

When the Supreme Court takes a case involving forced medication to execute, it will be a very controversial, close case. I think that Justices Roberts, Alito, Scalia, and Thomas will determine that the medication is not only in the state's best interests but also is in the prisoner's best interest, and that this allows the competency standard for execution to be met. The standard set by *Ford* states that the inmate must understand why he or she is being executed. Not all of the symptoms for mental illness must be completely relieved in order for this standard to be met. I believe that this group will also not rule without a genuine consensus of death penalty states, as they have refused to do in past cases. The conservative bloc also does not take into account international opinion. With all this being said, I believe they will find that it is up to the states to whether or not to prohibit the practice.

Conversely, I do not doubt that Justices Breyer and Ginsburg will determine that this practice would violate multiple Constitutional guarantees. Without having seen many capital punishment opinions by Justices Sotomayor and Kagan, I still believe that these women will come to the same conclusion. I think that these justices will agree with the state courts of South Carolina and Louisiana and determine that the medication is not only in the prisoner's best medical interests, but also would be considered part of the punishment and would only create a temporary mask of competency. Since these drugs cannot actually completely cure the mental illness, I do not believe these justices will be able to rule that the situation would pass the standards set forth in *Ford*.

As previously stated, it will most likely all come down to Justice Kennedy. When I look at his voting record and how he has in the past analyzed cases involving the Eighth Amendment and evolving standards of decency as well as his opinion in *Riggins*, I believe that he will vote that forced medication in order to execute violates an individual's Constitutional rights. Kennedy relies heavily on the scientific evidence presented as well as international law. With such a solid, unified opinion from both of these communities, I think that Kennedy will give great deference to these opinions and will vote to not allow forced medication for the distinct purpose of execution. If we also take into account his warning that he did not think that a state could actually meet the requirements of the *Riggins* test, I do not see a way in which he could rule that a state could force a death row inmate to be medicated to restore competency for execution.

Once a death row inmate is showing symptoms of mental illness and is deemed incompetent, I believe that Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan will determine that these inmates should be taken off death row and should be sentenced to life

without parole. Even though there is a lot of debate about creating a standard of competency, with the voting record of these justices, I think that it is likely that they will create a categorical ban. If an inmate needs to be medicated, I believe that they will state that execution is not appropriate. In this case, I think that the amicus briefs that will be filed by the major organizations along with the states who seem to be determining that forced medication to execute is not appropriate, will make all the difference in swaying Kennedy and the rest of the liberal justices.

Conclusion

In a controversial decision, I believe the Court will rule that only if an inmate is competent without the aid of medication will he or she be eligible for execution. All of the evidence from national organizations alludes to the fact that medication provides only a state of temporary competency. Additionally, the relevant precedent demonstrates that the state does have the ability to control aspects of an inmate's personal liberties, but at the same time, the inmates do not lose all of his or her constitutional guarantees. The line will be drawn by the Court between forcibly medicating to protect the prison environment and further the individual's best medical interests and forcibly medicating with the intent of providing competency for execution.

Former Chief Justice Earl Warren once stated, "It is the spirit and not the form of law that keeps justice alive." Even though justice ruled that these prisoners should be executed, in the spirit of law, the Eighth Amendment protects those who cannot fully protect themselves. It is in these cases which the Supreme Court is required to ensure that each individual's Constitutional guarantees protect them, whether they are in their homes, on the streets, or in a state maintained prison or asylum.

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