

Commuting Death Sentences of the Insane: A Solution for a Better, More Compassionate Society

*By LINDSAY A. HORSTMAN**

CLAUDE ERIC MATORANA is insane. He is a forty-four year old French citizen, with chronic paranoid schizophrenia and is treated by a psychiatrist every three weeks.¹ These encounters with his doctor are "filled with brief touches of reality overwhelmed by the bizarre."²

Claude Eric Maturana is also on death row.³ In 1992, he was convicted of first degree murder.⁴ Maturana and Stephen Ballard took Glenn Estes, a teenager they believed stole a car part from them, into the desert outside of Tucson, Arizona.⁵ Once in the desert, Maturana and Ballard shot Estes several times and then slit his throat with a machete.⁶ The two defendants were tried separately.⁷ Maturana was sentenced to death; Ballard received life imprisonment.⁸

Maturana's situation is legally significant because in 1986 the United States Supreme Court, in *Ford v. Wainwright*,⁹ held that a person sentenced to death cannot be executed if found "insane."¹⁰ Support for the 5-4 decision was based on the Eighth Amendment's "cruel

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1. See Carol Morello, "Healthy" would be a fatal diagnosis for prisoner, USA TODAY, Nov. 9, 1999, at 4A.

2. David Schwartz, *Mentally Ill Inmate Poses Ethical Dilemma; Treatment Would Make His Execution Possible*, DALLAS MORNING NEWS, Aug. 9, 1999, at 1A.

3. See *Arizona v. Maturana*, 882 P.2d 933, 934 (Ariz. 1994).

4. See *id.* at 935.

5. See *id.* at 934-35.

6. See *id.* at 934.

7. See *id.* at 935.

8. See *id.* at 935-36.

9. 477 U.S. 399 (1986).

10. *Id.* at 401, 409-10.

and unusual punishment" clause.¹¹ The Court however left the job of implementing the standards for determining "competency to execute," to the respective states.¹² Maturana's case did not address the insanity issues presented in *Ford*, but the similarity of the facts and circumstances of the two cases suggests that the Supreme Court has not satisfactorily resolved the competency to execute standard, as many seriously mentally ill persons are still being executed.¹³

This Comment illustrates how the laws regarding the treatment of the insane on death row dilute the spirit of *Ford*, and thus violate the Eighth Amendment to the Constitution.¹⁴ More specifically, this Comment explores three main problems with the existing incompetency laws. First, the competency to execute standard is too simplistic in its definition of insanity. Currently an insane inmate can be put to death if he is able to comprehend that being executed means that he will die for a crime that he committed. The standard should be more restrictive since extremely ill people are still able to meet this minimal threshold requirement. Second, the procedures for determining competency to execute are unreliable and inconsistent. Several factors contribute to the procedural problems including when the sanity determination is made, what preliminary showing is required, the lack of uniformity amongst the states regarding evidence, and the amount of discretion given to non-neutral parties. Finally, the remedy offered to those found incompetent—restoring sanity through medication—is contrary to evolving standards of decency.¹⁵

11. *Id.* at 409–10. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required . . . nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

12. *Ford*, 477 U.S. at 416–17.

13. For the purposes of this Comment, the author will not address the related but different issue of executing the mentally retarded. Currently about half of the death penalty states allow the execution of the mentally retarded; however, the United States Supreme Court is currently reviewing the constitutionality of this practice in *Atkins v. Virginia*, 534 S.E.2d 312 (Va. 2000), cert. granted, 533 U.S. 976 (2001). Until recently, it has not been unconstitutional to execute the mentally retarded, as decided in *Penry v. Johnson*, 532 U.S. 782 (2001).

14. See Roberta M. Harding, "*Endgame:*" Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment, 14 ST. LOUIS U. PUB. L. REV. 105, 108–09 (1994).

15. See Ptolemy H. Taylor, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045, 1059–60 (1992); see also *Ford*, 477 U.S. at 406. In addressing each of these issues more closely, the author in no way attempts to overlook or diminish the nature of the crimes involved, or the pain and suffering such crimes have caused the victims and their families. Rather, the focus is the justness of our laws and the proper treatment of all human beings.

Part I of this Comment uses Maturana's case to highlight the problems faced by insane death row inmates. Part II provides background information on the seminal United States Supreme Court case, *Ford v. Wainwright*,¹⁶ and takes a close look at pertinent California law. This Comment proposes that a focused critique of California law on the issue will enable California to prevent situations like Maturana's from arising in its state. Part III lays out the flaws inherent in the competency to execute standard, including the standard itself, the procedures, and the consequences of its application. These flaws show that the current system is inadequate and illustrate why a new, uniform statute is necessary. Part IV presents a model statute, which would require the automatic commutation of a death row inmate's sentence to life imprisonment if found insane. Part IV also shows how the model statute addresses the inadequacies of current statutes and dispels some foreseeable concerns. This Comment urges that the statute be adopted in California, and that it be used as a model for other states as well.

I. Current Problems with Executing the Insane: *Arizona v. Maturana*

Maturana's situation is an illustrative example of a death row case involving insanity issues. Before his original trial, Maturana's first lawyer raised the issue of his client's mental competency, alleging that Maturana had been "hearing voices and having hallucinations."¹⁷ Nonetheless, the trial court found him competent to stand trial.¹⁸ The issue of Maturana's sanity was not addressed again at trial nor was it at issue when his case was on appeal before the Arizona Supreme Court.¹⁹

After Maturana was sentenced to death, his new lawyer, Carla Ryan, found records revealing a history of mental illness.²⁰ She requested a psychiatric evaluation in January 1999 and two doctors declared Maturana incompetent.²¹ Ryan then "filed a motion that

16. 477 U.S. 399 (1986).

17. Morello, *supra* note 1, at 4A.

18. *See id.*

19. *See id.*

20. See Kim Cobb, *Arizona Seeks a "Hired Gun" to Treat Killer; Inmates Mental Illness Pits Law Against Medical Ethics*, HOUSTON CHRON., Sept. 25, 1999, at A1.

21. See *Mentally Ill Man Awaits Execution*, MILWAUKEE J. SENTINEL ONLINE (May 8, 2001), at <http://www.jsonline.com/news/nat/ap/may01/ap-fit-to-die050801.asp> [hereinafter *Mentally Ill Man Awaits Execution*].

resulted in a judge's declaration that Maturana was incompetent,²² which resulted in Maturana being sent to a prison unit at the Arizona State Mental Hospital in Phoenix.²³

It is undisputed that due to the nature of schizophrenia, the symptoms of the disease come and go.²⁴ However, some manifestations of Maturana's illness are as follows: Maturana thinks the CIA comes and takes him to perform assassinations;²⁵ he thinks the jail put a device in him that allows him to talk to people telepathically;²⁶ he is convinced that he is an agent of the "world police" who monitor him through a device in his chest;²⁷ he speaks in numbers and initials;²⁸ he thinks his sentence has been commuted by "Rule 11, Margaret 3" and that the "Embassy" and "NATO TOBY" divisions are involved;²⁹ he believes he gets in and out of prison and conducts top secret investigations for the "Federal F&I" and "Central TBS";³⁰ he stated he was the world conductor in "American 601" and that he did not need medication because he has an "1107 working FBI 702."³¹ Other manifestations of his illness include frequently talking about visits from his mother who has been dead for over thirty years, and hallucinations that he is already dead.³² Maturana thinks that he is "going home soon because he had gone through the American white flag check of the badge No. 5071.3 and veterans' No. 620."³³ Maturana has even asked his attorney "why her office was not hooked up to the electronic device inside him that allows him to communicate without a telephone."³⁴

22. Morello, *supra* note 1, at 4A.

23. See *Mentally Ill Man Awaits Execution*, *supra* note 21.

24. See Cobb, *supra* note 20, at A1. Schizophrenia is a disorder "marked by a tendency to withdraw from reality, ambivalent, constricted, and inappropriate responses and mood, unpredictable disturbances in stream of thought, regressive tendencies to the point of deterioration, and often hallucinations and delusions." BLAKISTON'S GOULD MEDICAL DICTIONARY 1224 (McGraw-Hill 4th ed. 1979).

25. See Cobb, *supra* note 20, at A1.

26. See *id.* at A1.

27. Schwartz, *supra* note 2, at 1A.

28. See Morello, *supra* note 1, at 4A.

29. *Id.* at 4A.

30. Susie Steckner, *To Heal and Then Execute; Ethical Chasm Opens for Doctors in Case of Schizophrenic Inmate*, ARIZ. REPUBLIC, July 7, 1999, at A1.

31. *Id.*

32. See *Mentally Ill Man Awaits Execution*, *supra* note 21.

33. Emily Heller, *Docs Refuse to Open Death's Door*, NAT'L L. J., Nov. 1, 1999, at A5.

34. *Id.*

Dr. Jerry Dennis, medical director and chief psychiatrist of Arizona's State Mental Hospital,³⁵ is currently working with Maturana but refuses to medicate him to the point of sanity for the sole purpose of enabling the state to execute him.³⁶ Maturana receives enough medication to keep him stable, but not enough medication to make him "legally competent."³⁷ Dr. Dennis could give Maturana two to three times the current dosage of medication, but has stated that he would only do so if Maturana were not condemned to death.³⁸ Dr. Dennis has stated "I'm upholding the ethics of my profession. It's not right to give a patient treatment just so that he can be executed."³⁹ He would rather resign than make Maturana sane—in order for the state to carry out his execution.⁴⁰ Many doctors, including Dr. Dennis, believe that such activity violates the Hippocratic Oath,⁴¹ which governs the practice of medicine.⁴² Dr. Jack Potts, chief forensic psychiatrist of Maricopa County, refused a request to treat Maturana, stating "[i]t's very clear it's an ethical violation . . . [o]ur role is do no harm. It wasn't a hard call."⁴³

The prosecution is outraged by Dr. Dennis's position and is fighting to have the imposed sentence carried out.⁴⁴ The prosecutors have articulated three main complaints. First, they disagree with Dr. Dennis and others about the existence of an ethical conflict.⁴⁵ The prosecutor, Paul J. McMurdie, does not believe it is against a doctor's ethical duties to medicate an inmate for the purpose of allowing the state to

35. See Lesley Stahl, *60 Minutes, Doctor's Dilemma; Whether a Prison Psychiatrist Who Declares a Murderer too Mentally Incompetent to be Executed can be Ordered to Improve his Condition so That he Can be Executed* (CBS NEWS TRANSCRIPT, April 22, 2001) [hereinafter *60 Minutes*].

36. See Amy Silverman, *AG Napolitano Turns Down Her 60 Minutes of Fame*, PHOENIX NEW TIMES, March 15, 2001.

37. E.J. Montini, *Being Sane Rx for Death in Arizona*, ARIZ. REPUBLIC, Sept. 30, 1999, at B1.

38. See David H. Schwartz, *Doctors, Lawyers Clash Over Death-Row Case*, THE CHRISTIAN SCI. MONITOR, Aug. 19, 1999, at 2.

39. Morello, *supra* note 1, at 4A.

40. See Schwartz, *supra* note 2, at 1A.

41. The Hippocratic Oath states in relevant part:

I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to anyone if asked . . . and will abstain from every voluntary act of mischief and corruption.

U.S. Med. Students, *Hippocratic Oath*, available at <http://www.usmedstudents.com/links/hippocraticoath.htm> (visited Feb. 24, 2002).

42. See *60 Minutes*, *supra* note 35.

43. *Mentally Ill Man Awaits Execution*, *supra* note 21.

44. See Schwartz, *supra* note 2, at 1A.

45. See *id.*

execute him.⁴⁶ Second, McMurdie believes that Maturana and others like him will do whatever it takes to be freed from death row even if it requires blatant lying.⁴⁷ McMurdie has stated that the claim for incompetency is “the excuse of the month” for death row inmates.⁴⁸ Finally, prosecutors have asserted that Dr. Dennis’s prognosis is unreliable.⁴⁹ The prosecutors believe that any doctor could find some evidence of a mental “problem” in every person on death row, and that there is no way to distinguish the truly mentally ill from everyone else.⁵⁰ As representatives of the people, the prosecutors are outraged at the thought that Maturana may not get what “he deserves”—that which was legally imposed on him by a jury.⁵¹ “The state . . . contends that the law demands doctors at the state hospital to make every attempt to restore Mr. Maturana to mental competency.”⁵²

Despite Dr. Dennis’s position, the hospital administrator, Jack Silver, tried to comply with the court’s requirement to medicate Maturana to the point of sanity in order for the state to carry out his sentence,⁵³ but no doctor would step forward to do so.⁵⁴ No one in the hospital would do it; no one in the state would do it; even a nationwide search failed.⁵⁵ For many months, the Maturana controversy and the battle between the legal and medical communities remained at a virtual deadlock with no definitive resolution, with the opposing sides staunchly defending their positions.

In January of 2000, Dr. Nelson C. Bennet came forward.⁵⁶ At the time, Dr. Bennet was the medical director for Georgia inmates.⁵⁷ Not only did he agree to observe Maturana,⁵⁸ but found him to be “com-

46. See Heller, *supra* note 33, at A5.

47. See Cobb, *supra* note 20, at A1.

48. Schwartz, *supra* note 2, at 1A.

49. See Steckner, *supra* note 30, at A1.

50. See *id.*

51. Schwartz, *supra* note 2, at 1A.

52. *Id.*

53. See Morello, *supra* note 1, at 4A.

54. See Cobb, *supra* note 20, at A1.

55. See Morello, *supra* note 1, at 4A; see also Simon Davis, *Insane Killer Treated so he Can be Executed, Ruling on Death Row Schizophrenic is Condemned as Immoral*, THE DAILY TELEGRAPH (LONDON), May 10, 2001, at 2 (stating “Arizona’s attorney general [sent out] 1,400 letters to psychologists across the United States trying to find someone who [would] treat Maturana sufficiently for him to be executed.”).

56. See Emily Heller, *New Doc Deems Man Fit to Be Killed*, NAT’L L. J., Jan. 24, 2000, at A4.

57. See *id.* Dr. Bennett has since been hired by the Arizona State Mental Hospital. See *id.*

58. He was paid \$2,300 to interview Maturana. See *60 Minutes*, *supra* note 35.

petent to face death and [not in] need [of] the medication that has been at the center of the dispute."⁵⁹ Adding to this surprising diagnosis, Dr. Bennet admitted that although apparently competent for execution, Maturana was in fact seriously ill.⁶⁰ His opinion resulted in Maturana being moved back to death row where he remains today.⁶¹ He continues to receive medication, which is given to him "once a day through a slot in the cell door."⁶² Maturana has been on and off death row for over ten years, during which time his mental condition has deteriorated considerably.⁶³ Maturana's attorney claims that "[t]here is no way for me to communicate with him,"⁶⁴ he has no concept of reality,⁶⁵ and he cannot assist in the defense of his case.⁶⁶ Ironically, since Maturana has not exhausted his appeals, no execution date has been set.⁶⁷

The governing Arizona statute states that a mentally incompetent person may not be executed.⁶⁸ The statute defines a mentally incompetent prisoner as one who is "presently unaware that he is to be punished for the crime of murder or unaware that the impending punishment for that crime is death."⁶⁹ Inmates are allowed to file a motion requesting a court order for a mental competency examination.⁷⁰ The motion must be "timely and present[] reasonable grounds for the requested examination."⁷¹ The court must then appoint experts to evaluate the inmate's mental state.⁷² "The experts' reports shall indicate whether the prisoner suffers from a mental disorder, illness, defect or disability such that the prisoner is incompetent to be executed and would benefit from competency restoration treatment."⁷³ After the examinations are complete, the court may con-

59. Heller, *supra* note 56, at A4.

60. See Alfred M. Freedman, M.D., *The Doctor's Dilemma: A Conflict of Loyalties*, 18 PSYCHIATRIC TIMES, ISSUE 1, Jan. 2001, at <http://www.mhsOURCE.com/pt/p010101b.html>.

61. See Heller, *supra* note 56, at A4.

62. Schwartz, *supra* note 2, at 1A.

63. See *Arizona Prison Therapy*, at http://www.patrickcrusade.org/arizona_prison_therapy.htm (visited Feb. 1, 2002).

64. Patrice Bernard, *A Frenchman on Death Row*, LE JOURNAL DU DIMANCHE (Mar. 21, 1999) (copy on file with author).

65. See *Mentally Ill Man Awaits Execution*, *supra* note 21.

66. See Schwartz, *supra* note 2, at 1A.

67. See Mike Wagner, *Execution Debate to Continue*, DAYTON DAILY NEWS, MAY 14, 2001, at *2.

68. See ARIZ. REV. STAT. ANN. § 13-4021(A) (West 2000).

69. ARIZ. REV. STAT. ANN. § 13-4021(B).

70. See ARIZ. REV. STAT. ANN. § 13-4022(A) (West 2000).

71. ARIZ. REV. STAT. ANN. § 13-4022(C).

72. See *id.*

73. *Id.*

duct a hearing where the defendant must prove incompetence to be executed by clear and convincing evidence.⁷⁴ If found incompetent, the inmate must receive competency restoration treatment and becomes eligible for death once competency is restored.⁷⁵ Finally, while the prisoner is being treated, the chief medical officer must file a report with the superior court every sixty days regarding the prisoner's competency.⁷⁶

Maturana's situation is a prime example of the dilemma that many death row inmates are facing. This case illustrates how the states are inadequately dealing with mentally ill death row inmates, which results in their execution and therefore directly violates the intent behind the Supreme Court's decision in *Ford*. It is important that the rules and procedures affecting insane death row inmates be assessed and adjusted to make the system comport with the governing law.

II. Death Row and Insanity

A. Constitutional Constraints: *Ford v. Wainwright*⁷⁷

In 1986, in *Ford v. Wainwright*, the United States Supreme Court held that it was unconstitutional to execute a death row inmate found to be insane.⁷⁸ Ford was sentenced to death in 1974, but in 1982 he "began to manifest gradual changes in behavior"⁷⁹ and slowly fell into mental illness. He had intricate theories about a conspiracy involving the capture of family, friends, and national leaders.⁸⁰ More specifically, Ford believed that he was part of a conspiracy within the prison and that he had dealings with the Ku Klux Klan.⁸¹ Ford also believed that his family members were being sexually assaulted somewhere outside of the prison.⁸² A psychiatrist for the defense examined him over a period of fourteen months, concluding in 1983 that Ford suffered from "Paranoid Schizophrenia With Suicide Potential," which is a "major mental disorder severe enough to substantially affect Mr.

74. See ARIZ. REV. STAT. ANN. §§ 13-4022(E) & (F).

75. See generally ARIZ. REV. STAT. ANN. §§ 13-4022(H), 13-4023 (describing competency restoration as giving an inmate treatment, such as anti-psychotic drugs or other similar medication, in order to make the person sane. Once an inmate has been medicated to the point where he can understand the fate that he is facing, his competency is restored.).

76. See ARIZ. REV. STAT. ANN. § 13-4023(A) (West 2000).

77. 477 U.S. 399 (1986).

78. See *id.* at 409–10.

79. *Id.* at 402.

80. See *id.*

81. See *id.*

82. See *id.*

Ford's . . . ability to assist in the defense of his life."⁸³ His doctor maintained that Ford did not know he was to be executed and that Ford actually believed he could not be executed.⁸⁴

Further investigation into Ford's sanity was conducted pursuant to Florida law.⁸⁵ Three doctors were ordered to evaluate Ford; each doctor spent a total of only thirty minutes evaluating his sanity.⁸⁶ Although each prognosis was different, all three doctors determined that he clearly had some type of mental illness.⁸⁷ One doctor diagnosed him as suffering from psychosis with paranoia, another said he was psychotic, and the final doctor concluded he had a severe adaptational disorder.⁸⁸ Nevertheless, each also determined he was able to understand his fate.⁸⁹ "[W]ithout explanation or statement, [the Governor of Florida] . . . signed a death warrant for Ford's execution."⁹⁰

Ford's attorneys first sought relief from the state court to no avail, after which they filed a habeas corpus petition in the United States District Court, which was denied.⁹¹ The appellate court affirmed, but the panel was divided.⁹² The United States Supreme Court then granted certiorari to decide whether executing the insane was unconstitutional, and whether or not a competency hearing should be afforded to inmates.⁹³

1. The Holding and Rationale

In *Ford*, the majority felt "compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."⁹⁴ The majority found such conduct violative of the Eighth Amendment's prohibition against cruel and unusual punishment.⁹⁵ The Court relied on historical reasoning to jus-

83. *Id.* at 402–03.

84. *See id.* at 403 (quoting Ford as stating: "I know there is some sort of death penalty, but I'm free to go whenever I want because it would be illegal and the executioner would be executed I can't be executed because of the landmark case. I won.").

85. *See id.* at 403–04; *see also* FLA. STAT. ANN. CH. § 922.07 (West 1985).

86. *See Ford*, 477 U.S. at 404.

87. *See id.*

88. *See id.*

89. *See id.*

90. *Id.*

91. *See id.*

92. *See id.* at 404–05.

93. *See id.* 405.

94. *Id.* at 409–10.

95. *See Ford*, 477 U.S. at 410; *see also* Kristen Wenstrup Crosby, Comment, *State v. Perry: Louisiana's Cure-to-Kill Scheme Forces Death-Row Inmates to Choose Between a Life Sentence of Untreated Insanity and Execution*, 77 MINN. L. REV. 1193, 1198–99 (1993).

tify the rationales behind its decision, which commentators have summarized as:

- (1) the execution of the incompetent offends general notions of humanity,[96]
- (2) execution of a madman does not successfully achieve deterrence,[97]
- (3) an incompetent person cannot suffer for committing the crime because of his inability to understand the punishment,[98]
- (4) religious beliefs,[99] and
- (5) the belief that a mentally ill person is punished for his madness alone.[100]

The holding was narrowly tailored to apply only to those persons on death row who are found to be insane.¹⁰¹ A “competency to execute” determination is usually done sometime before a scheduled execution, depending on the relevant state statute.¹⁰²

2. The Opinions

Justice Marshall, joined by Justices Brennan, Blackmun, Powell, and Stevens, wrote the majority opinion of the Court and asserted “that the Eighth Amendment prohibits the State from inflicting the death penalty upon a prisoner who is insane.”¹⁰³ Beyond this central holding, *Ford* was a plurality decision, in which the Justices split over the necessary procedures and requirements for determining whether a prisoner is insane.¹⁰⁴

Justices Marshall, Brennan, Blackmun, and Stevens criticized Florida’s statute, stating that the state’s procedures provided an “inadequate assurance of accuracy.”¹⁰⁵ Justice Marshall reasoned that a con-

96. Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35, 52–54 (1986). The execution of an insane person is “a miserable spectacle both against Law, and of extreme inhumanity and cruelty.” *Id.* at 52.

97. *See id.* at 51.

98. The rule is based on retribution, which cannot be achieved if one does not understand his fate. *See id.* at 54.

99. *Id.* Among other religious notions, “an insane person cannot make peace with God.” *Id.* at 50.

100. Rebecca A. Miller-Rice, *The “Insane” Contradiction of Singleton v. Norris: Forced Medication in a Death Row Inmate’s Medical Interest Which Happens to Facilitate His Execution*, 22 U. ARK. LITTLE ROCK L. REV. 659, 662 (2000); *see also Ford*, 477 U.S. at 406–10. *See generally* Harding, *supra* note 14, at 110–12 (discussing the “five rationales [that] have been historically relied upon to explain the creation and establishment” of the rule prohibiting execution of the insane).

101. *See Ford*, 477 U.S. at 410.

102. CAL. PENAL CODE § 3700.5 (West 2000) (providing that “[w]henever a court makes and causes to be entered an order appointing a day upon which a judgment of death shall be executed upon a defendant, [then doctors will be appointed] to examine the defendant, under the judgment of death, and investigate his or her sanity.”).

103. *Id.* at 399–400.

104. *See id.* at 418 (Powell, J., concurring).

105. *Id.* at 400.

demned prisoner should not be considered to have "lost the protection of the Constitution altogether" simply because he is on death row.¹⁰⁶ Justice Marshall argued that the main defects in the Florida statute were: (1) the prisoner was not able to present material evidence as to his sanity; (2) the defendant could not challenge the state's psychiatrists; and (3) the ultimate decision rested entirely with the Governor.¹⁰⁷ Justice Marshall asserted that the petitioner should be afforded a *de novo* adversary hearing, allowing the inmate an opportunity to offer evidence on his behalf.¹⁰⁸ However, the recommendation for a *de novo* adversary hearing did not gain majority support.¹⁰⁹

Justice Powell, as previously mentioned, joined the majority opinion as to the unconstitutionality of executing the insane under the Eighth Amendment, but wrote a separate concurrence focusing on the meaning of insanity and the procedures for reviewing a determination of insanity.¹¹⁰ Justice Powell defined the insane as "those who are unaware of the punishment they are about to suffer and why they are to suffer it."¹¹¹ Next, Justice Powell disputed Justice Marshall's requirement for a *de novo* hearing and gave three reasons why it should not be the standard.¹¹² First, the sanity determination would not decide *whether* someone will be executed; rather, it settles *when* the execution will happen.¹¹³ The state has an interest in seeing that those persons duly tried and convicted are in fact brought to justice.¹¹⁴ Second, the sanity hearing is not conducted "against a neutral background."¹¹⁵ In other words, sanity determinations are possible at any stage in the process, and most defendants have already been found competent at least once.¹¹⁶ Therefore, a state statute could "require a substantial threshold showing of insanity merely to trigger the hearing process"¹¹⁷ because of safeguards existing at the trial level.¹¹⁸ Finally, the determination of sanity is subjective, and a court hearing is not

106. *Id.* at 411.

107. *See id.* at 400.

108. *See id.* at 413–14.

109. *See id.* at 418 (Powell, J., concurring).

110. *See id.*

111. *Id.* at 422.

112. *See id.* at 425–26.

113. *See id.* at 425.

114. *See id.*

115. *Id.*

116. *See id.* at 426.

117. *Id.*

118. *See id.* at 420.

the best venue in which to make such assessments.¹¹⁹ Justice Powell reiterated that “[d]ue process is a flexible concept, requiring only such procedural protections as the particular situation demands.”¹²⁰

Justice O’Connor, joined by Justice White, concurred in part and dissented in part, finding that no state should be required to hold a full hearing on sanity.¹²¹ Justice O’Connor reasoned that the “demands of due process are reduced” once one has been validly convicted and society has established its right to punish.¹²² Justice O’Connor further reasoned that the federal courts should stay out of the issue altogether, as the imposition of the death penalty should be left to the individual states.¹²³

Justice Rehnquist, joined by Chief Justice Burger, dissented, arguing that there should not even be an Eighth Amendment right protecting the insane from execution.¹²⁴ Justice Rehnquist viewed the majority’s opinion as one which “needlessly complicates and postpones still further any finality in this area of law,” and allows for numerous unsubstantiated claims regarding a condemned man’s sanity.¹²⁵ In addition, the dissent also argued that the Florida statute was acceptable and that the majority/plurality fabricated a problem and then offered a solution inconsistent with precedent.¹²⁶

The splintered decision in *Ford* exemplified a core disagreement within the Supreme Court about the imposition of the death penalty on the insane. More specifically, the Court disagreed about what procedures should be used to determine sanity. The Court left the task of implementing *Ford*’s holding to the individual states,¹²⁷ which has resulted in an inequitable application of the competency to execute standard and divergent views over the “procedural safeguards that must be provided to a condemned inmate who makes a claim of mental incompetency.”¹²⁸

119. See *id.* at 426.

120. *Id.* at 425 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

121. See *id.* at 429. (O’Connor, J., concurring and dissenting) (stating “that this ‘particular situation’ warrants substantial caution before reading the Due Process Clause to mandate anything like the full panoply of trial-type procedures”).

122. *Id.*

123. See *id.*

124. See *id.* at 433 (Rehnquist, J., dissenting).

125. *Id.* at 435.

126. See *id.*

127. See *id.* at 406–10.

128. Sanford M. Pastroff, *Eighth Amendment—The Constitutional Rights of the Insane On Death Row*, 77 J. CRIM. L. & CRIMINOLOGY 844, 860 (1986).

B. California Law

In post-*Ford* California, the law provides that once an execution date has been set, three alienists¹²⁹ from the medical staff of the Department of Corrections are appointed to examine the inmate and investigate his or her sanity.¹³⁰ If a prisoner is deemed insane, the district attorney is notified, and jurors are summoned and impaneled.¹³¹ A hearing is then held, and if the person is found to be insane, he is kept in confinement until his reason is restored.¹³² Then a hearing is conducted in front of a judge who determines if sanity is in fact regained.¹³³ California's law is similar to many other states and includes many of the same flaws typical in this area of law.

As far back as 1947, the Supreme Court of California addressed some of the issues involved with the relevant death penalty statutes in *In re William Jerome Phyle*.¹³⁴ This case specifies the roles of each of the different players involved in a competency determination. First, it is the duty of the warden to call the need for a competency determination "to the attention of a district attorney for a judicial determination."¹³⁵ Additionally, a judicial determination of sanity can occur "only when the warden invokes such a proceeding."¹³⁶ Second, restoration of sanity is "a question for the determination of the superintendent."¹³⁷ Furthermore, "the Legislature has provided in effect that the courts of this state are without power, except as provided by statute, to determine the sanity of a person who has been sentenced to be executed for a capital offense."¹³⁸ Finally, the court in *In re Phyle* held that there is no due process right to "an adjudication of the question of [one's] sanity."¹³⁹ This case exemplifies both the rigidity that exists in California law and the inequitable assertions that the law rests upon. The rigidity of the law is evident in the fact that the warden is the person granted the power to start the process of reviewing a condemned man's sanity. The inequitable standards are apparent in the

129. An alienist is defined as "[a] psychiatrist. Especially, a physician qualified in a court of law as an expert witness in the field of psychiatry." BLAKISTON'S GOULD MEDICAL DICTIONARY 47 (McGraw-Hill 4th ed. 1979).

130. See CAL. PENAL CODE § 3700.5 (West 2000).

131. See CAL. PENAL CODE § 3701 (West 2000).

132. See CAL. PENAL CODE § 3703 (West 2000).

133. See CAL. PENAL CODE § 3704 (West 2000).

134. 186 P.2d 134 (Cal. 1947).

135. *Id.* at 137.

136. *Id.*

137. *Id.*

138. *Id.* at 139.

139. *Id.*

case's assertion that there is no inherent due process right to "adjudicate" the issue of insanity. Although California's Penal Code authorizes the impaneling of a jury for sanity determination,¹⁴⁰ case law shows that this safeguard is not necessarily an adversary proceeding.¹⁴¹

Another example of California precedence in this area is the case of *People v. Riley*,¹⁴² which involved a condemned inmate whose mental condition worsened as the day of his execution neared.¹⁴³ The case stands for the proposition that "in sanity determinations for death row inmates, there is no absolute right to a hearing and the ruling of the trial court was not subject to review by appeal."¹⁴⁴ The defendant also complained that he did not receive effective assistance of counsel in the sanity hearing because his attorney was appointed only minutes before the hearing.¹⁴⁵ However, the court dismissed the complaint on the basis that the appointed lawyer "acted zealously and competently."¹⁴⁶

In re Phyle and *Riley* are illustrative of the application of California law in executing the mentally ill. However, it should be noted that it is difficult to specifically point to case law which sufficiently details all of the difficulties arising in California, because the issue of competency to execute does not always get addressed adequately on the appellate record.

III. Problems with Implementing: "Competency to Execute"

There are four overarching problems with the current death penalty law. First, the definition of insanity is too restrictive. The simple manner in which states define competency to execute does not account for the complex nature of mental illness. Second, the current "competency to execute" standards are inconsistent with the intent of the *Ford* rule against execution of the insane. Third, the procedures implemented by the states do not guarantee that the rights of an insane inmate will be protected. Issues such as when sanity is determined, who determines it, and what evidence is required, in practice do not ensure that the insane will not be executed. Fourth, the result

140. See CAL. PENAL CODE § 3701 (West 2000).

141. See, e.g., *People v. Riley*, 235 P.2d 381, 381 (Cal. 1951).

142. See *id.*

143. See *id.* at 382.

144. *Id.* at 384.

145. See *id.* at 385.

146. *Id.*

imposed—forced medication—when an inmate is determined to be insane, does not serve any penal or societal interests.

A. Definitions

There are general, medical, and legal definitions of sanity, and the differences among these definitions create many of the problems that exist under death penalty statutes. Under current definitions, a person may suffer from mental illness and be considered medically insane but not legally insane or incompetent for the purpose of carrying out the death penalty. This dichotomy results in the execution of many medically ill persons.

Insanity is generally defined as “exhibiting unsoundness or disorder of mind . . . to such a degree as to be unable to function safely and competently in ordinary human relations.”¹⁴⁷ Schizophrenia, a common form of insanity, is defined as:

A psychotic disorder . . . characterized by disturbance in thinking involving a distortion of the usual logical relations between ideas, a separation between the intellect and the emotions so that the patient's feelings or their manifestations seem inappropriate to his life situation, and a reduced tolerance for the stress of interpersonal relations.¹⁴⁸

Often, “the patient retreats from social intercourse into his own fantasy life and commonly into delusions and hallucinations, and may . . . go on to marked deterioration or regression in . . . behavior.”¹⁴⁹

The medical definition of insanity is:

A group of psychotic disorders . . . characterized by fundamental alterations in concept formations, with misinterpretation of reality, and associated affective, behavioral, and intellectual disturbances in varying degrees and mixtures. These disorders are marked by a tendency to withdraw from reality, ambivalent, constricted, and inappropriate responses and mood, unpredictable disturbances in stream of thought, regressive tendencies to the point of deterioration, and often hallucinations and delusions.¹⁵⁰

However, insanity in legal medicine is defined as “a mental disorder of such severity that the individual (a) is unable to manage his or her own affairs and fulfill social duties, (b) cannot distinguish right from wrong, or (c) is dangerous to himself or others.”¹⁵¹

147. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1167 (Merriam-Webster 3d ed. 1989).

148. *Id.* at 2030.

149. *Id.*

150. BLAKISTON'S GOULD MEDICAL DICTIONARY 1224 (McGraw-Hill 4th ed. 1979).

151. *Id.* at 681.

There are many kinds of mental disorders. Personality disorders are a type of mental illness which can make a person “rigid and maladaptive, and damage social, interpersonal, and work relationships”;¹⁵² whereas “[p]aranoid personalities are characterized by projection of [a person’s] own conflicts and hostilities onto others.”¹⁵³ Comparatively, another disorder involves persons with “[a]ntisocial personalities . . . [who] characteristically act out their conflicts and flout normal rules of social order.”¹⁵⁴ Under medical definitions, a person diagnosed as suffering from one of these or a combination of these disorders will be deemed mentally ill.¹⁵⁵

In contrast, the legal definition of insanity is “[a]ny mental disorder severe enough that it prevents a person from having legal capacity and excuses the person from criminal or civil responsibility.”¹⁵⁶

All of the above definitions—general, medical, and legal—illustrate the vast complexities surrounding how a mental illness is defined and diagnosed. Yet, when it comes to the execution of a condemned person, the standard of sanity is viewed very differently. The legal definitions focus solely on the person’s ability to understand the legal consequences of his actions, instead of the complexities of the mental illness from which the person suffers. The definition of legal insanity should be expanded, so it encompasses a broader range of mental illnesses and therefore prevents execution of all who are insane.

B. The Competency to Execute Standard

In order to be competent to execute, the condemned must be aware that he is being punished for committing the crime of murder, and aware that when the sentence is carried out, he will die.¹⁵⁷ A per-

152. THE MERCK MANUAL 1545 (16th ed. 1992).

153. *Id.*

154. *Id.* at 1546.

155. See BLAKISTON’S GOULD MEDICAL DICTIONARY 824 (McGraw-Hill 4th ed. 1979) (defining mental illness or mental disorder as one of two psychiatric conditions, either primary brain function impairment or difficulty adapting to environment, “in which any associated impairment of brain function is secondary to the psychiatric disturbance.”).

156. BLACK’S LAW DICTIONARY 797 (7th ed. 1999).

157. See ARIZ. REV. STAT. ANN. § 13-4021(B) (West 2000) (defining incompetency to execute as being “presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death”); see also FLA. STAT. ANN. § 922.07(1) (West 2001) (defining competency to execute as “whether he or she understands the nature and effect of the death penalty and why it is imposed on him or her”).

son who is found insane will have his sentence stayed until competency is regained.¹⁵⁸

The phrase "competent to execute" is used to define a person who is sane for the purpose of carrying out the death penalty.¹⁵⁹ However, defining sanity as merely having the ability to understand one's crime and fate does not account for the complexities involved with diagnosis and treatment of mental illness.¹⁶⁰ Inevitability, with such a low threshold that the state must meet, people who are actually suffering from mental illness are still being executed.¹⁶¹ One defense attorney described the standard as being "so low almost anyone who's breathing can meet it."¹⁶²

There are numerous examples of people who can be considered insane under medical definitions but are still "competent to execute." Such is the case of Ricky Ray Rector, who was executed in 1992 in Arkansas. Rector shot himself in the head in a suicide attempt which severed a three-inch section of his brain, and resulted in a "frontal lobotomy."¹⁶³ There is also *Provenzano v. State*,¹⁶⁴ in which the defendant was sentenced to death "despite his delusional belief that he [was] Jesus Christ."¹⁶⁵ For more than twenty years he believed he was Jesus Christ and that he would be executed because he was Jesus Christ.¹⁶⁶ Thomas Provenzano was executed on June 21, 2000.¹⁶⁷ Each

158. See generally CAL. PENAL CODE §§ 3703, 3704 (West 2000) (setting forth procedures for suspension of execution and commitment to a state mental facility).

159. See Rochelle Graff Salguero, *Medical Ethics and Competency to be Executed*, 96 YALE L.J. 167 (1986).

160. See, e.g., Laura Reider, *Toward a New Test for the Insanity Defense: Incorporating the Discoveries of Neuroscience into Moral and Legal Theories*, 46 UCLA L. REV. 289, 332–33 (1998) (addressing the oversimplification of mental diseases):

While it is easy and, at times, administratively efficient to classify individuals into general categories of illnesses, it is not necessarily just The interaction between the brain and the body is too complex—and our ability to diagnose accurately is too unsophisticated—to exclude individuals based upon layperson's generalizations.)

161. See, e.g., Ward, *supra* note 96, at 58 (stating "some individuals are clearly incompetent, but many more are marginally competent; that is, competent to make some decisions or to take responsibility for some actions, but not others").

162. Spencer Hunt, *Sanity Standards: Mentally Ill Inmates Executed*, CINCINNATI ENQUIRER (April 22, 2001) (quoting Timothy F. Sweeney, attorney for Jay D. Scott in *State v. Scott*, 497 N.E.2d 55 (Ohio 1986), and *Scott v. Anderson*, 58 F.2d Supp. 767 (N.D. Ohio 1998)).

163. *Rector v. Bryant*, 501 U.S. 1239, 1240 (1991) (Marshall, J., dissenting to denial of certiorari).

164. 760 So. 2d 137 (Fla. 2000).

165. *Id.* at 140.

166. See *id.* at 141 (Anstead, J., dissenting).

167. See Death Penalty Information Center, *Executions in the U.S. 2000*, available at <http://www.deathpenaltyinfo.org/dpicexec00.html> (last visited Mar. 11, 2002).

of these individuals could be considered insane, and it is hard to believe that they actually met the competency to execute standard.

After their respective convictions, both Ford and Maturana were diagnosed as schizophrenic. The complexities involved in their mental illnesses vary, yet the competency to execute standard fails to address these differences.¹⁶⁸ The standard of understanding the fate of death reduces a sanity determination to a simplistic evaluation that does not address the concern of society, which as stated in *Ford*, is preventing the execution of the insane.¹⁶⁹ Not only has this prohibition been a part of American history, but contemporary values of a maturing society should play a role in determining punishments that comport with fundamental human dignity.¹⁷⁰ Yet, under current state laws, most death row inmates are found competent enough to be executed regardless of their mental disabilities.¹⁷¹

C. Procedures for Determining Competency to Execute

Problems also exist with the differing state statutes that govern the execution of the mentally ill, which further aggravates the ability of insane death row inmates to receive justice in post conviction proceedings. The more pressing problems regarding the competency to execute procedures include: when the issue of insanity is ripe; the requirements to receive an insanity hearing; the lack of uniformity among jurisdictions regarding the standard of proof necessary to prove insanity; and the amount of discretion given to governors.

1. Ripeness

Although the amount of time an inmate will spend on death row varies from state to state, an inmate can expect to spend an average of ten years on death row.¹⁷² Even though the number of years spent on death row seems long, there are many timing issues that affect death row inmates. One problem with the existing laws in several states, in-

168. Inmates often have suffered from "perinatal complications, developmental disabilities, childhood abuse and neglect, brain damage, social ostracism, failure in school and work, drug and alcohol abuse, or multiple suicide attempts." David Lovell & Ron Jemelka, *Coping With Mental Illness in Prisons*, FAM. AND COMMUNITY HEALTH, No. 3, Vol. 21, at 54 (1998).

169. See *Ford*, 477 U.S. at 409–10.

170. See *id.* at 406.

171. See Heller, *supra* note 33, at A5 (paraphrasing Stephen B. Bright, a death penalty opponent who teaches competency at Yale Law School).

172. See Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N. U. L. Rev. 581, 583 (2000).

cluding California, is that the issue of sanity is not ripe for a court to hear until death is imminent.¹⁷³ In such states, a competency to execute determination is not made until an execution date is set and is often conducted only after the court has issued an execution warrant.¹⁷⁴ While being condemned strips a person of many rights, certain basic fundamental rights afforded by the Constitution remain.¹⁷⁵ Therefore it follows that before one's life can be taken, basic due process requirements must be satisfied at all stages of the trial and appeals. One way to satisfy due process requirements is to create adequate time frames to ensure effective representation by counsel. Yet, it seems that the current practice in the United States is to deal with the death penalty in an increasingly rapid manner, as a means of achieving administrative efficiency.¹⁷⁶ This leaves the inmate with little opportunity to adequately prove his incompetency. Rushing the process may increase unreliability in the determination of sanity, because time constraints leave the client and his attorney with fewer options to pursue and less time to gather evidence and information. The need for administrative necessity should not be a compelling enough state interest, especially when weighed against the fundamental right to life.¹⁷⁷ Often with death row inmates, however, this notion gets distorted. Therefore, it is necessary to change the current laws so that the issue of mental competency is ripe at any stage during the proceedings. This change will allow condemned inmates sufficient opportunity to raise pertinent insanity issues.

2. Preliminary Showing of Insanity

Many jurisdictions require a preliminary showing of insanity before a court will grant a sanity hearing.¹⁷⁸ This requirement is prob-

173. See CAL. PENAL CODE § 3700.5 (providing that “[w]henever a court makes and causes to be entered an order appointing a day upon which a judgment of death shall be executed upon a defendant, [then doctors will be appointed] to examine the defendant, under the judgment of death, and investigate his or her sanity”). See also Van Tran v. State, 6 S.W.3d 257, 267 (Tenn. 1999) (noting that Tennessee only allows three days to file a petition for incompetency); Colburn v. State, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998).

174. See People v. Kelly, 822 P.2d 385, 413 n.11 (Cal. 1992) (stating “defendant’s sanity for execution is not now at issue since an execution date has not even been set”).

175. See Ford, 477 U.S. at 411.

176. See Anti-Terrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2253, 2244 (2001) (providing that “[a] [one] year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court”).

177. See U.S. CONST. amend. XIV (protecting individuals from being denied “life, liberty, or property without due process of law”).

178. See COLO. REV. STAT. § 16-8-111(1) (2001) (providing that “[w]henever the question of a defendant’s incompetency to proceed is raised, the court shall make a preliminary

lematic because it requires the inmate to show evidence of insanity to get a hearing, when the purpose of a hearing is to give the inmate an opportunity to prove his insanity to the court.¹⁷⁹ For example, in Georgia there is a presumption of sanity if the inmate already requested and received a prior sanity hearing at which he was found competent, the defendant is then required to make a *prima facie* showing of a substantial change in circumstances to again raise the issue of competency.¹⁸⁰ Even more restrictive are the laws of Idaho and Illinois, which only allow one opportunity to bring challenges to the sentence of death.¹⁸¹ In *Martin v. State*,¹⁸² the defendant's motion for a hearing was denied because "the nature of Martin's mental condition is basically the same as was presented and rejected at pre-trial

finding either that the defendant is competent to proceed or that the defendant is not."); KAN. STAT. ANN. §22-4006 (Supp. 2001) (dictating that the judge will suspend the sentence and conduct a hearing to determine sanity only if there is reason to believe that the convict is insane); *Johnson v. State*, 508 So. 2d 1126, 1127 (Mo. 1987) (holding that the defendant failed to establish reasonable probability that he was presently insane solely upon reading his affidavits); OHIO REV. CODE ANN. § 2949.28 (Anderson 1999) (requiring the judge to determine whether probable cause exists to believe that the convict is insane, then hold a hearing); *Commonwealth v. Moon*, 117 A.2d 96, 98 (Pa. 1955) (stating that without a hearing, the court appointed a sanity commission and defendant was found to be insane. "[I]t is the court and not the commission which must be satisfied that appellant is mentally ill under the standard prescribed." Defendant was deemed sane by the trial court because he knew where he was, what his sentence was, and why.); *Van Tran v. State*, 6 S.W.3d 257, 269 (Tenn. 1999) (putting "the burden on the prisoner to make a threshold showing that he or she is presently incompetent"); *Ex parte Jeffrey Henry Caldwell*, 58 S.W.3d 127 (Tex. 2000) (holding that the defendant "did not make a substantial showing of incompetence [and] . . . therefore was not entitled to the appointment of experts or a competency hearing"); *State v. Harris*, 789 P.2d 60, 68 (Wash. 1990) (one procedure of determining the mental state of a condemned prisoner is a "preliminary substantial showing of incompetency"); WYO. STAT. ANN. § 7-13-902 (Michie 2001) (If there is reasonable cause to believe that a defendant does not have the requisite mental capacity, the court shall order a stay of execution.).

179. See *Ford*, 477 U.S. at 411 (stating that "in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts").

180. See GA. CODE ANN. § 17-10-69 (Michie 1997) (providing that if a person has previously applied and has been determined competent to be executed, then there is a presumption of sanity, and the defendant must make a *prima facie* showing of a substantial change in circumstances in order to re-raise the issue of competency).

181. See *Paz v. State*, 852 P.2d 1355, 1356 (Idaho 1993) The statute

provides a defendant one opportunity to raise all challenges to the conviction and sentence in a petition for post-conviction relief except in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute.

Id. See also *People v. Jones*, 730 N.E.2d 26, 28 (Ill. 2000) ("The Post-Conviction Hearing Act contemplates the filing of only one post conviction petition.").

182. 515 So. 2d 189 (Fla. 1987).

on the issue of competency to stand trial.¹⁸³ The jurisdictions that prevent multiple sanity determinations are ignoring not only the inherent unpredictability of mental illness itself (because symptoms come and go and may develop over time), but also that being on death row can enhance or create insanity.¹⁸⁴ Studies have shown that condemned inmates suffer psychological deterioration on death row, and most often this deterioration comes from "the unique stress of anticipating one's death at a known time and in a predesignated manner."¹⁸⁵ Given the unique circumstances involved in determining the existence of mental illness, once an inmate is found insane, the death sentence should be commuted.¹⁸⁶

In *Ford*, Justice Powell argued that a state may require a "substantial threshold showing of insanity" to trigger a sanity hearing because most defendants had a sanity determination made during their original trial.¹⁸⁷ However, this requirement ignores the fact that inmates requesting a sanity determination may not have had their competency to stand trial previously reviewed.¹⁸⁸ It also ignores the fact that very few defendants are found incompetent to stand trial.¹⁸⁹ Additionally, the standards for incompetency at the trial or appellate level is different from the standards before execution. For example, in California the applicable law was recently articulated in *People v. Jones*.¹⁹⁰ There the court stated, "[a] defendant who, as a result of mental disorder or developmental disability, is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner is incompetent to stand trial."¹⁹¹ This standard is actually higher than competency to execute. Compare with the case of *State v. Steelman*,¹⁹² in which nine psychiatrists agreed that the defendant was suffering from some form of severe mental illness, with most

183. *Id.* at 190.

184. See Salguero, *supra* note 159, at 172. The imposition of a capital sentence on a person, combined with the conditions on death row, repeatedly leads to a development of psychiatric illness in inmates. *See id.*

185. *Id.* *See also* Taylor, *supra* note 15, at 1049 (stating that "[o]ne of the least common and possibly the most stressful of all human experiences is the anticipation of death at a specific moment in time and in a known manner").

186. *See* Harding, *supra* note 14, at 137-39.

187. *Ford*, 477 U.S. at 425-26 (Powell, J., concurring).

188. *See* Death Penalty Information Center, *Death Row USA, State Lists of Prisoners on Death Row as of July 1, 2001*, at <http://www.deathpenaltyinfo.org/DRUSA-TX.html> (visited Feb. 22, 2002).

189. *See id.*

190. 811 P.2d 757 (Cal. 1991).

191. *Id.* at 780 (citations omitted).

192. 612 P.2d 475 (Ariz. 1980).

agreeing it was paranoid schizophrenia.¹⁹³ One doctor stated that the defendant had a “mental illness impairing mental process to a disabling degree.”¹⁹⁴ The defendant was still sentenced to death because the mitigating circumstances of his illness did not outweigh the aggravating circumstances of the crime committed.¹⁹⁵ Also consider *Colburn v. State*,¹⁹⁶ in which the defendant had an extensive history of paranoid schizophrenia, but was nevertheless tried, convicted, and sentenced to death.¹⁹⁷ The court held that the “fact that appellant had a mental illness when he was tried and sentenced is not determinative of whether he will be sane at the moment of his execution.”¹⁹⁸ Colburn is still on death row in Texas.¹⁹⁹ Next, in Illinois, the Post Conviction Hearing Act “does not authorize a court to conduct an evidentiary hearing to determine whether a post-conviction petitioner is mentally fit to assist post-conviction counsel.”²⁰⁰

These examples demonstrate that many of the sanity determinations made during or before trial are as ineffective as those made directly before execution.

3. Lack of Uniformity Regarding Evidence

Another problem with the sanity determination is the lack of uniformity among the states as to what evidence of insanity must be shown in order to obtain post-conviction relief. For example, some states require proof by clear and convincing evidence.²⁰¹ Other states, however, require a preponderance of the evidence.²⁰² Illustrative of this problem is Alabama’s statute, which leaves the sanity determina-

193. See *id.* at 483.

194. *Id.*

195. See *id.*

196. 966 S.W.2d 511 (Tex. Crim. App. 1998).

197. See *id.* at 513.

198. *Id.*

199. See NAACP Legal Defense and Education Fund, Inc., Quarterly Report by the Criminal Justice Project, *Death Row U.S.A.*, Fall 2001, available at <http://www.deathpenaltyinfo.org/DRUSA-TX.html>.

200. *People v. Owens*, 564 N.E.2d 1184, 1186 (Ill. 1990).

201. See ARIZ. REV. STAT. ANN. § 13-4023 (West 2000); see also *Medina v. State*, 690 So. 2d 1241, 1247 (Fla. 1997); IDAHO CODE § 19-2523(2) (Michie 2000) (providing that the judge will authorize that the defendant receive treatment if it is concluded by clear and convincing evidence that the defendant is ill, the illness will lead to deterioration of the defendant, treatment is available, and a reasonable person would agree to medication).

202. COLO. REV. STAT. § 16-8-111(2) (2001) (providing that “the burden of submitting evidence and the burden of proof by a preponderance of the evidence are upon the party asserting the incompetency of the defendant.”); see also KY. REV. STAT. § 431.2135 (West 1998); *Billot v. State*, 655 So. 2d 1, 14–15 (Miss. 1995) (finding that a hearing will be held to determine sanity by a preponderance of the evidence, which may be appealed).

tion to the judge's "unbridled discretion";²⁰³ while in Texas there is no standard for the court to follow in determining competency to be executed.²⁰⁴ Without a uniform standard for defendants to attempt to achieve, or for judges to apply and be held to, there are risks that severely mentally ill patients may be treated differently depending upon the jurisdiction in which the crime was committed and possibly be denied the ability to prove their insanity.

4. Governor Discretion

Finally, the amount of discretion given to state governors in making the final sanity determination poses another problem.²⁰⁵ Each state differs in the amount of authority given to the governor, but it is inequitable to give the governor sole, unreviewable power in a determination of this magnitude. First, governors are not neutral by virtue of their elected position nor are they qualified to determine the issue of sanity.²⁰⁶ For example, in *Rector v. Clinton*,²⁰⁷ discussed previously, the inmate suffered from a brain injury because "he shot himself in the head shortly after committing the murder for which he received

203. See *Magwood v. Smith*, 791 F. 2d 1438, 1445–46 (11th Cir. 1986) (stating that the defendant had no idea what evidence was necessary to satisfy the requirement of the statute).

204. See *Ex parte Jordan*, 758 S.W.2d 250, 253 (Tex. 1988) (the court urged the legislature to adopt legislation on the issue).

205. See ARK. CODE ANN. § 16-90-506 (Michie Supp. 2001) (if a person is found incompetent, the governor shall order that appropriate mental health treatment be provided); FLA. STAT. ANN. § 922.07 (West 2001) ("When the Governor is informed that a person under sentence of death may be insane, the Governor shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." If found insane the Governor will commit the person to a health treatment facility until he or she regains sanity.); KY. REV. STAT. ANN. § 431.240 (Banks-Baldwin 2001) (the execution will not take place until the Governor warrants it unless stayed by due process of law); MO. ANN. STAT. § 552.060 (West Supp. 2001) (the director of the department of corrections shall notify the governor if there is concern that a condemned person may be insane, and the governor shall order a stay of execution if necessary and there is enough time after notification for a determination); S.D. CODIFIED LAWS §§ 23A-27A22, 24 (Michie 1999) (when a death row defendant is mentally incompetent the warden shall notify the Governor and he shall appoint a commission of three to five disinterested, licensed physicians to examine him. When a defendant is incompetent to proceed the Governor shall suspend the sentence. The Governor can have him transferred to the human services center or not.); UTAH CODE ANN. § 77-19-8 (1999) (the Governor or the Board of Pardons and Parole or the executive director of the Department of Corrections may suspend the execution of a judgment of death in cases of suspected incompetency, however the executive director only has the power to stay the execution temporarily).

206. See Pastroff, *supra* note 128, at 862 (advocating that "the decision maker should not be the governor because of his potential bias").

207. 823 S.W.2d 829 (Ark. 1992).

the death penalty.”²⁰⁸ Despite the fact that Rector was missing part of his brain, the court refused to deem Rector insane.²⁰⁹ The court instead stated: “[A]lthough we may reduce a death sentence to life without parole, and have done so in the past, that action is taken as a matter of law, not as an act of clemency.”²¹⁰ The court then determined that the decision to grant clemency rests with the executive branch, which did nothing, and Rector was eventually executed.²¹¹

In order to avoid this problem, the sanity determination should only be decided by a medical doctor. Additionally, once the determination has been made, it must be reviewed by a neutral fact finder, in order to avoid the possibility of bias or political influence.

D. The Consequences of a Determination of Incompetency

For Maturana the situation is simple, there are only two options. Either he may live on death row forever, victim to a very debilitating mental illness, and therefore avoid execution, or he may be medicated with drugs that will relieve his suffering, but make him temporarily “sane,” enabling the state to put him to death. These are the only options since the law clearly states if a person is actually found “incompetent to be executed,” the result is only the postponement of death.²¹² As Justice Powell explained in *Ford*, the determination is not *whether* the person should be executed, but *when*.²¹³

As currently written, many state laws require automatic medication of inmates found to be insane.²¹⁴ The practice of medicating, also known as artificial sanity, only recently became controversial when Maturana’s doctor would not medicate him.²¹⁵ The problem with this practice is two-fold. First, the law provides that the insane shall not be executed because it is cruel and unusual punishment.²¹⁶ Artificial sanity is not a substitute for true sanity. Drugs inherently have only a temporary effect on people, usually just as long as the drug is in the blood

208. *Id.* at 830.

209. *See id.*

210. *Id.* at 830.

211. *See id.* at 831.

212. *See Ford*, 477 U.S. at 425.

213. *See id.*

214. *See* ARIZ. REV. STAT. ANN. § 13–4022(H) (West 2000); CAL. PENAL CODE § 3703 (West 2000).

215. *See* Schwartz, *supra* note 2, at 1A; *see also* Steckner, *supra* note 30, at A1.

216. *See Ford*, 477 U.S. at 409–10.

stream.²¹⁷ Additionally, “[t]he temporary nature of chemical competence renders difficult a reliable assessment of the sufficiency of an inmate’s competence for execution.”²¹⁸ Since an insane inmate cannot truly be made permanently sane, it follows that the inmate cannot be made competent to be executed, as the Supreme Court intended. Second, “medication of death-row inmates to produce competency for execution is merely an attempt to circumvent the national consensus against execution of the insane—a consensus that clearly does exist.”²¹⁹ We must have laws that comport with “the evolving standards of decency of our society that mark the progress of a maturing society.”²²⁰ However, obtaining artificial sanity through mandatory drugging, which is often unwanted, is contrary to these values.

Inconsistency in the treatment of death-eligible prisoners poses a problem, specifically in the area of forced medication. For example, Arkansas and Louisiana came to opposite conclusions in deciding whether forced medication should be used in order to gain competency to be executed.²²¹ Arkansas found that forcibly medicating an inmate for the purpose of execution was justified.²²² The court specifically relied “on the state’s expressed intention for forcing the medication, for [the inmate’s] ‘own good’ and the institution’s, as contrasted with any intention to make him competent to be executed.”²²³ On the other hand, the Louisiana court found that drugging solely for the purpose of execution could not be construed as medical treatment and therefore could not be condoned.²²⁴

The decision by the two state courts presents an ethical dilemma for physicians over whether to medicate prisoners to the point of gaining competency for the sole purpose of allowing the state to impose death.²²⁵ This dilemma pits the medical community against the law, spawning extensive debate.²²⁶ The Current Opinions of the Council on Ethical and Judicial Affairs (“CEJA”) specifically provide that

217. See Taylor, *supra* note 15, at 1059 (citing Donald J. Kemma, *Current Status of Institutional Mental Health Patient’s Right to Refuse Psychotropic Drugs*, 6 J. LEGAL MED. 107, 110 (1985)).

218. Crosby, *supra* note 95, at 1204.

219. Taylor, *supra* note 15, at 1065.

220. *Ford*, 477 U.S. at 406 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

221. See *Singleton v. Norris*, 992 S.W.2d 768 (Ark. 1999); see also *State v. Perry*, 502 So. 2d 543, 563–64 (La. 1986).

222. See *Singleton*, 992 S.W.2d at 770.

223. *Id.* at 768.

224. *State v. Perry*, 610 So. 2d 746, 752–56 (La. 1992).

225. See *Miller-Rice*, *supra* note 100, at 670.

226. See *Schwartz*, *supra* note 2, at 1A.

"[p]hysicians should not determine legal competence to be executed. When a condemned prisoner has been declared incompetent to be executed, physicians should not treat the prisoner for the purpose of restoring competence unless a commutation order is issued before treatment begins."²²⁷ The American Medical Association ("AMA") policy is: "[I]f treatment is primarily directed to restore competency to be executed, it is ethically unacceptable."²²⁸ The AMA guidelines also state: "[A] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."²²⁹ Additionally, in 1996, the World Psychiatric Association "specifically prohibited its members . . . from engaging in determinations of competency of death row inmates to be executed."²³⁰ Moreover, it was stated that "[u]nder no circumstances should psychiatrists participate in legally authorized executions nor participate in assessments of competency to be executed."²³¹ "Medical professionals [have] said anyone who takes on the job could face the loss of license to practice."²³²

On the other side of the debate is the prosecution and the law. In Arizona, prosecutors have threatened to file contempt charges against the State's Mental Hospital administrators because their refusal to medicate Maturana is in violation of their duty to treat the prisoners.²³³ However, filing contempt of court charges could force medical ethics and the law to meet head to head in a conflict that may not result in the best resolution for society. In other words, if doctors are forced to comply with medicating to execute, whether or not the doctor believes it should be required, the legal world would be imposing rules onto the medical field even though the profession has its own rules and guidelines. Thus the problem turns into a battle of conflicting established norms, between separate and distinct professional

227. AMA Policy Finder—Current Opinions of the Council on Ethical and Judicial Affairs (CEJA) E-2.06 Capital Punishment, available at http://www.ama-assn.org/apps/pf_online?f_n=browse&doc=policyfiles/CEJA/E-2.0 (last visited Feb. 4, 2002).

228. Schwartz, *supra* note 2.

229. Cobb, *supra* note 20, at A1.

230. Abraham L. Halpern, M.D., *When Physicians Participate in Capital Punishment*, May 7, 1999, available at <http://www.psych.org/pnews/99-05-07/halpern.html>.

231. *Id.*

232. *Id.* These rules pose an additional problem since this Comment asserts that only medical doctors should determine whether an inmate is competent to be executed. However, if the model statute, *infra*, is adopted, the participation of the physician would not violate rules of medical ethics because they would not be assisting or furthering the death of any person.

233. See Morello, *supra* note 1, at 4A.

bodies. Thus, “[there is] a rare clash over how far states should go in carrying out a punishment that itself has always been the subject of great moral debate.”²³⁴ Maturana’s case has brought these divergent viewpoints into conflict. Maturana’s lawyer and doctors are advocating for a change in Arizona law.²³⁵ This may be the only solution that could provide a true and meaningful remedy to a problem that is in dire need of a cure.

IV. Model Statute

With all the considerations discussed above, this Comment proposes a model statute to resolve the problems with the current treatment of death row inmates suffering from mental illness, as well as collateral tensions and issues. In urging adoption of the model statute in California and throughout the United States, this Comment also addresses concerns that may arise in connection with implementing the statute.

“The Human Rights Advocacy Committee . . . recommended that before hospital staff be required to treat the incompetent condemned, the sentence be commuted to life imprisonment; staff treatment thus would not advance the patient toward execution.”²³⁶ The following is a model statute, which seeks to implement the changes suggested by the Human Rights Advocacy Committee, and that this Comment urges California and other states to adopt, to ensure that incompetent inmates are not executed:

Any time a condemned inmate wishes to have his sanity evaluated, he is entitled to an attorney and a full hearing. Incompetence is that which is any major disconnect with reality or severe mental illness. The inmate will be evaluated by a doctor of his choice. If the defendant is found to be incompetent, the judge will order his sentence commuted to life imprisonment. After the sentence is commuted the prisoner is to be removed from death row and treated for his insanity. Should the court find that the defendant is sane, the defendant will be allowed an appeal as of right and will not be barred from subsequent requests prior to execution.²³⁷

234. Schwartz, *supra* note 38.

235. See Steckner, *supra* note 30, at A1.

236. Salguero, *supra* note 159, at 179–80.

237. To clarify, the author notes that the language of the proposed model statute is her own.

A. Implementation of the Statute

The proposed statute is geared toward protecting the rights of the condemned, and instituting the kind of justice upon which our legal system is founded. Unlike some current state statutes, this model statute allows for sanity determinations before death is imminent. It also allows for a full evidentiary hearing, similar to the type that Justice Marshall advocated for many years ago in *Ford*.²³⁸ The statute redefines “competency to execute” in order to account for the many different types of mental illness that exist, and in doing so will hopefully save those who are truly insane from execution. It offers a solution that is more compatible with a compassionate society and with treatment of ill human beings. Lastly, it does not prevent requests for a rehearing, if such requests are found necessary.

Application of this proposed law to Maturana’s case exemplifies the need for such a statute. If Maturana were evaluated under the new competency to execute standard, he would be found insane and thus able to receive treatment that would actually help improve his mental condition. He would still be incarcerated in a prison hospital but he would not be eligible for execution or be on death row. In addition, the statute adds a provision that California and other states are lacking—that inmates be evaluated by a doctor of their choice. This provision will ensure that inmates are given fair evaluations, which should result in unbiased results.²³⁹ In Maturana’s case, had he been found sane, he would still have the opportunity to re-petition the court for a sanity hearing should his condition worsen.

Part of the reasoning behind the rule in *Ford* was to protect people from the fear and pain of death without the comfort of understanding²⁴⁰ and because the execution of “a mad man is . . . a miserable spectacle, both against Law, and of extre[me] inhumanity and cruelty, and can be no example to others.”²⁴¹ These same reasons also apply to this newly proposed statute. Those who are undoubtedly mentally ill, but pass the simple “understanding one’s fate” test, may still not have an adequate grasp on reality, and the world, rendering execution unjust.

238. See *Ford*, 477 U.S. at 418.

239. See, e.g., James J. Gobert, *In Search of the Impartial Jury*, 79 J. CRIM. L. & CRIMINOLOGY, 269, 287 (1988) (stating it is “the selection of impartial jurors which insures nondiscriminatory decision making”).

240. See *Ford*, 477 U.S. at 410.

241. *Id.* at 407 (quoting Sir Edward Coke, 3 INSTITUTES 6 (6th ed. 1680)).

B. Concerns

The fears which may arise in response to the model statute are threefold. First, if California or another state were to adopt the model statute, there may be an increase in instances of malingering.²⁴² Although this is an understandable worry, physicians who review sanity issues are capable of detecting the differences between real and fake mental illnesses.²⁴³ Refusing to provide inmates with adequate procedures for fear that one could abuse the system does not comport with society's view of fairness, and it unjustly punishes those who are truly in need of protection.

A second concern is that the courts may become overloaded with hearings as a result of implementing a more liberal statute, such as the one proposed by the model statute.²⁴⁴ This argument can be brought any time a change to the penal system is recommended or suggested, however should not prohibit important changes. Additionally, the determination of sanity is a matter of life or death. When such important decisions are at hand, the law should not diminish defendants' rights because of clerical and systematic inconveniences. This argument does not serve the interests of justice nor does it seek to find the truth, both of which are important notions in American jurisprudence.

Finally, some people may feel that justice is being subverted by allowing inmates to evade the sentence that was imposed under the system of law by which we all must abide.²⁴⁵ However, this argument ignores the fact that insane inmates need help and protection. It is because of these differences and the fact that our society, through its laws, needs to act with compassion, that the United States Supreme Court held that the insane shall not be executed.²⁴⁶ However, under current statutes, our society cannot ensure that the law is being upheld because of the lack of uniformity and inherent inequalities in the system of review. The only way to ensure that *Ford* is upheld is to have

242. See BLAKISTON'S GOULD MEDICAL DICTIONARY 797 (McGraw-Hill 4th ed. 1979) (defining a malingering as "feign[ing] or exaggerat[ing] illness or incapacity in order to avoid work or other responsibilities").

243. See Harding, *supra* note 14, at 142–43.

244. See Karl Manheim, *The Business of the California Supreme Court: A Comparative Study*, 26 LOY. LA. L. REV. 1085, 1108 (1993) (noting that the "the court transacts nearly ten thousand items of business each year. These consist principally of petitions for hearing, orders[,] and case depositions."). The author also noted that there has been a "crush of death penalty appeals." *Id.* at 1129.

245. See David Mc Cord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 28–34 (1998).

246. See *Ford*, 477 U.S. at 409–10.

better, more uniform standards, and commute the sentences of those who are indeed found to be insane.

Conclusion

"[T]he Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhumane punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."²⁴⁷ The clause must also "be read with an eye toward evolving standards of decency and in the light of contemporary human knowledge."²⁴⁸ The law as it now stands is unjust. It questions the ethics and morality of the criminal justice system; it causes a conflict between medical and legal standards; and it does not offer insane inmates the protection and treatment they are entitled to.

Claude Maturana deserves to be punished for the crime that he committed. But the problems with Maturana's case are a sign that the current system is ripe for change. California and other states should adopt a standard that provides fair treatment for every human being and commutes the death sentences of the mentally insane, and thus comports with the United States Constitution.

247. Taylor, *supra* note 15, at 1047 (quoting *Furman v. Georgia*, 408 U.S. 237, 270 (1972)).

248. Crosby, *supra* note 95, at 1197 (quoting *Robinson v. California*, 370 U.S. 660, 666 (1962)).