Thus, a carrier can be made liable for damages based on the law on Human Relations,[192] the contract of common carriage,[193] or the law on quasi-delicts. There is, therefore, no need to continue to rely on the law of extraordinary diligence in every case.

Each basis of liability, however, has its respective legal qualifications. Indeed, the system of our Civil Code is like a road network of highways and streets. The use of these routes is subject to rules and regulations to ensure the safety of pedestrians as well as the motoring public. Like every road network, the Civil Code should be read and applied with a due regard for established rules to prevent traffic jams. For instance, the structured presentation of our law on Damages[194] requires specific conditions for recovery which in every case must be complied with. For this reason, one must distinguish the varying bases of the carrier's liability.

By liberally invoking the duty of the carriers to observe extraordinary diligence, our courts have breached the "rules of the road," causing "legal traffic jams," thereby muddling the theories and concepts incorporated in the Code. Effectively, the courts have amended the law, which it obviously cannot do.

Ultimately, this requires the exercise of congressional prerogative. Congress may adopt Article 1755 as proposed to be amended by this writer, or it may amend it to embody the liberal interpretation given by the our courts to the law of extraordinary diligence.

The beauty of the law lies in its dynamism. Laws can always be changed when they no longer serve the purpose for which they are passed. This power to change the law, however, lies with Congress.

[192] Civil Code, art. 19, et. seq.

[193] Id., art. 1732, et seq.

[194] Civil Code, arts. 2195-2235.

AN EXAMINATION OF SELECTED ISSUES INVOLVED IN THE EXECUTION OF INSANE DEATHROW CONVICTS

KATRINA VICENTE GOLI*

ABSTRACT

The Supreme Court affirmed the first death sentence last 1996. Aside from this, there are 281 inmates on death row at present after their convictions by the lower courts. With the growing number of death row inmates and with the courts apparently disposed to meting out death sentences whenever called for, the issue of death row convicts becoming insane after final sentence has been pronounced and while awaiting their execution becomes an important issue.

In the Philippines, commentators are of the opinion that when a death row convict becomes insane, his execution should be stayed pending his treatment at a mental facility based on Article 79 of the Revised Penal Code. According to the provision, however, once the death row convict regains his sanity, he is once again death eligible.

The provision, which deals generally with the suspension of the execution of sentences once the convict becomes insane while serving said sentence, does not seem to adequately resolve certain issues especially in the death penalty context, such as: (1) the procedure to be observed once an insanity claim is raised by or on behalf of the death row convict, as well as (2) the procedure to be observed after a death row convict is adjudged insane. Both the due process clause and the equal protection clause of the Constitution require that uniform procedures be formulated in order that those entitled to the statutory right of not being executed while insane may avail of such as well as to avoid the arbitrary, capricious, unreliable and unpredictable administration of the death penalty.

Specifically, a resolution of the first issue entails answers to the following questions: (a) is the death row convict still entitled to procedural due process; (b) if so, to what extent or degree of procedural due process is he entitled? The study concludes that the death row convict is still entitled to procedural due process and that the extent or degree of such is determined by a balancing of the limited right to life of the death row convict by virtue of his statutory right not to be executed while insane vis-a-vis the interests of the state and society in avoiding the filing of spurious insanity claims, in avoiding the delay or frustration in carrying out the death penalty, as well as minimizing fiscal and administrative costs. The study then proposes certain guidelines by discussing selected aspects of procedure in order to aid in the formulation of uniform and specific procedures to deal with such issue.

A resolution of the second issue abovementioned entails answers to the following questions: (a) if the death row convict is adjudged insane, can the state forcibly treat him in order to render him sane for execution purposes; (b) does he have the right to refuse medication;

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(c) if so, who will refuse for him, considering the fact that he is insane; (d) if he is treated and regains so much of his sanity as to be able to decide for himself as to whether or not to continue treatment, does he now have the right to refuse forcible treatment by the state; and (e) if he has the right to refuse forcible medication by the state, what happens if he refuses or, on the other hand, if he agrees to continued treatment?

The study reasons that after a death row convict is adjudged insane, the state, to be faithful to its parens patriae function, can only medicate him with the view of regaining so much of his sanity that he is able to determine for himself whether or not he desires continued treatment. At this juncture, after weighing the interests of the state in forcible medication, (i.e., its police power and parens patriae function), against the interests of the death row convict against forcible medication, (i.e., his right to liberty, right to privacy, right against cruel, inhuman and degrading punishment, right against torture and his right to equal protection), the study concludes that the death row convict has a right to refuse forcible treatment by the state.

In the course of the above analysis, the study also raises additional questions as to the reliability and predictability of the present method of treating insanity using antipsychotic drugs, concluding that the lack of precise understanding as to the effects of these drugs in general and their effects on any individual in particular, necessitates a permanent stay of execution, if the death penalty is to be applied fairly and equally.

"They go in and out, like most people with mental illness, they have crisis periods, and other periods when they can function. A lot depends on stress, bad diet, lack of medication, lack of exercise. . . . Unless you can manipulate the environment, they can only deteriorate.

Some of these people are much too crazy to help their attorneys prepare appeals. They might have been able to assist their attorneys at trial time, three years, five years, earlier, but now they are totally psychotic, irrational. It doesn't take an expert to tell that. . . We see them become catatonic, curl up in the fetal position and suck their thumbs, and the prison system gives them IV's and says they are faking insanity. Five to ten percent of the inmates go so far over the edge that we can never bring them back. We watch this happen to them."

- *In Florida, Insanity is No Defense,*
239 The Nation, 537, 555-56 (1984)

"Nothing less than life is at stake and court decisions authorizing the State to take life must be error-free as possible. We must strive to realize this objective, however elusive it may be .... Let us not for a moment forget that an accused does not cease to have rights just because of his conviction. This principle is implicit in our Constitution which recognizes that an accused, even if he belongs to a minority of one, has the right to be right, while the majority, even if overwhelming, has no right to be wrong."

- *People vs. Esparas*, promulgated August 20, 1996.
G.R. No. 120034; 260 SCRA 539

I. INTRODUCTION

A. Background of the Study

1. The Death Penalty in the Philippines

Leo Pilo Echegaray, a laborer, was found guilty of raping his 10-year old daughter. The Supreme Court affirmed his death sentence on 25 June 1996.[1] He will become the first person to be executed under Republic Act 7659,[2] entitled, "An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for that Purpose the Revised Penal Code, as Amended, Other Special Penal Laws, and for Other Purposes."

Although the 1987 Constitution suspended the death penalty, the Constitutional Commission still left it up to the legislature to reimpose the same at its discretion "for compelling reasons involving heinous crimes."[3] The result was R.A. 7659 which took effect on 1 January 1994.

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[1] People v. Echegaray, G.R. No. 117472, 25 June 1996.

[2] R.A. 7659 is a consolidation of Senate Bill No. 891 and House Bill No. 62.

[3] PHIL. CONST. art. III, §19(1): Excessive Fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua."

On 20 March 1996, President Fidel V. Ramos signed Republic Act 8177, entitled, "An Act Designating Death by Lethal Injection the Method of Carrying Out Capital Punishment, Amending for the Purpose Article 81 of the Revised Penal Code, as Amended by Section 24 of Republic Act 7659," which prescribes lethal injection in carrying out capital punishment. According to President Ramos, this method is a more humane method [as against death by electrocution] of executing those convicted under R.A. 7659.[4] R.A. 8177 amends Article 81 of the Revised Penal Code, as amended by Section 24 of R.A. 7659. Instead of the one year "waiting period" after final conviction and before execution under Section 24 of R.A. 7659,[5] Section 1 of R.A. 8177 provides:

> The death sentence shall be carried out not earlier than one year nor later than eighteen months after the judgment has become final and executory without prejudice to the exercise by the President of his executive clemency powers at all times.

The implication of the above is that at present, a death row convict will have to suffer the anticipation of his impending execution for a maximum of one and a half years. Although the purpose of the law is commendable - to give the death row convict more time to find ways to stay his execution or to apply for executive clemency[6] - the fact remains that the stress the death row convict will have to endure may work hardships upon his mental condition. As stated by Senator Lina, in his *en contra* speech during the deliberations of Senate Bill 891,"[7] the cruelty of the death penalty is the unique horror of waiting for the time of execution and the agonizing conflict between the desire to live in hope and the need to be resigned and prepare for possible imminent death."[8]

Aside from the waiting period for execution that death row convicts will have to face, the convicts have already been incarcerated for years counting the time from their arrest to their trial, the trial proper, and the period pending automatic review by the Supreme Court, uncertain as to whether or not their death sentences will be affirmed. A newspaper article recently reported that of the 282 inmates presently on death row after conviction by the lower court, 175 received the death sentence in 1996.[9] However, only one of the 282 convictions has been affirmed by the Supreme

[4] *A More Humane Imposition of Capital Punishment*, MANILA BULLETIN, March 24, 1996 (Speech of President Fidel Ramos at the Ceremonial Signing of the Lethal Injection Law in Malacanang on March 20, 1996).

[5] Section 24 of R.A. 7659 provides: "The death sentence shall be carried out not later than one (1) year after the judgment has become final."

[6] *Painless death or brutal pain?* THE SUNDAY CHRONICLE, July 28, 1996: According to House Representative Erasmo D. Damasing, the principal author of the House version of the bill that became R.A. 8177, the extended period provided for in the law is to give "the death convict all avenues that he can use in order that the injection would not proceed. . . . In other words, the death convict, after the decision of the court has become final, can count one year and a half in order to ask the President for a presidential pardon, commutation of sentence, enough time in order to ask the President for reprieve, meaning, temporary suspension."

[7] People v. Echegaray, G. R. No. 117472, June 25, 1996.

[8] I Record of the Senate, 2nd Reg. Sess., 120 (1993).

[9] *The Death Lottery*, MANILA STANDARD, December 31, 1996.

Court. Considering the rate the lower courts have been handing out death sentences in 1996, the article went on to say that the Supreme Court would have to confirm a death sentence every two calendar days just to keep up with new sentences, yet leaving the backlog of cases untouched.[10] This is an indication that prisoners who have been sentenced to death may have to wait for years before their cases are actually decided by the Supreme Court. In fact, the commander of the guards of the New Bilibid Prison, an individual in constant touch with prisoners, lamented the impact of the slow wheels of justice: "Sometimes it takes the Supreme Court 10 years to affirm a death sentence case. Because of this, many of the inmates lose their sanity.[11]

2. The Possibility of Becoming Insane while on DeathRow

The phenomenon of death row convicts who subsequently become insane while awaiting the execution of their sentences is not a new one. As early as 1950, the United States Supreme Court recognized the possibility, if not probability, of death row convicts becoming insane while awaiting execution.[12] In that case, Justice Frankfurter stated, "In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."

According to psychologists and psychiatrists, there is an interrelationship or correlation between insanity and incarceration.[13] A study estimated that after receiving the death penalty, at least fifty percent of Florida's death row convicts become insane.[14]

Some reasons cited for the possibility of death row convicts becoming insane after the finality of conviction are: (1) pre-existing mental ailments of a number of death row convicts deteriorate further because of the strain of being on death row; (2) stress associated with anticipating death at a specific time and in a known manner; (3) the very nature of being on death row increases the convict's susceptibility to becoming insane; (4) the infrequency of family visits and the burden of additional security restrictions; (5) frequent loss of support from loved ones; (6) the stress of long confinement and uncertainty while awaiting the results of appeal; (7) virtual non-existence of conditions fostering positive mental health as convicts are confined separately and are segregated from the general prison population.[15]

[10] *Id.*

[11] *Death Penalty Issue: Pro-life or pro-death?* PHILIPPINES TIMES JOURNAL, July 2, 1992.

[12] Solesbee v. Balkcom, 339 "U.S." 9 (1950).

[13] *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35 (1986); *Diagnosing and Treating "Insanity" on Death Row: Legal and Ethicsal Perspectives*, 5 BEHAVIORAL SCIENCES AND THE LAW 175 (1987); *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. JUR. PSYCHIATRY 167 (1992).

[14] *Competency for Execution: Problems in Law and Psychiatry, supra* note 13.

[15] *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TULANE L. REV. 1045 (1992); *Evaluations of Competency to be Executed*, 18 CRIM. JUST. & BEHAV. 146 (1991); *Psychiatry, Insanity, and the Death Penalty: A Note on Implementing Supreme Court Decisions*, 79 J. CRIM. L. & CRIMINOLOGY 218 (1988); *Competency for Execution: Problems in Law and Psychiatry, supra* note 13.

In *Rector vs. Bryant*,[16] Justice Marshall, dissenting, reiterated the importance of this phenomenon. To emphasize the strong likelihood that death row conditions could significantly contribute towards an increase in the number of insane death row convicts, Justice Marshall stated: "The issue in this case is not only unsettled, but is also recurring and important. The stark realities are that many death row inmates were afflicted with serious mental impairments before they committed their crimes and that many more develop such impairments during the excruciating interval between sentencing and execution."

3. Views on the Execution of Death Row Convicts who Become Insane while on DeathRow

All the forty-one states in the United States imposing the death penalty provide for the exemption of insane death row convicts from execution.[17] Twenty-six states provide express statutory exemption; four adopted the exemption in case law; seven follow discretionary exemption procedures; and four follow the common-law rule prohibiting the execution of insane persons.[18]

In *Ford vs. Wainwright*,[19] Justice Marshall, writing the five-to-four majority decision, examined various common law principles to support exempting an insane death row convict from execution, *viz.*: (1) Madness is its own punishment. The need for execution is extinguished as insanity in itself is sufficient punishment for the convict; (2) The execution of the insane does not have any retributive value. Society's demand for retribution requires that the criminal act be offset by punishment of equivalent moral quality. However, the value of capital punishment as retribution lessens if the death row convict does not possess his full mental faculties at the time of execution. The punishment becomes "lesser" than the crime committed since if insane, the death row convict does not "suffer" for committing the crime, does not "feel" the consequences of his unlawful action, and may not even be "conscious" of receiving his punishment; (3) The execution of the insane death row convict does not accomplish deterrence which is one of the principal reasons for capital punishment. The execution cannot serve as an example to others as it is merely a miserable spectacle which is inhuman and cruel. Also, offenders do not commit crimes foreseeing that they will become insane after conviction; (4) The execution of the insane death row convict deprives him of the opportunity to assist in his defense. The insane death row convict should not be executed on the basis of his inability to raise exculpatory or mitigating arguments, but should be given the opportunity to challenge his death sentence and possibly obtain a stay of execution by assisting his legal counsel; (5) Execution of the insane death row convict prevents him from making spiritual restitution before his death. The death row convict should be given an opportunity to repent, ask for forgiveness and make peace with his God, acts which he may be unable to perform if insane; (6) The execution of the insane simply offends human dignity.

[16] Rector v. Bryant, 501 "U.S." 1239 (1991).

[17] *N.B.* Appendix A of the original text containing relevant data was omitted from publication.

[18] *Id.*

[19] Ford v. Wainwright, 477 "U.S." 399 (1986).

The Ford court, in addition to common law, analyzed "objective evidence of contemporary values" in state statutes which indicate that society will not tolerate executing "one who has no capacity to come to grips with his own conscience or deity." By doing so, the Court elevated the exemption from execution of insane death row convicts to a constitutional guarantee and concluded that execution of the insane constitutes cruel and unusual punishment. The *Ford* majority concluded that under the "evolving standards of decency that mark the progress of a maturing society," the cruel and unusual punishment clause prohibits the execution of the insane.

Regardless of the specific rationale or combination of rationales on which the prohibition against the execution of insane death row convicts is based, Philippine commentators opine that the execution of insane death row convicts should be suspended under Article 79 of the Revised Penal Code.

R.A. 7659 provides for the cases where the execution of the death sentence is suspended. Section 25 of the said law thus provides:

> SEC. 25. Article 83 of the [Revised Penal] Code is hereby amended to read as follows:
>
> "ART. 83. Suspension of the execution of the death sentence. - The death sentence shall not be inflicted upon a woman while she is pregnant or within one (1) year after delivery, nor upon any person over seventy years of age. In this last case, the death sentence shall be commuted to the penalty of reclusion perpetua with the accessory penalty provided in Article 40. . . ."

Although death row convicts who become insane are apparently not included in the above enumeration, commentators[20] have expressed the view that the death sentence of convicts who become insane should also be suspended under Article 79 of the Revised Penal Code, but that they are to be executed once they recover their reason. Article 79 of the said Code provides:

> ART. 79. Suspension of the execution and service of the penalties in case of insanity. — When a convict shall become insane or an imbecile after final sentence has been pronounced, the execution of the said sentence shall be suspended only with regard to the personal penalty, the provisions of the second paragraph of circumstance number 1 of Article 12 being observed in the corresponding cases.
>
> If at any time the convict shall recover his reason, his sentence shall be executed, unless the penalty shall have prescribed in accordance with the provisions of this Code.
>
> The respective provisions of this section shall also be observed if the insanity or imbecility occurs while the convict is serving his sentence.

[20] 1RAMON C. AQUINO, THE REVISED PENAL CODE (1987); 1LUIS B. REYES, THE REVISED PENAL CODE (13th ed. 1993).

Likewise, Constitutional Commissioner Florenz Regalado, during the deliberations of the 1986 Constitutional Commission, enumerated several substantive safeguards against an unjust or an improvident imposition of the death penalty, one of which was: "If the accused is insane at the time the death penalty is to be carried out, the death penalty cannot be executed."[21]

II. OBJECTIVE OF THE STUDY

Despite the statutory right to suspension of execution when a death row convict becomes insane, no definite guidelines have been formulated as to: (1) the procedures to be followed when an insanity claim is raised; and (2) the procedures to be followed once the death row convict has been adjudged insane. The equal protection clause and the due process clause of the Constitution[22] requires that uniform procedures be formulated to ensure that those entitled to the statutory right of suspension of execution may avail of such and to prevent the arbitrary, capricious, unreliable and unpredictable administration of the death penalty. Failure to formulate such procedures undermines the ability to successfully identify the death row convicts entitled to the statutory exemption from execution.

A. Guidelines for Procedures when an Insanity Claim is Raised

According to the Constitution, a person may not be deprived of life, liberty, or property without due process of law.[23] However, a determination of the existence of an interest or right deserving procedural protection - here, the statutory right not to be executed while insane - constitutes only the first step in the due process analysis. Once the interest or right is identified, the extent of procedural protection must then be established. A balancing process weighing three factors must be employed to determine the extent or degree of procedural due process the death row convict is entitled to, namely: (1) the interest of the death row convict; (2) the State's interests as well as society's interests; and (3) the risks of an erroneous decision.[24]

B. Guidelines for Procedures after a Death Row Convict has been Adjudged Insane

Under Article 79 of the Revised Penal Code, the stay of execution is lifted and the State is once again free to proceed with the execution once the insane death row convict regains his sanity. Article 12, in relation to Article 79, provides that the court shall order the commitment of a convict adjudged insane in a hospital or asylum for treatment. Implicit in this requirement is the State's right to forcibly medicate the death row convict so as to render him sane for execution purposes. Thus, once a death row convict is adjudged insane, numerous controversies arise, such as: (1) whether or not the death row convict can refuse such medication/treatment; (2)

[21] I Record of the 1986 Constitutional Commission, 745.

[22] PHIL. CONST. art. III, §1 provides: " No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws."

[23] PHIL. CONST. art. III, § 1.

[24] *See infra* notes 41-43 and accompanying text.

how the insane death row convict can refuse such medication/treatment when he is in fact insane; (3) whether or not another person should be allowed to make a decision regarding medication/treatment on behalf of the insane death row convict; (4) whether or not the death row convict can refuse to continue with medication/treatment should he regain so much of his sanity through medication/treatment; and (5) the implications of the death row convict's acceptance/refusal of further treatment.

The issue of forcible medication is compelling and important because it once again renders the death row convict eligible for execution. The formulation of definite guidelines to arrive at a uniform set of procedures assumes importance as the failure to do so may lead to arbitrary and capricious outcomes. The United States Supreme Court in *Furman vs. Georgia*[25] forbade the arbitrary and capricious administration of the death penalty stating that such a practice is unconstitutional. Similarly, *Woodson vs. North Carolina*[26] forbids the unreliable and unpredictable administration of the death penalty. The implementation of Article 79 of the Revised Penal Code, in the absence of a uniform set of procedures, could very well result in the execution of the insane.

During the deliberations of Senate Bill 891,[27] Senator Lina in his *en contra* speech stated: "Because of the irrevocability of a death sentence once carried out, the vulnerability of judicial error and the errors of other pillars of the criminal justice system, is a drawback so significant that it cannot be ignored."[28] Senator Biazon, in the debates regarding the number of Justices of the Supreme Court needed to affirm a death sentence, stated: "I think the safeguards must be so instituted in these provisions to ensure that there is no doubt that the decision, whether or not to take a man's life, is given proper attention."[29] The Supreme Court recently held that in death penalty cases, "nothing less than life is at stake and any court decision authorizing the State to take life must be as error-free as possible."[30] The Court went on to say: "We must strive to realize this objective, however elusive it may be ..."

Well-defined and structured procedures, derived from an established set of guidelines, when applied fairly, can be utilized to identify death row convicts who should be exempted from the execution process without, however, at the same time disregarding the rights of the state and society to carry out death sentences.

The main objective of this study is therefore to formulate specific guidelines that can serve as a basis in the framing of uniform and definite procedures dealing with insane death row convicts.

[25] Furman vs. Georgia, 408 "U.S." 238 (1972): "The penalty of death... is unique in its total irrevocability."

[26] Woodson vs. North Carolina, 428 "U.S." 280 (1976).

[27] *See supra* notes 7-8 and accompanying text.

[28] *Id.*

[29] *Id.*

[30] People vs. Esparas, 260 SCRA 539 (1996).

III. SCOPE AND DELIMITATION OF THE STUDY

The study does not reflect the author's personal views on the pros and cons of the overall issue of the death penalty. The study was limited to an examination of the legal implications of selected issues arising from the implementation of the death penalty law and did not delve into medical, moral or ethical considerations of the problems and issues under consideration. Furthermore, the study was geared primarily towards the formulation of guidelines with the end in view of aiding in the development of laws Congress may heretofore pass regarding the issues raised in the study.

II. PROCEDURES IN RAISING THE INSANITY CLAIM

A. The Procedural Due Process Issue in Raising the Insanity Claim

1. THE IMPLICATION OF PROCEDURAL DUE PROCESS IN RAISING THE INSANITY CLAIM

ARTICLE III, Section 1 of the 1987 Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.

As a procedural requirement, due process relates chiefly to the mode of procedure which government agencies must follow in the enforcement and application of laws. It is a guarantee of procedural fairness.[31] Since this Constitutional provision does not make a distinction as to who and when a person is entitled to due process protection, presumably, even those who have already been convicted can avail of such guarantees, including death row convicts.[32]

A uniform set of procedures ensures that the death row convict will be able to avail of this constitutional protection in raising an insanity claim. On the other hand, the absence of uniform standards may result in the disparate treatment of insane

[31] JOAQUIN BERNAS, THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER-PRIMER 28 (2nd ed. 1992) [hereinafter BERNAS, REVIEWER-PRIMER].

[32] Colgate-Palmolive Phil., Inc. v. Gimenez, 1 SCRA 267 (1961): The Supreme Court used the statutory construction rule of *"ubi lex non distinguit nec nos distinguire debemos"* (where the law does not distinguish, neither do we distinguish); Bell v. Wolfish, 441 US 520 (1979): It is axiomatic that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison, and that they may claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty or property without due process of law."; People vs. Esparas, 260 SCRA 539 (1996): The Philippine Supreme Court, in referring to death penalty cases, held: "Let us not for a moment forget that an accused does not cease to have rights just because of his conviction. This principle is implicit in our Constitution which recognizes that an accused, even if he belongs to a minority of one has the right to be right, while the majority even if overwhelming has no right to be wrong."

death row convicts.[33] This need for fair treatment is especially compelling when a person's life is on the balance.[34] In *Ford*, the United States Supreme Court held that the procedures connected with the determination of sanity must achieve "a heightened standard of reliability" and that the procedural safeguards required in this context must closely resemble those standards employed at other stages of capital punishment proceedings.[35]

A death row convict's insanity claim entails his interest in life.[36] While it can be argued that a major portion of the death row convict's life interest has been sacrificed by his conviction and death sentence, it can be counter-argued that the death row convict retains enough of his interest in life to be granted due process protection as his residual life interest is supplemented by a statutory right - the right not to be executed while insane under Article 79 of the Revised Penal Code. In effect, as long as the death row convict remains insane, the State returns part of his forfeited interest in life and once such an entitlement to life is conferred, the State cannot deprive the insane death row convict of such entitlement without affording him some due process protection.

Having identified the existence of an interest deserving procedural protection, due process analysis requires the establishment of the extent of procedural protection.

[33] Ichong v. Hernandez, 101 Phil. 1155 (1957): The guarantees inherent in the equal protection clause clearly require that similarly situated persons be treated equally. Equal protection simply means that all persons or things similarly situated or under like circumstances and conditions must be treated alike both as to the rights conferred and the liabilities imposed.

[34] Lockett v. Ohio, 438 US 586 (1978): "Where life hangs in the balance, a fine precision must be insisted upon."; Ake v. Oklahoma, 470 US 68 (1984): "The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."

[35] Ford v. Wainwright, 477 "U.S." 399 (1986): The United States Supreme Court held that "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. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution called for no less stringent standards than those demanded in any other aspect of a capital proceeding."

[36] A death row convict's insanity claim would seem not to entail a liberty interest. First, he does not lose any additional liberty by being transferred from death row to mental hospital. Second, the prisoner can be viewed as having forfeited any liberty interest by his conviction and confinement. The death row convict's interest is not precisely a property interest either.

When the United States Supreme Court decided the case of *Ford* in 1986, the primary issue was not whether or not an insane death row convict could be executed, but rather, the procedure for determining sanity for execution. Prior to *Ford*, the Court had never required such procedures to meet constitutional procedural due process guidelines.[37] The *Ford* Court struck down a Florida statute[38] allowing the governor to determine *ex parte* a prisoner's sanity because due process required a full hearing on such issue. The plurality held that even when a state court has rendered judgment, a federal court is obliged to hold an evidentiary hearing if the state procedures are inadequate to find the facts. The Court ruled that Florida's statute violated due process in three ways, viz.: (1) Ford's attorneys were not allowed to present their own evidence on the sanity questions.[39] This is an infringement of the convict's right to be heard and increases the likelihood that probative information will be ignored in the process of psychiatric evaluation, a process notorious for disagreement even among experts.[40] (2) The death row convict was not involved in the truth-seeking process as Ford's attorneys could neither cross-examine nor impeach the governor-appointed psychiatrists.[41] Cross-examination is important since it sheds light on the background and competence of each psychiatrist and the meaning of the reports submitted by them. The Court concluded that results could be distorted without cross-examination. (3) According to the Court, the most striking defect was the assignment of the ultimate decision in the hands of the Governor of Florida, representing the executive branch. The Court held that the Governor could not be a

[37] *Constitutional Law: Extent of Procedural Due Process Required to Adjudge the Competency of a Condemned Prisoner*, 38 U. FLA. L. REV. 681 (1986).

[38] Ford v. Wainwright, 477 "U.S." 399 (1986): "FLA. STAT. ANN. Par 922.07(3) - 1982 & Supp. 1985: (1) When the Governor is informed that a person under sentence of death may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person. The Governor shall notify the psychiatrists in writing that they are to examine the convicted person to determine whether he understands the nature and effect of the death penalty and why it is to be imposed upon him. The examination of the convicted person shall take place with all three psychiatrists present at the same time. Counsel for the convicted person and the state attorney may be present at the examination. If the convicted person does not have counsel, the court that imposed the sentence shall appoint counsel to represent him. (2) After receiving the report of the commission, if the Governor decides that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him, he shall issue a warrant directing him to execute the sentence at a time designated in the warrant. (3) If the Governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon him, he shall have him committed to the state hospital for the insane. (4) When a person under sentence of death has been committed to the state hospital for the insane, he shall be kept there until the proper official of the hospital determines that he has been restored to sanity. The hospital official shall notify the Governor of his determination, and the Governor shall appoint another commission to proceed as provided in subsection(1). (5) The Governor shall allow reasonable fees to psychiatrists appointed under the provisions of this section which shall be paid by the state.

[39] Ford v. Wainwright, 477 "U.S." 399 (1986): Justice Marshall, the ponente, held that because of the frequency of dispute among the psychiatrists, the factfinder must resolve differences in opinion within the profession on the basis of the evidence offered by each party. "In all other proceedings leading to the execution of an accused, we have said that the factfinder must have before it all possible relevant information about the individual defendant whose fate it must determine."

[40] *See infra* notes 64-69 and accompanying text.

[41] Ford v. Wainwright, 477 "U.S." 399 (1986): "Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent."

neutral party as he was, a "commander of the State's corps of prosecutors," in charge of the process which results in the death sentence and has an interest in enforcing said sentences.

Despite its findings, however, the *Ford* Court failed to formulate specific procedures that would meet constitutional due process standards and left the decision as to the minimum procedures to the different states as long as those procedures cured the constitutional defects in Florida's statute at issue in *Ford*. Apparently, while the Court recognized that a full and fair hearing includes the right to present evidence, the right to cross-examine, and the right to have a neutral decision-maker, several major questions were left unresolved, such as: the degree of evidence required to create a right to a competency hearing; who may raise the insanity claim; the constitutionality of a state-appointed panel of psychiatrists to determine the insanity claim; and under what procedures the validity of the insanity claim can be determined.[42]

In the Philippines, Article 79 of the Revised Penal Code merely provides that in cases where a convict becomes insane after final sentence has been pronounced or while the convict is serving his sentence, " the execution of said sentence shall be suspended only with regard to the personal penalty, the provisions of the second paragraph of circumstance number 1 of Article 12 being observed in the corresponding cases ..." The second paragraph of number 1 of Article 12 provides that:

> When the imbecile or an insane person has committed an act which the law defines as a felony (*delito*), the *court* shall order his confinement in one of the hospitals or asylums established for persons thus afflicted, which he shall not be permitted to leave without first obtaining the permission of the same court. (emphasis supplied)

The above provision categorically states that it is the court which shall pass judgment on the insanity claim. However, as in the *Ford* decision, the extent or degree of procedural due process to be accorded the death row convict has not been specifically addressed. The argument that a death row convict is entitled to a full-blown trial every time he raises an insanity claim disregards the State's interest in minimizing fiscal and administrative burdens and carrying out death sentences. To prevent the death row convict from raising an insanity claim each time his execution date nears, the degree of procedural due process the death row convict who claims insanity is entitled to must be established.

In determining the extent of procedural protection, the United States Supreme Court in *Mathews vs. Eldridge*[43] employed a balancing process weighing three distinct factors: (1) the private interest that will be affected by the state action; (2) the State interest in limiting the fiscal and administrative burdens of additional procedural safeguards; and (3) the probable effect such safeguards will have on reducing the

[42] *Insanity of the Condemned*, 88 YALE L. J. 532 (1979); *Ford v. Wainwright: Eighth Amendment Prohibits Execution of the Insane*, 38 MERCER L. REV. 949 (1987); *Restoration of Competency for Execution: Furiosus Solo Furore Punitor*, 44 SW. L. J. 1191 (1990).

[43] Mathews v. Eldridge, 424 "U.S." 319 (1976).

risk of erroneous decisions. The necessity of balancing the aforementioned factors was based on a recognition of the inverse relationship between private and State interests, i.e., due process protections will generally be more extensive if private interest is considerable, the risk of error great, or the state interest attenuated; and vice-versa. While the minimum requirements of procedural due process are notice and a hearing,[44] the form and timing of these procedures must also be determined via a balancing process.[45]

B. The Extent of Procedural Due Process in Raising the Insanity Claim

Any attempt to develop guidelines defining the extent and/or degree of procedural due process to be accorded a death row convict who raises an insanity claim should be based on a balancing of the interests of the death row convict, of the State's and society.

1. THE DEATH ROW CONVICT'S INTEREST

A death row convict has a fundamental interest in avoiding the death penalty: life itself. The United States Supreme Court in *Gardner vs. Florida*[46] acknowledged that the death penalty is unique because of its severity and finality. In *Woodson vs. North Carolina*,[47] the same Court held: "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference there is a correlative difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." In *Gregg vs. Georgia*,[48] the Court stated: "When a defendant's life is at stake, the court has been particularly sensitive to insure that every safeguard is observed." In *People vs. Esparas*,[49] the Philippine Supreme Court held:

> There is more wisdom in our existing jurisprudence mandating our review of all death penalty cases, regardless of the wish of the convict and regardless of the will of the court. Nothing less than life is at stake and any court decision authorizing the State to take life must be as error-free as possible. We must strive to realize this objective, however elusive it may be, and our efforts must not depend on whether an appellant has withdrawn or has escaped . . . Let us not for a moment forget that an accused does not cease to have rights just because of his conviction. This principle is implicit in our Constitution which recognizes that an accused, even if he belongs to a minority of one, has the right to be right, while the majority even if overwhelming, has no right to be wrong.

[44] Ynot v. Intermediate Appellate Court, 148 SCRA 659, 668 (1987): The minimum requirements of due process which are notice and hearing may not, generally speaking, be dispensed with because they are intended as a safeguard against official arbitrariness. It has to be so if the rights of every person are to be secured beyond the reach of officials who, out of mistaken zeal or plain arrogance, would degrade the due process clause into a worn and empty catchword.

[45] *Id.* at 659-669: This is not to say that notice and hearing are imperative in every case for, to be sure, there are a number of admitted exceptions. In such instances previous judicial hearing may be ommitted without violation of due process in view of the nature of the property involved or the urgency of the need to protect the general welfare from a clear and present danger.

[46] Gardner v. Florida, 430 "U.S." 349 (1977).

[47] Woodson v. North Carolina, 428 "U.S." 280 (1976).

[48] Gregg vs. Georgia, 428 "U.S." 153 (1976).

[49] People v. Esparas, 260 SCRA 539 (1996).

2. INTERESTS OF THE STATE AND SOCIETY

a. Interest Against the Filing of Spurious Claims

In his dissenting opinion in *Ford*, Justice Rehnquist noted that Ford was accorded a full trial on the issued of his guilt and penalty and that "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." Justice Rehnquist argued that such spurious claims provide a means by which a death row convict may escape the ends of the judicial process.

b. Interest Against Delay and Frustration in Carrying Out the Death Sentence

In addition to the possibility that spurious claims may be filed, the possible delay in carrying out the death sentence frustrates the power of the state to punish convicts. The process of execution may become interminable should full procedural due process rights be granted the death row convict.

Before *Ford*, only three United States Supreme Court decisions addressed the issue of the execution of insane death row convicts:[50] (1) *Nobles vs. Georgia*;[51] (2) *Solesbee vs. Balkcom*,[52] decided fifty-three years later; and (3) *Caratativo vs. California*.[53]

Nobles was decided in 1897. It was the first case wherein the United States Supreme Court considered the execution of insane death row convicts. In this case, the accused claimed a right to trial by jury to decide present sanity. The Court noted that a long and detailed proceeding would be unpracticable since a death row convict could delay execution indefinitely by repeatedly raising the insanity issue. The Court held that: "If it were true that at common law a suggestion of insanity after sentence, created on the part of a convict an absolute right to a trial of this issue, it would be wholly at the will of a convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after

[50] *Constitutional Law: Extent of Procedural Due Process Required to Adjudge the Competency of a Condemned Prisoner*, 38 U. FLA. L. REV. 681 (1986).

[51] Nobles v. Georgia, 168 "U.S." 398 (1897).

[52] Solesbee v. Balkcom, 339 "U.S." 9 (1950).

[53] Caratativo v. California, 357 "U.S." 549 (1958).

suggestion of insanity, to be followed by trial upon trial." Since the issue to be decided upon is *present sanity*, prior findings of sanity would not be conclusive if the issue is raised repeatedly. This could effectively prevent the imposition of the death sentence resulting in the complete frustration of the State's ability to impose the capital punishment.

In *Solesbee*, the Court, recognizing that full adversarial hearings would result in considerable delay of execution, held that the State was under no obligation to provide a hearing. The Court reasoned: "A person legally convicted and sentenced to death had no statutory constitutional right to a judicially conducted or supervised inquisition or trial on the question of insanity subsequent to sentence." The Court held that due process had not been offended because "society must have the power to try, convict and execute sentences."

The Court in *Caratativo* held: "It is a legitimate consideration to take into account that an adversary proceeding on the issue of probable cause of insanity might open the door to interminable delaying maneuvers in capital cases."

In *Ford*, Justice Powell, concurring and dissenting, argued for a less elaborate procedure to determine sanity. He said that: "the State's substantial and legitimate interest in taking Ford's life as punishment for his crime" precludes application of the same scrutiny level used in determining whether an individual will be executed at all. Justice O' Connor, in an opinion joined by Justice White, concurred in part and dissented in part. Regarding the extent to which due process should be accorded, she noted that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly." Justice Rehnquist, dissenting, addressed the issue of finality in the criminal process, stating that any application of the due process clause "needlessly complicates and postpones still further any finality in this area of the law."

c. Interest Against Costs

In *Ford*, Justice Powell, concurring and dissenting, recognized that formal adversarial hearings would impose a burden on the state's administrative system. It cannot be denied that the implementation of the rule against executing insane death row convicts imposes substantial costs upon the judicial system, more so if the resolution of insanity claims require very elaborate procedures. Another relevant issue to be considered is the right of indigent death row convicts claiming insanity to court-appointed psychiatrist.

C. Issues Involved in the Development of Guidelines for the Raising of an Insanity Claim

Having recognized the implications and significance of balancing the conflicting interests of the death row convict, the State and society in the determination of the degree or extent of procedural due process a death row convict claiming insanity is entitled to, attention can now be focused on the issues that should be considered in framing guidelines on the procedures in raising an insanity claim.

1. WHO MAY RAISE THE INSANITY CLAIM

A majority of the states in the United States permit only the warden or the prison official having custody of the death row convict to raise the initial insanity claim.[54] However, the absence of the death row convict's right to raise the claim on his own behalf invites an arbitrary decision. The unreviewable discretion awarded the warden or custodial personnel raises the spectre of depriving the death row convict of minimal due process protection, especially in the absence of mandatory procedures requiring the warden/custodian to initiate the insanity issue when conditions and circumstances so warrant.

The right to raise the claim is of paramount importance to the death row convict. The State's interest in reducing costs and eliminating delay in the execution of the death sentence is outweighed by the risk of erroneously depriving the death row convict of his private interest if raising the insanity claim is left to the warden/custodial personnel.

The death row convict, especially if indigent, should therefore be provided with counsel for the "waiting period" after finality of conviction[55] and before his execution date.[56] The assistance of counsel over the entire death row period provides the insane death row convict with the opportunity and capability to initiate the inquiry.

Since an automatic procedure of period sanity determination prior to the execution of death row convicts may prove to be too burdensome, the appointment of counsel to consider each death row convict's need to claim insanity may prove to be relatively more effective. By appointing counsel, the State can place responsibility for frivolous and dilatory claims upon both the attorney and client, thus addressing the concerns of the State regarding spurious claims and delays in carrying out the death sentence.

2. NOTICE

In addition to a hearing, one of the minimum requirements of procedural due process is notice.[57] The purpose of notice in an insanity determination context is to

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[54] *Competency for Execution: Problems in Law and Psychiatry, supra* note 13. Overwhelmingly, the warden, sheriff, or prison superintendent is the initiator and initial evaluator of the claim (Arizona, Arkansas, California, Connecticut, Kansas, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, South Carolina, Utah, and Wyoming); two states name the court or judge (Alabama and Illinois); two states name the governor (Florida and Georgia); and in many states it is simply unclear (Delaware, Indiana, Maryland, Massachusetts, Montana, New York, and Virginia). In most jurisdictions, the question is unsettled as to whether mandamus will lie against a reviewing party who refuses to pursue the claim.

[55] Under R.A. 8177, the maximum `waiting period' before execution and after finality of conviction is one and a half years or eighteen months.

[56] Of course, if the death row convict is able to employ the services of his own counsel, he should be allowed to do so.

[57] Ynot v. Intermediate Appellate Court, 148 SCRA 659, 668.

provide the death row convict with the opportunity to prepare for the proceeding by informing him of the nature of the procedure about to take place and the time frame in which it will take place.

Although the Philippine Supreme Court has held that notice and hearing may be dispensed with, the justification for such was the immediacy of the problem sought to be corrected and the need to correct it.[58] There is no apparent urgency to justify dispensing with notice in the case of an insane death row convict since he is confined. Of far greater importance is the issue of life or death as a judgment in the convict's favor implies a stay of execution.

If the death row convict is, in fact, insane, however, the usual acts of notice may be insufficient because the convict may be unable to comprehend the meaning of the notice. To resolve such a situation where it can be argued that no notice in fact ever occurred, again justifies the appointment of counsel to represent the convict immediately after conviction up to his execution. Any notice can then be sent to the death row convict's counsel.

3. APPROPRIATE FORUM TO RESOLVE THE INSANITY CLAIM

Article 12 of the Revised Penal Code expressly states that it is a court which is empowered to resolve an insanity claim. However, a balancing of the death row convict's interest viz-a-viz the State's and society's interests necessitates an examination of the various proposals suggested as to the forum most appropriate to resolve the insanity claim.

Most states in the United States presently use variations of three general types of hearings, viz.: (a) discretionary review by one individual; (b) examination by a panel of medical experts; or (c) review by a court.[59]

a. *Discretionary Review By One Individual*

Most states in the United States permit a hearing on a death row convict's insanity claim only at the discretion of a warden or state administrator such as the state governor.[60] While such a procedure has the advantage of minimizing the state's administrative burden and expense, it invites arbitrary decision-making, increasing the potential for error and arbitrariness, thus depriving the death row convict of minimal due process protection. Reliance on the authority of a single administrator may, advertently or inadvertently, diminish the possibility that the death row convict's insanity claim will be objectively evaluated. For example, the warden or state administrator may possess an institutional bias, being an ongoing participant in the prison system.

[58] *Id.* at 669.

[59] *Competency for Execution: Problems in Law and Psychiatry, supra* note 13. In four of the sixteen states providing for psychiatric or medical examinations, the examining body is the ultimate arbiter of competency (Connecticut, Delaware, Indiana, and South Carolina).

[60] *Id.*

In *Javier vs. Commission on Elections*,[61] the necessity of impartiality was described thus:

> This Court has repeatedly and consistently demanded 'the cold neutrality of an impartial judge' as the indispensable imperative of due process. To bolster that requirement, we have held that the judge must not only be impartial but must also appear to be impartial as an added assurance to the parties that his decision will be just . . . There cannot be equal justice where a suitor approaches a court already committed to the other party and with a judgment made and waiting only to be formalized after the litigants shall have undergone the charade of a formal hearing.

While it may be true that the power to grant reprieves, commutations, and pardons has been left to the sole prerogative of the President in our jurisdiction,[62] the exercise of such power cannot be invoked in exempting insane death row convicts from execution. While the grant of executing clemency in any form is a privilege conferred upon the convict, it should be remembered that the exemption from execution of insane death row convicts is *a statutory right*. Therefore, to ensure availment of such right by insane death row convicts, the determination of insanity should not be left to the sole discretion of the Chief Executive.

Although the United States Supreme Court held in *Nobles, Solesbee* and *Caratativo* that the grant of exemption from execution is equivalent to executive clemency, and therefore should be made by the state governor, those cases were decided in times when the development of the concept of due process was not yet extensive. In fact, in the later case of *Ford*, decided in 1986, the Court labeled the determination of sanity by the governor as the "most striking defect" of the Florida statute in question.

b. *Hearing Before a Panel of Medical Experts*

Another type of hearing in use is the conduct of the inquiry before a panel of psychiatric experts since the only issue to be resolved is the death row convict's present sanity. In *Ford*, Justice Powell argued that Florida's statute was deficient in not allowing Ford a chance to present evidence on his own behalf, but stated that:

> My view is that a constitutionally acceptable procedure may be far less formal than a trial. The State should provide an impartial officer on board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.

[61] Javier v. Comelec, 144 SCRA 194.

[62] PHIL. CONST. art. VII, §19(1) provides: "Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment ...."

According therefore to Justice Powell, an impartial officer or committee that receives evidence and arguments from a death row convict's counsel would provide sufficient due process protection.[63]

The disadvantage of this type of hearing lies in the inherent imprecision of psychiatric judgments. Psychiatric evaluations have been described as calling for "basically subjective judgment"[64] and as representing "at best a hazardous guess however conscientious."[65] Psychiatry is "not. . . an exact science,"[66] but rather a field of "subtleties and nuances."[67] Its practitioners often deal with "elusive and deceptive symptoms."[68] Thus, psychiatrists "disagree widely and frequently"[69] when called upon to participate in legal proceedings.

While it is generally acknowledged that a panel of psychiatrists can best analyze the medical aspects of the death row convict's sanity, the panel cannot be expected to arrive at legal conclusions, i.e., whether or not the death row convict is insane for purposes of non-execution.[70] Insanity in the capital punishment context does not

[63] Ford v. Wainwright, 477 "U.S." 399 (1986): Justice Powell, concurring in part and concurring in the judgment, argued that the requirement of due process need not be as involved as those suggested in the plurality opinion, enumerating three reasons why less process is mandated. First, the insanity issue arises only after a prisoner has been validly convicted and sentenced to death. Second, because Ford has already been adjudged competent to stand trial, the court can presume that he remains sane shortly thereafter at the sanity hearing. And third, the adversarial procedures may not be the best means of determining the subjective medical issue of a prisoner's sanity.

[64] *Id.*

[65] Solesbee v. Balkom, 339 "U.S." 9 (1950): Frankfurter, J., dissenting.

[66] Ake v. Oklahoma, 470 "U.S." 68 (1984).

[67] Addington v. Texas, 441 "U.S." 418 (1979).

[68] Solesbee v. Balkom, 339 "U.S." 9 (1950).

[69] Ake v. Oklahoma, 470 "U.S." 68 (1984): "Psychiatrists disagree widely and frequently on what constitutes mental illness... there is no single, accurate psychiatric conclusion on legal insanity in a given case."

[70] The standards of sanity for execution in the different states of the United States are varied and problematic in their possible interpretations; *See* Appendix A; Ford v. Wainwright, 477 "U.S." 399 (1986). In Ford, the United States Supreme Court failed to formulate a standard for defining sanity for execution purposes. In his concurring opinion, however, Justice Powell attempted to define standards relevant to determining sanity for execution purposes, thus: (1) the prisoner must be aware of the punishment he is about to suffer; and (2) the prisoner must understand the reasons why death is to be inflicted.; ABA Criminal Justice Mental Health Standards, August 1987; *Evaluations of Competency To Be Executed*, 18 CRIMINAL JUSTICE & BEHAVIOR 146 (1991); *Involuntarily Medicating Condemned Incompetents for the Purpose of Rendering Them Sane and Thereby Subject to Exerution*, 70 WASHINGTON UNIVERSITY LAW QUARTERLY 1229 (1992). Other commentators, however, including the American Bar Association, have suggested that in addition to the standard advanced by Justice Powell, it be required that the death row convict exhibit sufficient understanding to recognize and comprehend any existing fact which might render his punishment unjust or unlawful, and he must show the intelligence necessary to convey such information to his attorney or the court.; *Id.* This additional requirement is based on the premise that the death row convict might be able to inform his attorney of the existence of facts or evidence not discovered previously which could lead to an appeal or stay of execution.; *Execution of the "Artificially Incompetent": Cruel and Unusual?*, *supra* note 15, on the other hand, would adopt the definition of insanity utilized in other stages of the criminal process, i.e., time of the commission of the offense, time of arraignment, time of trial, time of appeal. However, it must not be forgotten that in exempting the insane in each stage, the underlying rationales considerably differ as well as the fact that the death row convict has already been convicted by final judgment. Therefore an analysis of the different justifications for exempting the insane individual in each stage is called for if the formulation of the definition of insanity is to be taken from any of the said stages.

necessarily mean the same thing as psychosis or mental illness generally.[71] Questions such as competency to proceed, insanity, and sanity for execution are ultimately moral-legal ones that should be decided by legal (not psychological) decision makers.[72]

Moreover, since psychiatrists' opinions may tend to exhibit a bias toward institutionalization,[73] the state's right to impose the death sentence could be frustrated. Other sources of bias may stem from the psychiatrist's personal bias for or against the death penalty or from whoever hired the psychiatrist to resolve the insanity claim. The possibility of such biases prejudice the neutrality and impartiality of the resolution of the insanity claim.

c. Review by a Court

To ensure that a death row convict's due process rights are upheld, a judicial inquiry is considered by many as the best alternative for a number of reasons, to wit: (1) it provides a opportunity for the benefits of the adversarial process;[74] (2) it is the most appropriate forum to resolve the legal, and not medical, issue of the death row convict's present sanity;[75] and (3) judicial supervision may decrease the potential for error in a psychiatric examination.

In *Addington vs. Texas*,[76] the United States Supreme Court noted that psychiatric diagnoses are subject to a substantial degree of uncertainty.[77] Psychiatrists often tend to err on the side of medical caution by admitting persons in close cases, thus allowing a substantial risk of unreliability. Judicial supervision of any psychiatric examination decreases the potential for error as the responsibility for the final decision with respect to the legal questions rests in the hands of a judge. In fact, both the American Psychological Association and the American Psychiatric Association have concluded that the decision on the determination of sanity should be made by the court and that an adversarial system of expert witnesses is essential to fundamental fairness.[78]

[71] *Performing "Competency to be Executed" Evaluations: A Psycholegal Analysis for Preventing the Execution of the Insane*, 67 NEB. L. REV. 719 (1988).

[72] *Diagnosing and Treating "Insanity" On Death Row: Legal and Ethical Perspectives*, 5 BEHAVIORAL SCIENCES AND THE LAW 175 (1987).

[73] *Ford v. Wainwright: The Eighth Amendment, Due Process and Insanity on Death Row*, 89 N. ILL. U. L. REV. 89 (1986).

[74] *Id.*

[75] *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980).

[76] Addington v. Texas, 441 "U.S." 418 (1979).

[77] *See infra* notes 64-69 and accompanying text.

[78] ABA Criminal Justice Mental Health Standards, August 1987.

Because these benefits outweigh any administrative or fiscal benefit derived from a non-judicial forum, a judicial hearing should be required.[79] In *Ford*, the United States Supreme Court held that the determination of a death row convict's sanity requires "no less stringent standards that those demanded in any other aspect of a capital proceeding, and therefore, the district court must grant a hearing *de novo* on the question of sanity for execution purposes."

Furthermore, a more stringent forum for the sanity determination will also be in the best interest of the state as a finding of insanity could mean a stay of the death row convict's execution. The State, therefore, is also entitled to a stricter forum in order to ensure that its right to carry out the death sentence, without, however, violating the statutory right of insane death row convicts to suspension of execution, is not frustrated.

4. CROSS-EXAMINATION

A further issue in procedures for sanity determination is whether or not, and to what degree, the psychiatric evaluation is to be adversarial. Justice Powell, disagreeing with the majority in *Ford*, argued that ordinary adversarial procedures, including live testimony, cross-examination, and oral argument may actually hinder the reliable determination of sanity. Justice Powell believed that the submission of written evidence and argument would be satisfactory. Justice O' Connor, in a similar vein, would merely require the submission of written argument, rather than oral advocacy or cross-examination.

The Philippine Supreme Court has also held in a number of cases,[80] that formal or trial-type proceedings are not always required by the due process clause. "To be heard" does not only mean verbal arguments in court; one may be heard also through pleadings. There is no denial of procedural due process where the opportunity to be heard, either through oral arguments or pleadings, is accorded.

[79] In considering the factors significant to the determinations of a standard of sanity for execution purposes, it must be noted that the Ford Court appears to have envisioned the exemption from execution as applying to situations where a death row convict's mental disability is relatively severe. Ford's mental capacity disintegrated to such a degree that he was hearing voices, thought that his execution and others would not be carried out, and that some outside force was attempting to sexually molest his female relatives. The severity, magnitude and nature of these symptoms, as manifestations of his mental ailment, support the conclusion that the Ford Court contemplated that in order for a mental order to trigger the protection, it must be substantial or significant. Therefore, the death row convict, to be entitled to the exemption from execution, must suffer from a severe mental impairment. It should then be considered that raising the level of the standard or definition of sanity for execution purposes could very well also be a deterrent to the filing of spurious and multiple claims before the court, as well as addressing the state interest in reducing fiscal and administrative costs in said sanity determination.

[80] Yap Say v. Intermediate Appellate Court, 159 SCRA 325 (1988); Zaldivar v. Gonzales, 166 SCRA 316 (1988); Llora Motors, Inc. v. Drilon, 179 SCRA 175 (1989).

The *Ford* plurality held that death row convicts must have the ability to participate in insanity determination proceedings. The Court held: "In all other proceedings leading to the execution of an accused, we have said that the factfinder must have before it all possible relevant information about the individual defendant whose fate it must determine." Justice Marshall (*ponente*) stated: "Because of the frequency of dispute among psychiatrists, the factfinder must resolve differences in opinion within the profession on the basis of the evidence offered by each party." The plurality emphasized the need for the death row convict to be heard in view of the need for reliability in capital proceedings and the inconclusive nature of psychiatric evaluation. The Court also stated that the death row convict should have the opportunity to challenge or impeach the state-appointed psychiatrists. The Court held: "Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent." The Court stated further that: "cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[81]

In *Gardner vs. Florida*,[82] the Court held that a convicted murderer was entitled to certain procedural due process rights at a sentence hearing. The Court held that the state procedure which did not give the defendant an opportunity to respond to a certain confidential report did not meet due process requirements. The Court recognized that the death row convict's interest in avoiding the death penalty outweighs the state's administrative interests in preventing the death row convict from reviewing all the information at his sentencing hearing. The Court reasoned that adversarial debate is paramount in the truth-seeking process. Any state procedure which disallows a death row convict to challenge all the evidence at a sentencing hearing does not comply with due process requirements.

Since psychiatrists may have opposing opinions as to the sanity of the death row convict,[83] it is imperative that the cross-examination of psychiatrists, both state-appointed as well as those hired by the death row convict, should be allowed. Acknowledging that psychiatry is not an exact science, the Court reasoned that contrasting expert testimony enables the decision-maker to make informed and more accurate findings.

A related question that should be considered is whether or not indigent death row convicts are entitled to court-appointed psychiatrists. In *Ake vs. Oklahoma*,[84] the Court held that an indigent defendant with a preliminary showing of insanity, was

Ford v. Wainwright, 477 US 399 (1986): "The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."

[82] Gardner v. Florida, 430 "U.S." 349 (1977).

[83] *See supra* notes 64-69 and accompanying text.

[84] Ake v. Oklahoma, 470 "U.S." 68 (1984): "The private interest in the accuracy of a criminal proceeding places an individual's life or liberty at risk is almost uniquely compelling."

entitled to the assistance of a state-provided psychiatrist at the capital sentencing stage if he could not otherwise afford one. The Court held that due process requires that an indigent death row convict, claiming insanity, have access to psychiatric assistance. Recognizing the state's relatively minor financial interest in not providing psychiatric assistance, the Court emphasized the high risk of error when only one party supplies psychiatric evidence.

5. DEGREE OF EVIDENCE REQUIRED TO CREATE A RIGHT TO A HEARING WHEN AN INSANITY CLAIM IS RAISED

The death row convict's insanity claim is peculiar in that, upon a finding of sanity, he may raise the insanity issue repeatedly. If a death row convict has an unlimited right to the postponement of execution due to insanity, the process of execution will be interminable and the State's ability to impose capital punishment will be nullified.

To prevent the system from being thus manipulated, the process must be designed in such a manner so as to protect the rights of death row convicts and yet allow the State to carry out capital punishment. Any compromise between the convict's and state's interests should be at the expense of the repeating claimant, i.e., the death row convict, since it is the death row convict who insists upon repeated claims and subsequent hearings, causing delay and expense. An analysis, therefore, of due process at a first hearing should be considered before deciding on the safeguards that should be in place in a more expeditious system dealing with subsequent claims.

a. First Hearing

The standard adopted to determine the validity of an insanity claim must be defined. A low standard would lessen the discretion of those determining whether a trial is necessary and safeguards the insane death row convict's right to be heard. A high standard, on the other hand, could result in the summary rejection of a substantial number of meritorious insanity claims. Thus, the higher the standard, the greater the probability of mistakenly rejecting valid insanity claims.

The death row convict should therefore be guaranteed at least one hearing upon the mere suggestion of insanity, considering that a convict, sane or insane, if executed, cannot be resurrected. The initial petition would only have to allege that the death row convict is suspected of being insane. While the requirement of at least one hearing in every case involving insanity claims increases administrative costs, the life interest of the death row convict coupled with the high risk of error in utilizing an extremely high standard for screening claims, substantially outweighs the administrative argument.[85]

[85] *See supra* note 79. Moreover, the requirement that a 'severe' impairment exist before a death row convict can proceed should work to screen out meritless and dilatory claims as death convicts suffering from minor psychological disorders will automatically be excluded. This should function as an initial filter for claims that are advanced by those feigning insanity.

Perhaps the best counter-argument to those who insist upon the potential for delays in executions was expressed by Justice Frankfurter, dissenting, in *Caratativo*:

> It is beside the point that the claim may turn out not to be meritorious. It is beside the point that delay in the enforcement of the law may be entailed. . . if life hangs in the balance, it is far greater in importance to society, in light of the sad history of its denial, than inconvenience in the execution of the law. . . how much more so when the difference is between life and death.

A remedy to deter the filing of frivolous and meritless petition is the imposition of sanctions on both the attorney and the client, i.e., the death row convict. A possible sanction for the death row convict is the forfeiture of all chances for executive clemency and/or the inadmissibility of subsequent insanity claims that may be raised in the future.

b. Subsequent Insanity Claims

A balance between the state's interest in preventing the death row convict from abusing insanity claims to delay execution and the insane death row convict's equally strong due process interest must be struck in formulating guidelines for hearing subsequent insanity claims. Since the State's interest increases each time the execution is delayed, subsequent insanity claims must necessarily be dealt with in a manner that is less burdensome to the State. Such a procedure should not only hasten the processing of claims, but should also diminish the death row convict's incentive to claim insanity in the first instance when such claim has no merit.[86]

Once the State has provided one full hearing on the death row convict's insanity claim, his right to procedural protection diminishes and the state interest in expediting execution becomes more substantial. Hence, subsequent claims should be reviewed under a less burdensome system.

Subsequent claims should rely on the submission of position papers by the parties concerned, together with the affidavits of their witnesses, as well as counter-affidavits. The court then resolves the insanity based on the pleadings submitted by the parties. This procedure seems the best alternative as the constitutional requirement of due process is still met[87] and more importantly, the filing of spurious claims minimized. An awareness of the less burdensome procedure in subsequent hearings will serve to prevent the death row convict's counsel from filing an initial claim if he is not certain that his client is really insane. At the same time, state interest in avoiding delays and in minimizing fiscal and administrative burdens presented by repeated claims of insanity can be safeguarded.

[86] *Ford v. Wainwright: The Eighth Amendment, Due Process and Insanity on Death Row*, 89 N. ILL. U. L. REV. 89 (1986): While it may be true that a death row convict is desperate and may resort to any avenue in order to delay execution, an attorney who is not only responsible for frivolous claims but who may put his client in a less advantageous position when the client later actually becomes insane will likely counsel the client to forego raising the issue until it is reasonably thought to have some merit.

[87] *See supra* note 80 and accompanying text.

III. PROCEDURE AFTER A DEATH ROW CONVICT IS ADJUDGED INSANE

A. Introduction

Article 12 in relation to Article 79 of the Revised Penal Code states that once a convict is adjudged insane, the court should "order his confinement in one of the hospitals or asylums established for persons thus afflicted" for treatment of his mental affliction. Clearly, this treatment will have to be performed whether or not the insane death row convict consents because as he is insane, there can be no way of ascertaining his decision regarding medical treatment of his mental ailment.[88] While it may be argued that there may be a disparity between the concepts of insanity for execution and insanity to make treatment decisions, it is also probably true that most patients whose mental states satisfy the standard of insanity for non-execution are also incapable of making an informal choice about treatment and its consequences.[89] While the due process clause of the Constitution guarantees a person's right to choose whether or not to undergo treatment,[90] a person without autonomy or the capacity for self-determination cannot exercise such a right.[91]

Suggestions have been forwarded that another person (e.g., his attorney, a guardian or next-of-kin) be empowered to make the decision as to whether or not the insane death row convict should be subjected to medical treatment. It can, however, be argued, that said persons are not in a position to ascertain the decision of the insane death row convict. They can, at best, only surmise the decision the convict would arrive at if he were sane. The possibility of a conflict of interest between the death row convict and the surrogate decision-maker likewise arises. Surrogate decision makers may base their actions upon their own personal or religious beliefs/convictions or may be influenced by their perceptions of death. In effect, decisions are arrived at on a personal level rather than on behalf of the insane death row convict. The decision as to whether the death row convict would rather be treated and face execution or whether he would want to suffer his insanity and avoid execution is clearly a personal decision as either choice has severe consequences on the death row convict's life.[92]

Furthermore, the State has a duty to treat insane death row convicts. Under its *parens patriae* function, the State has a compelling interest in providing treatment to

[88] Moreover, in making a decision to accept treatment, a person is essentially entering into a contract with the treating physician. Under Article 1327 of the New Civil Code, however, insane persons cannot give consent to a contract.

[89] *Evaluation of and Treatment to Competency to be Executed: A National Survey and An Analysis*, 16 THE JOURNAL OF PSYCHIATRY AND LAW 67 (1988).

[90] *See infra* notes 138-156 and accompanying text.

[91] *Developments - Medical Technology and the Law*, 103 HARV. L. REV. 1520 (1990).

[92] *See infra* note 145. If the death row convict refuses medication, he will have to live out his insanity. On the other hand, if he accepts medication, he will have to suffer the side effects inherent in the treatment.

further the best interests of death row convicts who are so mentally impaired that they are unable to participate meaningfully in treatment decisions[93] in the belief that such treatment will be in the convict's best interests. The *parens patriae* power can thus be invoked to justify forced medication of those who are incompetent to participate in treatment decisions.

Washington vs. Harper[94] dealt with the issue of whether or not the State can forcibly medicate a mentally ill prisoner who was not on death row. Harper refused to continue taking medication only after an initial period of voluntary antipsychotic drug therapy.[95] *Perry vs. Louisiana*[96] was the first case which dealt with the issue of whether or not the state can forcibly medicate an insane death row convict to render him sane for execution. Perry initially underwent treatment voluntarily, but subsequently decided that he wanted to terminate treatment. Since the state insisted on medicating him, the issue of forcible medication arose. In both cases, Perry and Harper themselves made the decision to stop accepting treatment while under the effects of the treatment itself.

Decision-making, which should include the ability to properly appreciate the ramifications of any decision, cannot be expected to originate from a death row convict who has been adjudged insane. Therefore, instead of treating such insane death row convict for the purpose of rendering him sane for execution, he should be treated with the end in view of enabling him to personally decide whether or not to continue medical treatment. By taking this approach, the State will still be able to perform its *parens patriae* duty to treat those who cannot take care of themselves.

If, as in the case of Perry, the death row convict "regains" so much of his sanity as to make a meaningful decision regarding the continuation of his treatment, the death row convict should be allowed to make such a decision. The issue of forcible medication on the part of the state arises when the death row convict decides that he does not wish to continue with his treatment. The question as to whether or not the state can insist on the continued forcible medication of the insane death row convict to render him sane for purposes of execution must be taken under consideration. This particular facet of the issue of forcible medication will be discussed in the following section.

1. THE ISSUE OF FORCIBLE MEDICATION

In the Philippines, the treatment of a convict who becomes insane after final sentence has been pronounced or while serving sentence, is embodied in Article 12(1) in relation to Article 79 of the Revised Penal Code as follows:

[93] *See infra* notes 119-124 with accompanying text.

[94] Washington v. Harper, 494 "U.S." 219 (1990); *see also infra* notes 101-108 and accompanying text.

[95] Harper was diagnosed as suffering from a manic depressive disorder.

[96] Perry v. Louisiana, 610 So. 2d 746 (La. 1992); *see also infra* notes 109-113 and accompanying text.

> The court shall order his confinement in one of the hospitals or asylums established for persons thus afflicted, which he shall not be permitted to leave without first obtaining the permission of the same court.

Once sanity is restored, Article 79 of the same Code provides:

> If at any time the convict shall recover his reason, his sentence shall be executed, unless the penalty shall have prescribed in accordance with the provisions of this Code.[97]

According to commentators, the above provisions apply to death row convicts who became insane after the finality of their death sentences and while awaiting their execution.[98] A judge of the Court of First Instance, after fixing the date of the execution of the death penalty, may, upon petition of the party affected, temporarily suspend or postpone the execution and set it for another date upon the ground of, among others, the insanity of the convict (Article 79).[99] The above provisions therefore indicate that when a death row convict is adjudged insane, the State is empowered to take steps to restore his sanity and subsequently enforce the death sentence provided that the penalty has not yet prescribed.

The forcible issue is an important one because it could render the statutory exemption from execution inoperative as it restores the death row convict's death eligibility. Specifically, the issue arises when the state seeks to forcibly restore an insane death row convict's sanity to reactivate his eligibility to be executed. The issue focuses on the right of the insane death row convict to refuse medical treatment[100] designed to restore his sanity for purposes of execution vis-a-vis the competing interests of the state and society.

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[97] Article 92 of the Revised Penal Code defines the period of prescription in the case of the death penalty to wit: The penalties imposed by final sentence prescribe as follows: 1. Death . . . in twenty years;.

[98] *See supra* note 20 and accompanying text.

[99] *Id.*

[100] The forcible medication issue is greatly complicated by the increasing use of psychotropic drugs to treat insanity. In the past forty years or so, advances in psychopharmacology have provided the basis for significant change in the treatment of mental illness. *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipschotic Medication*, 12 HOFSTRA L. REV. 77 (1983). In the Philippines, as well, the use of antipsychotic drugs is the prevailing method of treating insanity. Interview with Dr. Jeanne Querol, psychiatrist at the National Mental Hospital, 06 January 1997. Although electric convulsive theraphy (ECT) is still employed, this is only resorted to when the patient is resistant to medication such as when the maximum dosage has already been administered, without any significant change in the disposition of the patient. *Id.* Often characterized as "synthetic sanity" or "chemical competence," this mental condition is created when psychotropic medication is administered to restore sanity for defendants facing trial and/or execution. *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, 16 BULLETIN OF AMERICAN ACADEMY PSYCHIATRY Law 205 (1988). Antipsychotic drugs, also refered to as neuroplectics or major tranquilizers, constitute a subset of psychotropic medications that retard and reduce the symptoms of complex mental illness, like schizophrenia, psychosis, and manic depression. *Id.*; *Washington v. Harper: Forced Medication and Substantive Due Process*, 25 CONNECTICUT L. REV. 265 (1992). In *Harper*, Justice Kennedy discussed the use of antipsychotic drugs when he delivered the opinion of the Court: "Antipsychotic drugs, sometimes called `neuroplectics' or `psychotropic drugs,' are medications commonly used in treating mental disorders such as schizophrenia. The effect of these and similar drugs is to alter the chemical balance in the brain, the desired result being that the medication will assist the patient in organizing his or her thought processes and regaining a rationale state of mind." Washington v. Harper, 494 "U.S." 219 (1990).

a. *Washington vs. Harper*[101]

Walter Harper was found guilty of robbery in 1976, sentenced to prison and released on parole after four years. His parole was revoked when he assaulted two nurses in a hospital. He was confined in the Special Offender Center (SOC), a special prison for prisoners with mental problems or behavioral disorders as he had tried to attack prison guards and other inmates. Harper was diagnosed as suffering from mental illness which could not be specifically identified. He agreed to take the prescribed antipsychotic medication for some time, but refused further medication because of the adverse side effects he allegedly suffered. The treatment staff, claiming that his complaints were exaggerated or feigned, initiated proceedings to require him to take medication and subsequently forcibly administered antipsychotic drugs pursuant to SOC Policy.[102] To stop the administration of drugs, Harper filed suit under the Federal Civil Rights Acts, contending that the forcible administration of antipsychotic drugs without prior judicial hearing violated his liberty interest under the due process clause, equal protection clause and free speech clauses of the Federal and Washington state constitutions.[103]

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[101] Washington v. Harper, 494 US 219 (1990). This case deals with the forcible administration of antipsychotic drugs to an inmate who is not on death row.

[102] *Id.* "If a psychiatrist determines that an inmate should be treated with antipsychotic drugs but the inmate does not consent, the inmate may be subjected to involuntary treatment with the drugs only if he: (1) suffers from a `mental disorder'; and (2) is `gravely disabled' or poses a `likelihood of serious harm' to himself, others, or their property. . ." The definitions of the terms `mental disorder,' `gravely disabled,' and `likelihood of serious harm' are defined in the policy. `Mental disorder' means "any organic, mental or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." `Gravely disabled' means "a condition in which a person, as a result of a mental disorder: (a) is in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifest severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his health or safety." `Likelihood of serious harm' means (a) a substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others."

[103] *Id.* The Washington Supreme Court ruled in Harper's favor on due process grounds and therefore did not address his equal protection or free speech claims. Although the United States Supreme Court recognized constitutional liberty interest in refusing antipsychotic medication, the Court found that the State of Washington had in fact provided adequate due process protection of that right. The state's policy required that a decision to medicate a prisoner involuntarily be made by a committee composed of a psychiatrist, a psychologist, and an official of the state mental facility. Involvement in the treatment or diagnoses disqualified any potential committee member. The prisoner's procedural rights included the following: the right to notice of the committee's hearing; the right to attend, present evidence, and cross-examine witnesses; the right to representation by a disinterested lay advisor versed in the psychological issues; the right to appeal to the SOC's superintendent; and the right to periodic review of any involuntary medication ordered. State law also granted him the right to state court review of the committee's decision. The Court found these administrative hearing procedures sufficient to comply with procedural due process clause, holding that the due process clause does not require a judicial hearing before the state may treat a mentally ill prisoner with psychotrophic drugs against his will. Harper's liberty interest, when balanced against the state interest involved and the efficacy of the particular procedural requirements, was, in the Court's view, adequately protected by relegating the decision to administer drugs to medical professionals rather than to a judge.

The United States Supreme Court, evaluating Harper's substantive rights under the Due Process Clause of the Fourteenth Amendment, stated: "The substantive issue involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it."

The Court recognized that the convict's significant liberty interest in avoiding forced medication is protected by the Due Process Clause.[104] However, the Court qualified the interest by stating that "the extent of a prisoner's right under the Due Process Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement" and declared that, in certain circumstances, the forcible medication of inmates does not violate the Due Process Clause.

Making use of the analysis employed in *Turner vs. Safely*,[105] the *Harper* Court used a three-part test to determine whether or not a rational connection can be established between prison regulation in question and the government interest it is intended to serve. The Court held: "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'"[106] The Court stated that the forced medication policy could be rationalized in line with prison officials' strong interest in preventing a mentally unbalanced prisoner from harming himself or others. Under such circumstances, the state's interest in prison safety and

[104] *Id.* "We have no doubt that. . . respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."

[105] Turner vs. Safely, 482 "U.S." 78 (1987): The case dealt with a class action suit initiated to determine the constitutionality of two Missouri prison regulations, one related to correspondence between inamtes at different institutions and the other to inmate marriages. The United States Supreme Court listed the factors relevant to determining the 'reasonableness' of regulations: (1) the existence of "a valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it; (2) the presence or absence of "alternative means of exercising the right" infringed upon by the regulation; (3) the impact "accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." The Court stated that "the absence of ready alternatives for the prison is evidence of the reasonableness of a prison regulation."

[106] Washington v. Harper, 494 "U.S." 219. Addressing the substantive determination of reasonableness, the majority found three of four factors discussed in Turner applicable to the facts in *Harper:* (1) a "valid, rational connection" must exist between the prison regulation and the state interest justifying the regulation; (2) the impact which allowing assertion of the constitutional right would have on the prison community must be considered; (3) prison officials need not examine every conceivable alternative before concluding that the absence of a ready alternative makes the regulation reasonable. Applying those standards, the majority held that the state's interest in preserving the safety of the prison community and its duty to take "reasonable measures for the prisoners' own safety" were legitimate objectives.

security justified subordinating the inmate's liberty interests. The Court further found the proposed alternatives (e.g. physical restraints) ineffective and inadequate substitutes for involuntary medication.[107]

In view of the foregoing, the Court held: "Given the requirements of the prison environment, the Due Process Clause permits the state to treat a prison inmate who has serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." The Court explained:

> The state has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution. Prison administrators have not only an interest in ensuring the safety of prison staffs but the duty to take reasonable measures for the prisoner's own safety.

Thus, the Court held that the state's interest in preserving the safety of the prison community and its duty to take reasonable measures for the prisoner's own safety were legitimate objectives, and that the policy was an appropriate method for furthering the state's legitimate objectives. The Court held that the state's interests in prison safety and security were well-established.[108] The Court, however, also stated that "the drugs may be administered for no purpose other than treatment, and only under the direction of a licensed psychiatrist."

b. Perry vs. Louisiana[109]

The United States Supreme Court was confronted with the issue of whether or not a state can render a death row convict competent for execution by forcibly administering antipsychotic drugs in *Perry vs. Louisiana*. The case provided the Court with an opportunity to extend the reasoning in *Harper* to the issue of the restoration of sanity by means of forcible medication for the purpose of execution.

[107] *Id.* The Harper Court held that the fact that Harper had presented possible alternative means for furthering the state's objectives without infringing on his right to reject the administration of antipsychotic drugs did not establish the invalidity of the state's policy. The first option which Harper presented was that he must be adjudicated to be incompetent and that a "substituted judgment" must be made by a court before he may be involuntarily medicated. This was rejected by the Court because "it takes no account of the legitimate governmental interest in treating him where medically appropriate for the purpose of reducing the danger he poses." Physical restraints and/or seclusion, the second alternative presented, was also rejected, not only because they pose a great danger of physical injury to the prisoner and those administering the restraints, but because there was no proof that they were effective as medication.

[108] Washington v. Harper, 494 "U.S." 219 (1990) *citing* Turner v. Safely, 482 US 78 (1987) and O'Lane v. Estate of Shabazz, 484 US 342 (1987).

[109] Perry Washington v. Louisiana, 610 So. 2d 746 (La. 1992).

Perry, who had an extensive history of mental problems, was arrested in 1983 for murdering five family members, including his parents. The trial court, on the basis of recommendations of several psychiatrists, initially found Perry incompetent to stand trial and had him transferred to a Louisiana mental forensic facility for treatment. The trial court found him competent to stand trial after eighteen months and sentenced him to death in 1985. His conviction and sentence were subsequently confirmed by the Louisiana Supreme Court. While waiting for his death sentence to be carried out, Perry's mental condition deteriorated so much so that medical experts diagnosed him as suffering "from a schizoaffective disorder that causes his days to be a series of hallucinations, delusions and disordered thinking, incoherent speech, and manic behavior." When the Louisiana Supreme Court suggested that a review of Perry's competency for execution "might be in order," the trial court, in accordance with *Ford*, appointed three psychiatrists and a psychologist to evaluate Perry's competency for execution. Each expert agreed that since Perry was suffering from a schizophrenic mental disorder which prevented him from remaining in touch with reality, it was only the administration of Haldol, a mind-altering drug, that made Perry's thinking more coherent, rational, and less paranoid. The experts concluded that Perry's competency for execution was, at best, sporadic and could not be predicted with reasonable certainty despite the use of powerful drugs. In 1988, the trial court ruled that under the *Ford* standard of competence, Perry was competent to be executed only when maintained on Haldol. Although the court recognized Perry's right to avoid unwanted medication, the court determined that Louisiana's interest in carrying out the jury verdict outweighed Perry's interest. The trial court ordered the Louisiana Department of Public Safety and Corrections to forcibly medicate Perry so as to render him competent for execution.[110]

Perry appealed to the United States Supreme Court when the Louisiana Supreme Court denied a review of his case. The United States Supreme Court, instead of directly ruling on the issue of whether or not a state can render a death row convict sane for execution through forcible administration of antipsychotic drugs, vacated the medication order and remanded the case to the trial court, specifically ordering the latter to decide the case "in the light of *Washington vs. Harper*." On remand, the trial court, reasoning that *Harper* did not involve capital punishment proceedings and was therefore inapplicable, reinstated its original order.

The trial court's order was reversed by the Louisiana Supreme Court which held that the state could not forcibly medicate a death row convict for the primary purpose of restoring sanity for execution. The Court noted that the forced medication

[110] Judge Humel, presiding over the 19th Judicial District Court in East Baton Rouge Parish, held: "It is ordered that the defendant, Michael Owen Perry, is mentally competent for purposes of execution in that he is aware of the punishment he is about to suffer and he is aware of the reason that he is to suffer said punishment. It is further ordered that defendant's competence is acheived through the use of antipsychotic drugs including Haldol and the Louisiana Department of Public Safety and Corrections is further ordered to maintain the defendant on the above medication as to be prescribed by the medical staff of said Department and if necessary to administer said medication forcibly to defendant and over his objection."

of an insane death row convict in order to render him sane for execution must be distinguished from forcible medication of an individual as provided for in *Harper*. The Court differentiated the two cases as follows: (1) *Harper* is relevant to prison safety cases and should not be extended to death penalty cases; (2) Louisiana's medicate-to-execute plan cannot claim to improve either prison safety or serve Perry's medical interest, unlike the forcible medication issue in *Harper*, and (3) the *Harper* decision implies that forcible medication may not be used for punishment purposes, a characteristic of the *Perry* case.

By applying a compelling state interest test, the Court determined that the state's interest in carrying out the death penalty did not justify the intrusion of medication into Perry's mind and body.[111] The Court further held that since forced medication degraded Perry's dignity as a human being,[112] and was arbitrary since such treatment was without general application,[113] the cruel and unusual punishment clause of the Louisiana Constitution was violated. Thus, the Court concluded that the state could not forcibly medicate Perry solely to restore him to competence for execution. The Court ordered a stay of execution until Perry regained his sanity and competence for execution independent of the use of antipsychotic drugs, regardless of whether this event might never occur.

2. ANALYSIS OF *PERRY* IN LIGHT OF *HARPER*

The United States Supreme Court's specific order to the state court to decide Perry "in light of *Washington vs. Harper*" when the case was remanded, highlights the importance of *Harper*.

In *Harper*, the Court balanced the prisoner's liberty interest in avoiding forced medication against the state's interests through the use of due process analysis.[114] Under *Harper*, the State must show a rational connection between the forcible medication statute and a legitimate state interest. According to the *Harper* Court, the

[111] Perry v. Louisiana, 610 So. 2d 746 (La. 1992). The Court viewed the forced administration of antipsychotic drugs as a violation of Perry's right to privacy since such treatment "requires the unjustified invasion of his brain and body with discomforting, potentially dangerous and painful drugs, the seizure of control of his mind and thoughts, and the usurpation of his right to make decisions regarding his health or medical treatment."

[112] *Id.* The Court declared that "The punishment intended for Perry is severely degrading to human dignity. It will involve far more than the mere extinguishment of human life... He will be forced to linger for a protacted period, stripped of the vestiges of humanity and idgnity ussually reserved to death row inmates, with the growing awareness that the state is converting his own mind and body into a vehicle for his execution."

[113] *Id.* The court further stated that "The punishment is anomalous, irregular and without general application. Under these circumstances there will be increased danger of arbitrariness and capriciousness in both the forcible administration of drugs and the determination of competence for execution."

[114] Washington v. Harper, 494 "U.S." 219 (1990). The Court acknowledged that forcibly injecting drugs into a patient's body interferes with substantial liberty interests. However, as long as the Due Process Clause is satisfied and adequate procedural safeguards are implemented, a state can treat a mentally incompetent prisoner with drugs against his will.

State must establish the simultaneous existence of the following interests before it can forcible administer antipsychotic drugs to an insane prisoner: (1) that the treatment is in the prisoner's medical interest (a *parens patriae* interest), and (2) that the inmate is dangerous to himself or to others (a police power interest).

Under a *parens patriae* theory, the State acts to preserve and promote the welfare of those who cannot take care of themselves and those who are so impaired that they are unable to participate meaningfully in treatment decisions.[115] Having been adjudged insane, Perry is entitled to the medication by the state. Under a police power theory, the state has the power to forcibly medicate a death row convict like Perry who poses an immediate danger to other prisoners or prison officials.

The *Perry* Court resolved the issue of whether or not the state may forcibly medicate a death row convict under state law rather than *Harper* and focused on whether or not the state can forcibly medicate a death row convict for the sole purpose of restoring sanity for execution.[116] The *Perry* Court limited the cases under which the state may not forcibly medicate a death row convict to cases where the state admits that its purpose in medicating the death row convict is to render him sane for execution. Under *Harper*, however, a state may forcibly medicate a prisoner if it has a penological interest in doing so and if the medication serves the prisoner's medical interest. The *Harper* Court, while recognizing that the Due Process Clause protects a prisoner's liberty interest in avoiding forced medication, qualified this interest by stating that "the extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement." The death row convict's interest in refusing antipsychotic medication must therefore be viewed within the death penalty context. A more general interpretation of the *Harper* Court's conclusion that a state may justify forcible medication if it has a penological interest in doing so and if the medication serves the prisoner's medical interest[117] lessens the distinction between the two cases. If the *Harper* case is to be generally applied to all legitimate penological interests, the *Perry* Court should have attempted to determine whether or not the state can assert a legitimate penological interest to justify the forcible treatment of insane death row convicts within the death penalty context.

Harper, however, failed to address other key issues, including the source of the right to refuse and the important substantive protections for the prisoner. *Harper* does not address the prisoner's right to refuse based on the right of privacy, freedom of expression, or the right against cruel and unusual punishment.[118] These issues

[115] Addington v. Texas, 441 "U.S." 418 (1979). "The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of mental disorders to care for themselves."

[116] Perry v. Louisiana, 610 So. 2d 746 (La. 1992). The Court determined that *Harper* required the state to prove that forcing medication furthered the goal of prison safety and the prisoner's medical interest.

[117] Washington v. Harper, 494 "U.S." 219 (1990). "Medication will be ordered only if it is in the prisoner's medical interests and if it is reasonably related to legitimate penological interests."

[118] The Harper Court only concerned itself with the due process issue and did not consider the substantive rights of Harper to refuse medication.

should have been considered as this could have tilted the balance in favor of the inmate.

B. Constitutional Issues Involved in Forcible Medication

1. INTERESTS OF THE STATE IN FORCIBLE MEDICATION

a. *Parens Patriae* Function

The *parens patriae* power is traditionally grounded on the belief that minors and the mentally incompetent cannot protect or care for themselves. The term *parens patriae* (father of his country) has been defined as the inherent power and authority of the state to provide protection to the persons and property of those *non sui juris*,[119] such as minors, insane and incompetent persons. *Parens patriae* is a prerogative, inherent in the supreme power of the state, to be exercised in the interest of the humanity, and for the prevention of injury to those who cannot protect themselves.[120] This is an obligation the state must live up to - it cannot be recreant to such a trust.[121]

In the context of insane individuals who are not incarcerated, Rule 101 of the Revised Rules of Court provides for proceedings for the hospitalization of insane persons. Under this Rule, the petition for commitment of a person to a hospital or other place for the insane shall be filed by the Director of Health in all cases where in his opinion such commitment is: (1) for the public welfare; or (2) for the welfare of the person who, in the Director's judgment, is insane, and such person or the one having charge of him is opposed to his being taken to a hospital or other place for the insane.[122]

In the prison context, the United States Supreme Court held that in fact, if a disturbed inmate did not receive appropriate and prompt psychiatric or other medical attention, there could be a successful suit against the prison for deliberate indifference to the inmate's medical needs.[123] States have a constitutional duty and recognized interest in administering medical treatment to incarcerated mentally ill individuals.[124]

It is important to note that while the *Perry* Court closely followed the ruling in *Harper*, it concluded that the forced medication of an insane death row convict to render him sane for execution should be distinguished from the practice of forcibly medicating a prisoner who is not on death row as provided for in *Harper*. Within the

[119] Vasco v. Court of Appeals, 81 SCRA 762 (1978).

[120] Government of the P.I. v. Monte de Piedad, 35 Phil. 728 (1916).

[121] Nery v. Lorenzo, 44 SCRA 431 (1972).

[122] Revised Rules of Court, Rule 101, §1. However, the person alleged to be *non compos* must not only have reasonable notice of the proceedings, but he must be afforded an opportunity to test the truth of the allegations in the petition or information, and must be present.

[123] Estelle v. Gamble, 429 "U.S." 97 (1976).

[124] Washington v. Harper, 494 "U.S." 219 (1990). A prisoner has an Eighth amendment right to adequate medical treatment for known medical problems; *see also* Addington v. Texas, 441 "U.S." 418 (1979) and Estelle, 429 "U.S." 97 (1976).

context of the *parens patriae* function of the state, the *Perry* Court distinguished the *Perry* case from the *Harper* decision, as follows: (1) the forcible medication of a death row convict for the purpose of execution cannot be considered as medical treatment since it contradicts the basic principles of the medical profession; (2) while *Harper* requires the state to show that forced medication is in the medical interest of both the prisoner and the state, forced medication in the *Perry* case was sought after to aid in the execution process; and (3) *Perry* contradicts the *Harper* decision which implies that the forced administration of antipsychotic drugs may not be used for the purpose of punishment.[125]

Apparently, the *Perry* Court decided to focus on the second distinction, i.e., the use of antipsychotic drugs in the case of Perry for the purpose of rendering him sane for execution viz-a-viz the *Harper* case where antipsychotic drugs were used in the medical interest of the prisoner. The Perry Court held that forcible medication could not be deemed to be in the medical interest of the death row convict since forced medication in such a situation was desired merely for execution purposes. The *Harper* requirement that forcible medication be in the medical interest of the prisoner unavoidably leads to the problem of determining the true motives of the state behind any attempt to forcibly medicate. Determining the state's motive for forcibly medicating a death row convict is a difficult, if not an impossible task. It would require resolving the question of whether or not the use of antipsychotic drugs could ever be in the medical interest of the death row convict when such use could result in his execution.

If the state's objective in forcible medication is not to treat the death row convict for his personal health and welfare, but rather to punish and kill him, the attempt to restore sanity for execution by forcible medication becomes part and parcel of the state execution order as restoration becomes a step towards execution. Forcible medication to restore sanity for execution represents a part of the death row convict's punishment, ignoring his treatment needs or interest. It clearly violates the *Harper* ruling that "drugs may be administered for no purpose other than treatment." Taken within the death penalty context, it is difficult to understand how the forcible administration of antipsychotic drugs could be in the medical interest of a death row convict.

From a medical perspective, the decision of whether or not to provide psychiatric and medical treatment to an insane death row convict in order to render him sane for execution places physicians in an ethical conflict.[126] If the physician withholds psychiatric or medical treatment, insanity is prolonged and the state will forego execution. By doing so, however, the doctor inhumanely confines the death row convict to a life of mental anguish and torment.[127] Alternatively, if the physician treats

[125] The author will argue later that forcible administration of psychotropic drugs for the purpose of restoring sanity for execution actually constitutes `punishment' rather than `treatment' and therefore entails scrutiny of a possible violation of the cruel and unusual punishment clause. *See infra* notes 192-198 and accompanying text.

[126] A discussion of this ethical conflict is outside the scope of the study. *See* Scope and Delimitation.

[127] *Psychological Abnormality and Capital Sentencing*, 7 INT'L J. L. & PSYCHIATRY 249 (1984).

the insane death row convict, he finds himself pushing the convict one step further toward execution in violation of the Hippocratic Oath, the foundation of medical ethics, which "defines the role of the healer, requiring respect for the patient and imposing a duty to do no harm and take no life."[128]

In cases where forcible medication does not lead to death, as exemplified by *Harper*, the state may have a legitimate *parens patriae* interest sufficient to overcome a prisoner's right to forego treatment. When the prisoner is sentenced to death, however, as in the case of *Perry*, it is evident that the state cannot claim any *parens patriae* justification for facilitating the death of an insane death row convict.

b. Police Power

> Police power has been defined as: [t]he power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same.[129]

It is the power primarily exercised by the legislative organs of the government, whether national or local, to "prescribe regulations to promote the health, morals, peace, good order, safety and general welfare of the people."[130] It has also been defined as the power inherent in the state to regulate liberty and property for the promotion of the general welfare.

By reason of its functions, it extends to all the great public needs and is described as the most pervasive, the least limitable and the most demanding of the three inherent powers of the state, far outpacing taxation and eminent domain.[131]

There are two requisites to be met to justify the state in its exercise of police power. It must appear that: (1) the interests of the public generally, as distinguished from those of a particular class, require such interference; and (2) the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[132]

Medical Ethics and Competency To Be Executed, 96 YALE L. J. 167 (1986).

U.S. v. Toribio, 15 Phil. 85, 93 (1910).

Ermita-Malate Hotel and Motel Operators Association, Inc. v. City Mayor of Manila, 20 SCRA 849, 859-860 (1967).

Ynot v. Intermediate Appellate Court, 148 SCRA 659, 670 (1987).

Id. at 148 SCRA 659, 671.

The second requirement has been amplified as follows: "police power must not outrun the bounds of reason and result in sheer oppression" as "due process is identified with freedom from arbitrariness."[133] It has also been held that "the protection of the general welfare is the particular function of the police power which both restrains and is restrained by due process."[134] Therefore, the state may deprive persons of life, liberty or property provided there is due process of law and everyone is given the equal protection of the law.[135]

Due process of law has a two-fold aspect: (1) procedural due process; and (2) substantive due process. *In Ermita-Malate Hotel & Motel Operators Association vs. City Mayor of Manila,*[136] the Supreme Court identified due process as freedom from unreasonableness or arbitrariness. The Supreme Court held:

> There is no controlling and precise definition of due process. It furnishes though a standard to which governmental action should conform in order that deprivation of life, liberty or property, in each appropriate case, be valid. What then is the standard of due process which must exist both as a procedural and as substantive requisite to free the challenged ordinance, or any governmental action for that matter, from the imputation of legal infirmity sufficient to spell its doom? It is responsiveness to the supremacy of reason, obedience to the dictates of justice. Negatively put, arbitrariness is ruled out and unfairness avoided. To satisfy the due process requirement, official action must not outrun the bounds of reason and result in sheer oppression. Due process is thus hostile to any official action marred by lack of reasonableness. Correctly has it been identified as freedom from arbitrariness. It is the embodiment of the sporting idea of fair play.

If the state's goal is to carry out the death sentence, then the means employed to accomplish the state's goal, forcible medication to render the death row convict sane for execution, must pass the test of "reasonableness." It must be determined whether or not the state's exercise of its police power in forcibly medicating an insane death row convict in order to render him sane for execution, is valid considering the limitations in its exercise which includes compliance with the constitutional requirement of substantive due process.

The *Harper* Court determined that prison safety was a legitimate state interest and that forcible medication of a dangerous and insane prisoner was reasonably related to that interest. It can be argued that the state can also claim a legitimate penological interest within the death penalty context, i.e., carrying out its criminal sentence. The State has a substantial and legitimate interest in the enforcement of its

[133] Ermita-Malate, Hotel and Motel Operators Association, Inc. v. City Mayor of Manila, 20 SCRA 849, 860.

[134] Ynot v. Intermediate Apellate Court, 148 SCRA 669 (1987).

[135] PHIL. CONST. art. III, §1.

[136] Ermita-Malate, Hotel and Motel Operators Association, Inc. v. City Mayor of Manila, 20 SCRA 849, 860.

criminal laws especially for heinous crimes[137] by taking the death row convict's life as punishment for his crime. Since the State has a vested right to punish the death row convict by reason of previous conviction and since the State cannot legally carry out the sentence without medicating the insane death row convict, the State must be allowed to administer antipsychotic medication even against the will of the death row convict. Since medication is necessary to carry out the sentence, the interest of the death row convict in being free from forced medication can be deemed extinguished upon the imposition of the death sentence.

Moreover, it is the state's duty to society to punish criminals and to deter heinous crimes, i.e., to minimize criminal acts against society. If the forcible medication of insane death row convicts restores sanity for execution, then the state achieves its societal goal of protecting the community against dangerous offenders, especially those who commit heinous crimes.

The exercise of the state's police power within the death penalty context meets the first requirement of validity, i.e., the need for such interference in the interests of the general public, as distinguished from those of a particular class. However, a determination of whether or not the second requirement - the test of reasonableness under the due process clause - has been met necessitates an examination of the competing interests of the death row convict in avoiding such forcible medication.

2. INTERESTS OF THE DEATH ROW CONVICT AGAINST FORCIBLE MEDICATION

a. Right to Liberty[138]

The importance of liberty was emphasized in *People vs. Hernandez*[139] where the Supreme Court held that "[T]he preservation of liberty is such a major preoccupation of our political system that, not satisfied with guaranteeing its enjoyment in the very first paragraph of Section (1) of the Bill of Rights, the framers of our [1935] Constitution devoted paragraphs (3), (4), (5), (6), (7), (8), (11), (12), (13), (14), (15), (16), (17), (18) and (21), of said Section (1) to the promotion of several aspects of freedom." This has been preserved in the 1987 Constitution.[140]

In *Rubi vs. Provincial Board,*[141] liberty as guaranteed by the Constitution was defined by Justice Malcolm to include "the right to exist and theright to be free from arbitary and personal restraint or servitude. The term cannot be dwarfed into mere freedom from physical restraint of the person of the citizen, but is deemed to embrace

[137] Perry v. Louisiana, 610 So. 2d 746 (La. 1992). "Clearly, the state possesses a significant interest in the enforcement of its criminal laws. I would conclude that the forcible medication of Perry is reasonably related to a legitimate penological interest." (J. Marcus, dissenting); "Forcible medication to allow execution is warranted for such hideous crimes." (J. Cole, dissenting).

[138] PHIL. CONST. art. III, §1.

[139] People vs. Hernandez, 99 Phil. 515, 551, 552 (1956).

[140] JOAQUIN BERNAS, THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 101 (1st ed., 1987) [hereinafter BERNAS, COMMENTARY].

[141] Rubi vs. Provincial Board, 39 Phil. 660, 704 (1919).

the right of man to enjoy the facilities with which he has been endowed by his Creator, subject only to such restraint as are necessary for the common welfare." Such constitutionally protected decisions, include decisions involving procreation, contraception, family relationships, child rearing, and education.[142]

In *Rubi*, however, the Court also gave the warning that liberty is not license: "Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's will." Liberty, therefore, in the interest of public health, public order or safety, of general welfare, in other words through the proper exercise of the police power, may be regulated. The crucial question is therefore whether or not there is an observance of due process.

The United States Supreme Court in *Harper*, held that even in the case of prisoners, "the liberty of citizens to resist the administration of mind-altering drugs arises from our Nation's most basic values."[143] In the case of an insane death row convict whom the state seeks to forcibly medicate in order to render him sane for execution, to the extent that there is a compulsion to act in a certain way, i.e., where he is unduly prevented from acting the way he wishes to do, his liberty is affected.[144] However, such a restriction is permissible as long as due process is observed, the test being "reasonableness."

In *Harper*, the Court addressed but brushed aside the risks involved in taking medication, stating that the level of risk to a person taking antipsychotic medication is not definite, but that the prisoner's interests are protected by the use of a hearing

[142] Meyer v. Nebraska, 262 "U.S." 390 (1923): right to acquire and teach useful knowledge; Pierce v. Society of Sisters, 268 "U.S." 510 (1925): right of parents to direct upbringing and education of their child; Griswold v. Connecticut, 381 "U.S." 479 (1965): right to use contraception.

[143] Washington v. Harper, 494 "U.S." 219 (1990), *quoting from* Stanley v. Georgia, 394 "U.S." 557 (1969): "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

[144] Morfe v. Mutuc, 22 SCRA 424 (1968): The Supreme Court recognized that to the extent that R.A. 3019 (Anti-Graft and Corrupt Practices Act of 1960) provided for a periodical submission of sworn statement of assets and liability by public officers, liberty is affected because the public officer is compelled to act in a certain way.

board.[145] Justice Stevens, concurring and dissenting, agreed with the majority that a liberty interest is involved in avoiding the forcible administration of antipsychotic medication, but underlined the failure of the majority to adequately address the intrusiveness of forced medication. Justice Stevens argued that the severity of the dangers posed by antipsychotic medication[146] enhances the degree of infringement upon the liberty interest involved when forcible medication is allowed. Acknowledging that the Washington Supreme Court was correct in equating the level of intrusiveness of forcible medication with electroconvulsive therapy or

[145] Washington v. Harper, 494 "U.S." 219 (1990). The Harper Court held that: "While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. It may be treated and reversed within a few minutes through the use of the medication Cogentin. Other side effects include akathesia (motorless restless, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac disfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. A fair reading of the evidence suggests that the proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from ten percent to twenty five percent. According to the American Psychiatric Association, studies of the condition indicate that sixty percent of tardive dyslinesia is mild or minimal in effect, and about ten percent may be characterized as severe." Antipsychotic drugs can impair mental functions and cause abnormal motor activity. One side effect that impairs motor activity is called akinesia. Akinesia causes lethargy, drooling, lessening of spontaneity, apathy, and a disinclination to initiate activity. Patients suffering from akinesia often have rigid facial expressions. Akathesia casuses a pronounced inner restlessness or jumpiness. Patients experiencing akathesia often will not be able to sit still and may be overcome by panic. Furthermore, some patients suffereing from akathesia will experience an increase in psychotic symptoms. Another and more serious side effect that patients taking antipsychotic drugs frequently experience tardive dyskinesia (TD). TD is characterized by rhythmic and involuntary muscular movements that often occur around the mouth. The muscular contractions also may affect the limbs and the trunk and may be so severe that the movements permanently cripple the patient. TD also may cause involuntary movement of the fingers, hands, legs, and pelvic areas, hindering the patient's ability to maintain balance, thereby making it difficult for the patient to walk normally. In more advanced stages, TD can interfere with all of a patient's motor activity, thus affecting the patient's speaking ability, swallowing and breathing. Studies have estimated that approximately one-half of all chemically ill schizophrenics suffer from TD. Furthermore, TD can affect patients who have been taking antipsychotics for only a short period of time. There is no known cure for TD. Another serious side effect associated with antipsychotic drugs treatment is impaired mental functioning. Studies have noted that antipsychotic drugs can decrease a patient's abilities to learn, to remember, and to reason. Other effects of antipsychotic drugs include sedation, dry mouth and throat, stuffy nose, blurred vision, urinary retention, constipation, and lightheadedness. Moreover, the emotional side effects of antipsychotic drugs, including a flattening of emotions which manifests itself as boredom, listlessness, lethargy, purposelessness, and apathy, can indirectly affect the patient's mental processes by affecting motivation. Many of the physical side effects of antipsychotic drugs, although not directly affecting mental processes, are so distressing that they frequently affect the ability to think clearly and concentrate. *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, *supra* note 100; *Antipsychotic Drugs and the Incompetent Defendant: A Perspective on the Treatment and Prosecution of Incompetent Defendants*, 47 WASHINGTON & LEE L. REV. 1059 (1990); *Execution of the "Artificially Competent": Cruel and Unusual?*, *supra* note 15; *WASHINGTON v. Harper: Forced Medication and Substantive Due Process*, *supra* note 100; *Incompetency, Execution and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361 (1994); Interview with Dr. Jeanne Querol, *supra* note 100.

[146] Washington v. Harper, 494 "U.S." 219 (1990). While the majority was concerned about the potential negative side effects, it recognized these drugs as useful tools in treating incompetent prisoners, stating that the medical professional should consider the side effects before recommending the use of psychotropic drugs. The majority responded to Justice Stevens' claims that they had failed to take into account the dangers inherent in these medications by pointing out that "what the dissent 'discounts' are the benefits of these drugs, and the deference that is owed to medical professions. . ."

psychosurgery, he argued that the dangers involved in taking antipsychotic medication and the intrusiveness involved make the "right to refuse such medication... a fundamental liberty interest deserving the highest order of protection." In a footnote, Justice Stevens stated that the cases cited by and relied upon by the majority were clearly inapposite[147] stating that the deprivations of liberty in those cases were far less significant than Harper's interest in avoiding unwanted invasion of his mind and body by forcible administration of antipsychotic drugs with its substantial danger of powerful side effects.

Justice Stevens argued that the interest in avoiding forcible medication is more significant than the interest in the free exercise of one's religion discussed in *O'Lane vs. Estate of Shabazz*[148] or the free speech rights at issue in *Turner vs. Safely*.[149] When Justice Stevens asserted that an intrusion upon certain fundamental rights can be more significant than the infringement of other fundamental rights, he, however, failed to mention that more importantly, certain invasions of fundamental rights can be viewed as more significant than other infringements upon that **same right** if the surrounding circumstances are taken into consideration. This interpretation could be taken to mean that the majority could have erred in its evaluation of the degree and severity of the infringement caused by forcible medication with antipsychotic drugs, thereby making the same unreasonable.

Since the degree of infringement is greater when antipsychotic drugs are involved vis-a-vis other neutral substances, the scrutiny required must be much stricter. This approach was used by the United States Supreme Court in *Winston vs. Lee*.[150] In the case of *Winston*, a search and seizure case, the Commonwealth of Virginia sought a court order to surgically remove a bullet from an alleged burglar so that the bullet could be used as evidence against him at his trial.[151] The Court compared the invasiveness of the surgical procedure to the involuntary taking of blood from a person suspected of drunken driving, a procedure upheld in *Schmerber vs. California*.[152] The *Winston* Court heeded the *Schmerber* Court, which had warned:

[147] *Id.* In his dissent, Justice Stevens claimed that the majority made a glaring error by equating the significance of Harper's interest in avoiding unwanted medication with the interest in avoiding transfer to a mental hospital in Vitek v. Jones, 445 US 480 (1980), *the interest in freedom of correspondence in Turner, 482 "U.S." 78 (1987), and the interest in practicing one's religion in Estate of Shabazz*, 484 US 342 (1987). Justice Stevens appeared to believe that the interest impacted in Harper was more significant than the interests infringed upon in Vitek, Turner, and Estate of Shabazz.

[148] O'Lane v. Estate of Shabazz, 482 "U.S." 342 (1987).

[149] Turner v. Safely, 482 "U.S." 78 (1987).

[150] Winston vs. Lee, 470 "U.S." 753 (1985).

[151] In Winston, an armed store owner shot, and was shot by, a robber. The robber ran from the scene and approximately twenty minutes later, the police found Rudolph Lee eight blocks from the earlier shooting, suffering from a gunshot wound. Lee told the police that he had been shot when two men tried to rob him. The police took him to the emergency room where he was identified by the store owner who happened to be receiving treatment for his wounds in the same emergency room. Lee was arrested. The Commonwealth of Virginia sought a court order directing Lee to undergo surgery in order to remove the bullet. Following testimony that the surgical procedure would not be dangerous, the court ordered the operation. In a physical examination just prior to the surgery, the doctor discovered that the bullet was much deeper than originally believed. The district court enjoined the procedure and the Supreme Court granted certiorari.

[152] Schmerber v. California, 384 "U.S." 757 (1966).

> "That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."

While the *Winston* Court recognized that both the surgery and the taking of blood infringed upon the constitutional rights of privacy and security, it held that "the procedure sought here is an example of the 'more substantial intrusion' cautioned against in Schmerber" and found the procedure impermissible. The Court further held that "the medical risks of the operation, although apparently not extremely severe, are a subject of considerable dispute; the very uncertainty militates against finding the operation to be 'reasonable.'"[153] The Court found that the state's interest in surgery - to obtain evidence of guilt - was unreasonable in light of the uncertainty of the medical risks and the intrusion on Lee's privacy interests and bodily integrity.[154]

Applying the reasoning in *Winston* to *Harper*, two arguments may be advanced. First, it can be argued that forcible medication with antipsychotic drugs is more than a minor intrusion which is far worse than surgery rejected in *Winston* since this kind of intrusion involves the total divestment of a prisoner's control over the invasion of his mind and body.[155] Unfortunately, the *Harper* majority regarded the intrusion as only minor and apparently did not believe that the possible side effects of these medications were severe after hearing evidence about the potential dangers of antipsychotic drugs. The majority did admit, however, that "there is considerable debate over the potential side effects of antipsychotic medication."This acknowledgment directly supports the second argument that the very uncertainty about the severity and likelihood of potential side effects militates against the reasonableness of forced medication with antipsychotic drugs.

As seen from the above, therefore, the forcible medication of an insane death row convict for the purpose of making him sane for execution is an invasion of liberty which is protected by the due process clause. The test of reasonableness mandated by the due process clause is not met when the state forcibly medicates the insane death row convict with antipsychotic drugs. Firstly, forcible medication entails a substantial infringement on the right to liberty as it involves a complete intrusion into the mind and body of the death row convict over which he has absolutely no control over;[156] and secondly, even in the absence of the first argument, the same test of reasonableness, however, will still not be complied with due to the uncertainty involved in the administration of antipsychotic drugs, in particular, its possible side

[153] Winston v. Lee, 470 "U.S." 753 (1982). When dealing with a potential infringement on the constitutional rights of a prisoner, the standard of review which the Court has consistently applied, and which is reaffirmed in Harper, is one of reasonableness.

[154] Although Winston involved an overly intrusive procedure, Winston also has implications for a death row convict's right to refuse medication. As the dangerous side effects associated with antipsychotic drugs treatment indicate, forcible medication is invasive and involves significant risks to a defendant's health and well-being, much like the proposed surgery in Winston. Winston therefore, indicates that the state is required to show a compelling reason to medicate a death row convict without his consent.

[155] Washington v. Harper, 494 US 219 (1990).

[156] *Id.*

effects. Moreover, the Supreme Court pronouncement in the *Ermita-Malate* case should be remembered:

> What cannot be stressed sufficiently is that if the liberty involved were freedom of the mind or the person, the standard for the validity of governmental acts is much more rigorous and exacting, but where the liberty curtailed affects at the most rights of property, the permissible scope of regulatory measure is wider.

b. *Right To Privacy*[157]

There is a difference between an allegation of a deprivation of liberty and an allegation of a violation of an individual's right to privacy. In *Morfe vs. Mutuc*,[158] the Supreme Court held: "The due process question touching on an alleged deprivation of liberty as thus resolved goes a long way in disposing of the objections raised by the plaintiff that there has been a violation of the constitutional right to privacy."

The Supreme Court went on to say: "The concept of liberty would be emasculated if it does not likewise compel respect for his personality as a unique individual whose claim to privacy and interference demands respect" and that in our jurisdiction, "the right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection."

Because of the express recognition of privacy, specifically that of communication and correspondence[159] and implicitly in the search and seizure clause,[160] the liberty of abode,[161] and the right against self-incrimination,[162] the violation of the said right should be closely scrutinized.

In *People vs. Burgos*,[163] the Supreme Court held that the right against unreasonable searches and seizures is a safeguard against wanton and unreasonable invasion of the privacy and liberty of a citizen as to his person, papers and effects. In his book, Father Bernas stated that

> "Section 2 is not just a circumscription of the power of the state over a person's home and possessions. More importantly, it protects the privacy and sanctity of the person himself. It is a guarantee of the right of the people to be secure in their persons...against unreasonable searches and seizures."[164]

[157] PHIL. CONST. art. III, §2, provides: "The right of the people to be secure in their *persons*, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable. . ." (emphasis supplied)

[158] Morfe v. Mutuc, 22 SCRA 424 (1968).

[159] PHIL. CONST. art. III, §3(1), provides: "The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law."

[160] PHIL. CONST. art. III, §2, provides: "The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable ..."; *see supra* note 157.

[161] PHIL. CONST. art. III, §6, provides: "The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. . ."

[162] PHIL. CONST. art. III, §17, provides: "No person shall be compelled to be a witness against himself."

[163] People vs. Burgos, 144 SCRA 1 (1986).

In *People vs. CFI of Rizal, Br. IX*,[165] the Supreme Court, in discussing the constitutional guarantee against unreasonable searches and seizures, held that:

> The right to privacy is an essential condition to the dignity and happiness to the peace and security of every individual, whether it be of home, or of persons and correspondence. The constitutional inviolability of this great fundamental right against *unreasonable* searches and seizures must be deemed absolute as nothing is closer to a man's soul than the serenity of his privacy and the assurance of his personal security.

And in *Ayer Productions Pty. Ltd. vs. Capulong*,[166] the Supreme Court recognized that our law, constitutional and statutory, does include a right of privacy. The Court, however, went on to say that "The right to privacy or 'the right to be let alone,' like the right of free expression, is not an absolute right" and that "it is left to case law to mark out the precise scope and content of this right in differing types of particular situations. " The Court held that a violation of the right to privacy could be justified by the use of either the `balancing of interests test' or the `clear and present danger test.'

The United States Supreme Court recognized that within the prison context, the Fourth Amendment "guarantees the privacy, dignity and security of persons against arbitrary and invasive acts by officers of the Government or those acting at their direction."[167] Although a prisoner may have no reasonable expectation of privacy in his cell, prisoners have a reasonable expectation that the privacy of their bodies and their minds will not be physically invaded by the state.

A more general right to refuse drug treatment is based upon a First Amendment right to be free of interference with mental processes and the right to bodily security.[168] Article III, Section 4 of the 1987 Constitution provides for the freedom of speech and press.[169] In discussing this constitutional guarantee, Father Bernas turned to the common law doctrine, which was first elevated to a constitutional principle through the First Amendment of the American Federal Constitution and which was summarized by Blackstone thus:

> . . . but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. . . Thus, the will of the individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment

[164] BERNAS, COMMENTARY, *supra* note 140.

[165] People vs. CFI of Rizal, Br. IX, 101 SCRA 86 (1980).

[166] Ayer Productions Pty. Ltd. vs. Capulong, 160 SCRA 861 (1988).

[167] Skinner v. Railway Labor Executives Association, 109 S. Ct. 1402 (1989).

[168] Arkansas v. Mississipi, 458 "U.S." 1119 (1982).

[169] PHIL. CONST. art. III, §4, provides: "No law shall be passed abridging the freedom of speech, of expression, or of the press ..."

is still left; the disseminating, or making public, of bad sentiments destructive to the ends of society, is the crime which society corrects.[170]

Even in Article III, Section 5 of the 1987 Constitution, which refers to the freedom of religion,[171] the Supreme Court held in *Gerona vs. Secretary of Education*[172] that:

> The realm of belief and creed is infinite and limitless bounded only by one's imagination and thought. So is the freedom of belief including religious belief, limitless and without bounds. One may believe in most anything, however strange, bizarre and unreasonable the same may appear to others, even heretical when weighed in the scales or orthodoxy or doctrinal standards. But between the freedom of belief and the exercise of said belief, there is quite a stretch of road to travel. If the exercise of said religious belief clashes with the established institutions of society and with the law, then the former must yield and give way to the latter. The Government steps in and either restrains said exercise or even prosecutes the one exercising it.

The constitutional rights of freedom of speech and religion should therefore be construed to extend to freedom of thought and belief. Since the Constitution protects the freedom of expression and of religion, it must also protect the more basic right to formulate and maintain ideas.

By definition, antipsychotic drugs affect one's mind, intellectual functions, perceptions, moods and emotions.[173] The United States Supreme Court has acknowledged that the ability of these drugs to control behavior rests in their capacity to achieve mind-altering effects.[174] Antipsychotic drugs are undeniably mind-altering, and effect changes in mental processes without the cooperation of the patient.[175] Since antipsychotic drugs directly intrude on mental processes in a manner the subject cannot resist,[176] mental health treatments that coerce beliefs, attitudes, and mental processes implicate the constitutional guarantee of freedom of expression.

Since the effects of antipsychotic drugs on patients and the patients' mental processes have led courts to determine that the First Amendment which protects freedom of expression is implicated,[177] these courts also reason that the more basic right to formulate and maintain ideas must also be protected.

[170] BERNAS, COMMENTARY, *supra* note 140.

[171] PHIL. CONST. art. III, §5, provides: "No law shall made respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

[172] Gerona v. Secretary of Education, 106 Phil 2 (1959).

[173] Washington v. Harper, 494 "U.S." 219 (1990).

[174] Mills v. Rogers, 457 "U.S." 291 (1982).

[175] *Id.*

[176] Washington v. Harper, 494 "U.S." 219 (1990).

[177] Bee v. Greaves, 744 F. 2d 1387 (19th Cir. 1984): The case involved pretrial detainees forcibly subjected to antipsychotic medication. The tenth Circuit recognized a first amendment right to refuse treatment, because such drugs could affect the ability to think clearly and to communicate; *see also* Arkansas v. Mississippi, *supra* note 168.

The numerous side effects of antipsychotic drugs on the physical, emotional and mental aspects of an individual substantially intrudes on the right to privacy.[178] When an individual loses total control over his entire being as the drugs take effect and the sanctity of the person himself is absolutely violated, the death row convict is transformed into an instrument or tool in the hands of the state totally disregarding his dignity or worth as a human being, a mandate of the Constitution deserving protection.[179] Viewed in this light, the state's attempt to regulate the insane death row convict's right to privacy fails the test of reasonableness of the due process clause.

c. Right Against Cruel, Inhuman, and Degrading Punishment[180]

In *People vs. Dionisio*,[181] the Supreme Court interpreted the constitutional prohibition against cruel and unusual punishment as referring to penalties that are inhuman and barbarous, or shocking to the conscience, holding that fines and imprisonment are definitely in this category. In *People vs. Estoista*,[182] the Supreme Court held that:

> It takes more than merely being harsh, excessive, out of proportion, or severe for a penalty to be obnoxious to the Constitution. The fact that the punishment authorized by the statute is severe does not make it cruel and unusual. Expressed in other terms, it has been held that to come under the ban, the punishment must be 'flagrantly and plainly oppressive,' 'wholly disproportionate to the nature of the offense as to shock the moral sense of the community.

As to what degree of disproportion will be considered as obnoxious to the Constitution, the Supreme Court in *People vs. Dacuycuy*[183] held that "this still has to await appropriate determination in due time since to the credit of our legislative bodies, no decision has yet struck down a penalty for being 'cruel and unusual' or excessive."

It can be said that punishments are cruel and/or inhuman when they involve lingering death, such as burning alive, mutilation, starvation, drowning, and other barbarous punishments; they imply something barbarous, something more than the extinguishment of life.[184] Punishment is degrading when it brings shame and humiliation to the victim, or exposes him to contempt or ridicule, or lowers his dignity and self-respect as a human being.[185] The old Constitution used the expression "cruel and unusual". The new Constitution dropped the word unusual, in order to allow

[178] Washington v. Harper, 494 "U.S." 219 (1990).

[179] PHIL. CONST. art. II, §11, provides: "The state values the dignity of every human person and guarantees full respect for human rights."

[180] PHIL. CONST. art. III, §19(1).

[181] People v. Dionisio, 22 SCRA 1299 (1968).

[182] People vs. Estoista, 93 Phil. 674 (1953).

[183] People vs. Dacuycuy, 173 SCRA 90 (1989).

[184] HECTOR S. DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES (1991).

[185] *Id.*

for development of penology, using instead degrading and inhuman to emphasize that at stake is the dignity of the person.[186] The Constitutional proscription, established on grounds of humanity, precludes the imposition of harsh penalties that public sentiments have regarded as an affront to reason or shocking to the conscience of men. It is consistent with the constitutional policy which states that "the State values the dignity of every human person."[187]

The distinction between the constitutional provisions provided for in Section 19(1) vis-a-vis Section 19(2)[188] was explained by Father Bernas during the deliberations of the 1986 Constitutional Commission. Thus, the purpose of Section 19(1) is "to provide a norm for invalidating a penalty that is imposed by law."[189] "We are talking of a punishment that is contained in a statute which, if as described in the statute is considered to be degrading or inhuman punishment, invalidates the statute itself."[190] Father Bernas further explained that Section 19(2) "is about a person who is held under a valid statute but is treated cruelly and inhumanely in degrading manner."[191]

Article 12(1) in relation to Article 79 of the Revised Penal Code provides for the forcible medication of insane death row convicts to render them sane for excecution. This statute, which, on the basis of previous discussion, can be interpreted as punishment or part of the penalty imposed upon the death row convict, should be examined to determine if it violates Section 19(1) of the 1987 Constitution.

1) Forcible Administration of Antipsychotic Drugs as 'Punishment'

The cruel and unusual punishment clause only applied to forcible medication if such is construed as `punishment' within the purview of the Constitutional provision. `Treatment,' on the other hand, is a medical term, referring to a procedure performed for the ultimate benefit of the patient. Since the term `treatment' is distinct from the term `punishment,' an examination as to whether or not forcible medication violates the cruel and unusual punishment clause necessitates a determination of whether or not forcible medication in the death penalty context is `punishment.'

The distinction between `treatment' and `punishment,' however, is not entirely clear. In *Ingraham vs. Wright*,[192] the United States Supreme Court declared that the Eighth Amendment was "designed to protect those convicted of crimes," implying that its application was limited to criminal punishment. In a footnote, however, the Court expressly reserved judgment on the potential application of the Eight Amendment to health care practices:

[186] BERNAS, REVIEWER-PRIMER, *supra* note 31.

[187] PHIL. CONST. art. II, §10.

[188] PHIL. CONST. art. III, §19(2), provides: "The employment of physical, psychological, or degrading punishment against any prisoner or detainee, or the use of substandard or inadequate penal facilities under subhuman conditions shall be dealt with by law."

[189] I Record of the 1986 Constitutional Commission 703.

[190] *Id.* at 778-779.

[191] *Id.*

[192] Ingraham vs. Wright, 430 US 651 (1977).

> Some punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in circumstances in which they are administered to justify application of the Eighth Amendment. We have no occasion in this case, for example, to consider under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.

Ingraham suggests a two-part text that must be satisfied before the prohibition against cruel and unusual punishment may be applied to health care practices, viz.: (1) the action taken must be a punishment, and (2) the circumstances surrounding the punishment must be analogous to those of a criminal punishment.

In *Estelle vs. Gamble*,[193] a case was brought by a prisoner of a Texas state prison who claimed that prison officials violated his Eighth Amendment rights by depriving him of adequate medical treatment. The Court held that deliberate indifference to prisoners' serious medical problems and the intentional denial or delay of medical treatment constituted an "unnecessary and wanton infliction of pain" and therefore violated the cruel and unusual punishment clause. The Court found that the behavior of prison officials, though not inherently punitive, nonetheless constituted cruel and unusual punishment.

Estelle supports the argument that, in the forcible medication of prisoners, the treatment itself constitutes punishment. If failure to give treatment constitutes punishment, then active forcible treatment should be reviewed as a possible violation of the cruel and unusual punishment clause.

It should also be noted that the Court's finding that the officials' behavior which was not administered punitively was considered punishment and therefore a violation of the cruel and unusual punishment clause. Following this line of reasoning, forcible medication using antipsychotic drugs for control or treatment purposes should be considered a violation of the cruel and unusual punishment clause, whether or not the drugs were administered in response to misbehavior.

In *Sawyer vs. Sigler*,[194] officials of the Nebraska Penal and Correctional Complex required William Sawyer to take his emphysema medication in crushed or liquid form pursuant to a prison policy.[195] The prison physician prescribed alternative forms of medication when Sawyer claimed that the liquid form of medication nauseated him. Prison officials overruled the physician's recommendation. The district court found that a treatment resulting in nausea constituted cruel and unusual punishment when under the circumstances, alternative forms of treatment would not threaten the valid police power interests underlying the prison policy. This focus on the

[193] Estelle vs. Gamble, 429 US 97 (1976). Subsequently, the United States Supreme Court also followed this ruling, holding that states have a constitutional duty and recognized interest in administering medical treatment to incarcerated mentally ill individuals; Addington v. Texas, *supra* note 67; Washington v. Harper, *supra* note 101.

[194] Sawyer vs. Sigler, 320 F. Supp. 690 (D. Neb. 1970).

[195] The policy requires that all medication be administered in crushed or liquid form. This was intended to prevent the prisoners from hoarding narcotics.

detrimental result of an imposed form of medical treatment rather than on the form of treatment provides a stronger link between `treatment' and `punishment.' The likelihood of pain and other side effects produced by the drugs also supports the characterization of their forcible administration as `punishment.'

One can therefore argue, as the *Sawyer* court did that drug treatment may at times produce frightening and painful effects, which could result in a violation of the cruel and unusual punishment clause, regardless of how well-intentioned the therapeutic goals are.

Nelson vs. Heyne[196] extended further the distinction between treatment and punishment. In *Nelson*, juveniles in a correctional institution were forced to take the psychotropic drugs Sparine and Thorazine, "not as part of an ongoing psychotherapeutic program, but for the purpose of controlling excited behavior." The court held that the forcible medication constituted cruel and unusual punishment, citing the potentially harmful side effects of the drugs including: "Collapse of the cardiovascular system, the closing of the patient's throat with consequent apshyxiation, a depressant effect on the production of bone marrow, jaundice from an affected liver, and drowsiness, hematological disorders, sore throat and ocular changes." Although the drugs were introduced as treatment, the court found their administration was punishment.

With the weakening of the distinction between treatment and punishment, the mere labeling of such forcible medication as `treatment' does not automatically remove it from the scope of the cruel and unusual punishment clause. Although perceived beneficial effects from the drugs could be used to show the non-punitive purpose of their administration, courts have recognized that even legitimate motivations for official behavior do not do away with scrutiny of a possible violation of said clause. The forcible administration of antipsychotic drugs should be included in the broad definition of `punishment' as used in the abovementioned cases.

Scrutiny of the right against cruel and unusual punishment in the death penalty context then becomes clear as the forcible administration of antipsychotic drugs is seen as a necessary step to carry out the death sentence, forming part of the death row convict's punishment.

Moreover, in *People vs. Borja*,[197] Justice Barredo, concurring in imposing the penalty of *reclusion perpetua*, taking into consideration the fact that the accused had been under detention for more than 20 years and had been "living under the shadow of a sentence of death" almost 19 years ago. Justice Barredo went on to explain that "the passage of so many years of mental torture under deplorable conditions obtaining in the national penitentiary during all those years has transformed that penalty into a cruel one within the contemplation of the human proscription of the Constitution against the infliction of cruel and unusual punishment." Justice Barredo expounded on the "agony they have already undergone," saying that:

[196] Nelson vs. Heyne, 491 F. 2d 352 (7th Cir.)

[197] People v. Borja, 91 SCRA 340 (1979).

> I do not believe it can be denied that living under the shadow of a sentence of death for more than ten years, what with deplorable conditions in the death row and other parts of our national penitentiary, is a life that can be worse than death itself. Indeed, such an unusually long waiting amounts to cruelty, which should never be added - and the law, I dare say, does not contemplate that it may be added - to the penalty of death. . . Even a final judgment may not be executed pursuant to its specific terms when circumstances intervene that would make such rigorous execution inequitable, similarly, the imposition of the capital penalty under circumstance more afflictive and painful to the culprit than it should normally be should not be done. . . One cannot but realize that to add years and years of detention to the death penalty itself is revolting to one's sense of humanity and justice . . . *There is no justification for adding in effect, another penalty to the one prescribed by the Revised Penal Code. Indeed, if the law says the penalty should be death and no more, how can we impose an additional penalty of prolonged detention thru no fault of the convict?* (emphasis supplied)

If, as stated above, prolonged detention can be considered an `additional penalty,' then the forcible administration of psychotropic drugs with its attendant potentially harmful side effects falls under the same category.

2) Forcible Administration of Antipsychotic Drugs as Cruel, Inhuman or Degrading Punishment

Furman vs. Georgia[198] and *Gregg vs. Georgia*[199] represent two of the most significant events in American death penalty history. In *Furman*, the Court struck down the death penalty by holding that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." The five justices in the *Furman* plurality concluded, each for his own reasons, that Georgia's death penalty statute could not stand. Justice Brennan, concurring, declared that "a punishment must not be so severe as to be degrading to the dignity of human beings," reasoning that severe mental pain, as well as physical suffering, could trigger an eighth amendment violation. Justice Brennan explained the rationale of the Eighth Amendment in the following manner:

> At bottom, then the Cruel and Unusual Punishment Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity.

Even Father Bernas stated that: "The new Constitution, by allowing the possibility of the restoration of the death penalty, implicitly admits that it need not be cruel and inhuman. However, the circumstances under which a specific law may allow the death penalty may make it cruel and unusual under such law.[200]

[198] Furman v. Georgia, 408 US 238 (1972). This case develops `contemporary standards of decency' and `dignity of man' criteria as parts of the eight amendment cruel and unusual test; this case led states to stop executions for four years.

[199] Gregg v. Georgia, 428 US 153 (1976).

[200] BERNAS, REVIEWER-PRIMER, *supra* note 31.

Although no opinion delineated a single, common rationale,[201] *Furman* was later on interpreted[202] to mean that the death penalty "could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." In *Furman*, Justice White stated that the state must have a "meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not." He concluded that the imposition of the death penalty was sufficiently arbitrary to violate the Eighth Amendment. In subsequent cases, the Court has reflected a similar view, holding that the state has a "constitutional responsibility to tailor and apply the law in a manner that avoids the arbitrary and capricious infliction of the death penalty."[203] Therefore, under the cruel and unusual punishment clause, capital punishment must "be imposed fairly and with reasonable consistency, or not at all."[204] The United States Supreme Court still restricts the state's authority to implement the death penalty by requiring that the state's authority "be exercised within the limits of civilized standards."[205]

Clearly, the extreme mental and physical intrusiveness of antipsychotic drugs violates civilized standards of decency.[206] Forced medication constitutes not only a serious intrusion upon the body of the subject, but intrudes more upon the subject's mind. One medical expert's characterization of apomorphine, which causes sever vomiting spells, applies equally to many antipsychotic drugs: "Apomorphine's use is really punishment worse than a controlled beating since the one administering the drugs can't control it after it is administered."[207]

Evidence suggests that treatment with antipsychotic drugs may not be therapeutic for every patient. There is no reliable method of foreseeing how a particular patient will react to a specific medication, nor is there any adequate standard for deciding which antipsychotic medication or what dosage to prescribe.[208] While one patient may experience almost total relief of symptoms from a particular medication, another patient taking the same dosage of the same medication may experience devastating side effects, while a third patient similarly treated will suffer only mildly adverse effects.[209] One can never be certain whether a specific drug will be helpful in a particular case, and often drug treatments of psychiatric patients is carried out through

[201] The majority view consisted of five concurring opinions written by different justices.

[202] Gregg v. Georgia, 428 US 153 (1976). The Gregg Court responded to the Furman's Court's concern that the death penalty not be imposed in an arbitrary and capricious manner, but held that an absolute prohibition on capital punishment was not required. The Gregg Court also held that "the Eighth Amendment has not been regarded as a static concept" and "must draw its meaning from the evolving standards of decency that a maturing society" possesses; *see also* Edmund v. Florida, 458 US 782 (1982), where the Court recognized human dignity as a contemporary value.

[203] Godfrey v. Georgia, 446 US 429 (1980).

[204] Eddings v. Oklahoma, 455 US 104 (1982).

[205] Woodson v. North Carolina, 428 US 2480 (1976).

[206] Washington v. Harper, 494 US 219 (1990).

[207] Knecht v. Gillman, 488 F. 2d 1136 (8th Cir. 1973): *citing* testimony of Dr. Steven Ox, University of Iowa.

[208] *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, *supra* note 100.

[209] *Id.*; *Washington v. Harper: Forced Medication and Substantive Due Process*, *supra* note 100.

trial and error.[210]

These side effects are involuntary and the patient will have no control over them. The horror, however, lies in the fact that the patient knows what is happening to him.[211] According to a prisoner who had been given Prolixin:

> There is no other feeling like it. Nothing to relate it to, no experience anyone would normally go through in their life. It affects you mentally and physically and you feel suicidal. The physical effects are so bad you can't stand it. You get muscle spasms, predominantly in the legs, but also in all other parts of your body including the facial muscles. You get lockjaw; you can't control your tongue; you get leg cramps. You get so tired (as if you've been up three days in a row) you lie down. But you can't stay down for more than three or four minutes because your knees begin to ache, an itching type ache. Your thoughts are broken, incoherent; you can't hold a train of thought for even a minute. You are talking about one subject and suddenly you're talking about another.[212]

The negative effects of antipsychotic drugs erode the basic core of human dignity of a death row convict. The nausea, parkinsonism, akathesia, dystonia, and dyskinesia associated with the use of these drugs attack the fundamental well-being of the recipient. Such degradation robs the subject of his integrity, physical, mental, emotional, psychological. Death row convicts have good cause to object to forced medication on the ground that by degrading basic human dignity, it violates the fundamental fairness test of the cruel and unusual punishment clause.

d. Right Against Torture[213]

In distinguishing Article III, Section 19(1) as against Section 19(2), Father Bernas stated: "The first sentence of Section 19(1) speaks of punishments, which, if embodied in a penal law, render the entire law invalid. Section 19(2) concerns itself not with the validity of a penal law but with the manner of treating prisoners in detention."[214] Section 19(2) prohibits treatment of a prisoner which may amount to cruel, degrading, or inhuman punishment prohibited under Section 19(1).[215] The provision embodies the concern expressed by Commissioners Natividad, Ople, de los Reyes and Maambong. Commissioner Natividad, calling on his experience as the Chairman of the National Police Commission for many years, stated our jails

[210] *Assessment of Competency for Execution? A Guide for Mental Health Professionals*, *supra* note 100; *Washington v. Harper: Forced Medication and Substantive Due Process*, *supra* note 100.

[211] Interview with Dr. Jeanne Querol, *supra* note 100: "They can't control the side effects, but they know what is happening to them. Some patients will refuse treatment because of the side effects they experience. *Sabihin ng iba, 'Tumutulo ang laway ko pero hindi ko mapigil dahil parang matigas yung aking panga'... parang hinihila yung dila nila, tumutirik yung mata nila, kaya ayaw na nilang kumuha ng gamot.* ("Others will say: 'I'm drooling, but I can't stop it because of my lockjaw'... it's like their tongues are being pulled, their eyes are rolling, and this is why they don't want to take the medicine anymore.")."

[212] *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*, 51 LOUISIANA L. REV. 995 (1991).

[213] PHIL. CONST. art. III, §19(2).

[214] BERNAS, COMMENTARY, *supra* note 140.

[215] DE LEON, *supra* note 184.

are so crowded and the conditions are so subhuman that one-half of the inmates lie down on the cold cement floor which is usually wet, even in summer. One-half of them sleep while the other half sit up to wait, until the other half wake up, so that they can also sleep. In the toilets, right beside the bowl, there are people sleeping ... if a prison is subhuman and it practices beatings and extended isolation of prisoners, and has sleeping cells which are extremely filthy and unsanitary, these conditions should be included in the concept of cruel and inhuman punishment.[216]

Commissioner Maambong, on the other hand, said:

Confinement itself within a given institution may amount to cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices that are so bad as to be shocking to the conscience of reasonably civilized people. It must be understood that the life, safety and health of human beings, to say nothing of their dignity, are at stake. Although inmates are not entitled to country club existence, they should be treated in a fair manner."[217]

Even assuming arguendo that the argument of a violation of Section 19(1) is not acceptable, the forcible medication of insane death row convicts can be said to violate Section 19(2), which expressly recognizes that punishment may be of a psychological nature. Clearly, the arguments advanced to support the assertion of a violation of Section 19(1)[218] are also applicable to support the assertion of a violation of Section 19(2) as the extreme mental and physical intrusiveness of antipsychotic drugs cannot be sufficiently stressed. Moreover, Section 19(2) contemplates the improper, unreasonable or inhuman application of penalties or punishments on persons detained under a valid law.[219]

However, as seen under Section 19(2), it is left to Congress to pass a law specifically dealing with such.

e. *Right To Equal Protection*[220]

Another limitation on the valid exercise of police power is the constitutional guarantee of equal protection. Equal protection simply means that all persons or things similarly situated or under like circumstances and conditions must be treated alike both as to the rights conferred and the liabilities imposed.[221] Similar objects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others.

[216] II Record of the 1986 Constitutional Commission 702-03.

[217] I Record of the 1986 Constitutional Commission 78.

[218] *See supra* notes 199-213 and accompanying text.

[219] DE LEON, *supra* note 184.

[220] PHIL. CONST. art. III, §1.

[221] Ichong v. Hernandez, 101 Phil 1155, 1164 (1957).

What is required under this constitutional guarantee is the uniform operation of legal norms so that all persons under similar circumstances would be accorded the same treatment both in the privilege conferred and liabilities imposed. Favoritism and undue preference cannot be allowed. For this principle is that equal protection and security shall be given to every person under circumstances, which if not identical, are analogous. If the law be looked upon in terms of burdens or charges, those that fall within a class should be treated in the same fashion, whatever restrictions cast on some in the group equally binding on the rest.[222]

It is not enough, however, that a law guarantees equality. It is also required that it be applied equally. Thus, a law may appear to be fair on its face and impartial on appearance, but, if it administered "with an evil eye and an uneven hand," or even without actual denial of equal protection, yet, if it permits of unjust discrimination, there is a violation of the constitutional prohibition: "there is no difference between a law which denies equal protection and a law which permits such denial."[223]

Because of the obvious finality of the death penalty, the United States Supreme Court requires a higher degree of reliability and certainty/accuracy in capital proceedings than in others.[224] The concern for accuracy and the need for reliability to ensure that an insane death row convict is not executed, is undermined when the state administers antipsychotic drugs to insane death row convicts for the sole purpose of restoring sanity for execution.

Drug-based sanity is unreliable because of its temporary nature. The beneficial effect of antipsychotic drugs is temporary and generally does not last beyond the time the medication is eliminated from the blood stream.[225] A death row convict who claims to understand his punishment may not understand it ten minutes later or when the execution occurs due to time lapse or added stress which may reduce the effect of the medication. Furthermore, the medication does not affect the patient in the same manner each time it is administered.[226]

In view of the uncertainty associated with the use of antipsychotic drugs, the execution of a death row convict whose sanity is drug-induced risks violating the statutory exemption. The state lacks the key factors of reliability and predictability

[222] Gumabon v. Director of Prisons, 37 Phil 427 (1927).

[223] People v.Vera, 65 Phil. 56, 127 (1937).

[224] Furman v. Georgia, 408 US 238 (1972). "Death penalty differs from all other types of criminal punishment not in degree but in character"; Gregg v. Georgia, *supra* note 48: "Greater needs for safeguards in death penalty cases because death is uniquely severe and irrevocable"; Woodson v. North Carolina, 428 US 280 (1976): "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case. In order to satisfy the Cruel and Unusual Punishment Clause, the court must enforce and guarantee these specific and special safegaurds because a human life is at stake"; Lockett v. Ohio, 438 US 586 (1978); Edmund, 458 US 782 (1982): "Death penalty is clearly unique in its severity and irrevocability."

[225] *Psychiatric Participation in Capital Sentencing Procedures: Ethical Considerations*, 13 INT'L J. L. & PSYCHIATRY (page and year of publication unavailable); *Perry v. Louisiana: Can a State Treat an Incompetent Prisoner to Ready Him for Execution?* 19 BULLETIN OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 249 (1991).

[226] *Psychiatric Participation in Capital Sentencing Procedures: Ethical Considerations, supra* note 225; *Perry v. Louisiana: Can a State Treat an Incompetent Prisoner to Ready Him for Execution? supra* note 225.

when ascertaining the death row convict's sanity for purposes of execution since the temporary nature of chemical sanity renders difficult a reliable assessment of the sufficiency of a death row convict's sanity for execution purposes. The state arbitrarily and capriciously inflicts the death penalty as it would be very difficult to ensure that the death row convict was truly free of the effects of his insanity and able to meet the standard of sanity at the exact moment of his execution. Since the state cannot guarantee sanity at the moment of execution, the situation literally becomes a question of the executioner catching the death row convict on a 'good day' or else subjecting him to an execution that is illegal. Therefore, the risk that not all insane death row convicts will be exempt from execution is very high, constituting a violation of the equal protection clause.

Another debate in the medical circles that would seem to implicate the equal protection guaranteed by the Constitution, concerns the issue of whether or not the use of antipsychotic drugs simply alleviates adverse psychological symptoms or whether or not the drugs render the convict sane for purposes of execution. The debate focuses on the issue of whether or not insanity can be `cured' rather than merely `treated.'[227] One position contends that insane death row convicts can be cured. Under this approach, any improvement in mental condition is viewed as a shift towards the `cure' portion of the sanity continuum. Thus, with the aid of antipsychotic drugs, a death row convict could conceivably regain his sanity. The adherents of the `treatment' approach, on the other hand, claim that while insane death row convicts can be `treated,' they can never be `cured'. Improvements in the death row convict's mental condition are viewed as favorable responses to the treatment program or possibly even as a complete repression of the manifestations associated with the mental ailment. The elimination of erratic symptoms and the dissipation of the adverse effects of the mental condition do not, however, mean that the death row convict has been `cured' of the underlying ailment. Since the death row convict retains the underlying mental ailment, the exemption remains operative, and the stay of execution cannot be lifted.[228] In *Perry*, the Louisiana Supreme Court seemed to implicitly adopt the position that the improvement in the mental capacity of Perry was the result of `treatment' when it held that Louisiana's constitution forbids executing Perry while forcing him to take antipsychotic drugs that temporarily diminish his symptoms when his "underlying insanity can never be permanently cured or quelled."

More are of the opinion that any improvement resulting from the use of antipsychotic drugs does not reflect a `cure,' but is simply a consequence of having a particular treatment.[229] While antipsychotic medication may be effective in treating the symptoms of psychosis, it does not cure mental illness[230] because medication

[227] *Diagnosing and Treating Insanity on Death Row: Legal and Ethical Perspectives*, 5 BEHAV. SCIENCES & THE LAW 175 (1987).

[228] *Involuntarily Medicating Condemned Incompetents for the Purpose of Rendering Them Sane and Thereby Subject to Execution*, *supra* note 70.

[229] *Id.*

[230] *Assessing and Restoring Competency to be Executed: Should Psychaitrists Participate?* 5 BEHAV. SCIENCES & THE LAW 388 (1987).

only masks the symptoms of insanity. The assessment of whether sanity is real or not poses a difficult problem.

The United States Supreme Court had occasion to discuss the unpredictability of antipsychotic drugs. In *Riggins vs. Nevada*,[231] the issue was whether or not the state could force Riggins to take medication to insure his competence at his trial. The Court held that the Due Process Clause requires that a state show overriding justification for any intrusion into a defendant's constitutionally protected liberty interest in avoiding forcible administration of antipsychotic drugs. The Court, however, ruled that there would be a denial of Riggins' right to due process, if he were to be forcibly medicated, as the drug may adversely affect his right to a fair trial. The Court held that the administration of the drug could influence Riggins' demeanor as well as his ability to testify on his own behalf, to follow the proceedings, and to communicate effectively with counsel. The Court recognized that it would be impossible to determine the actual effect of medication on the outcome of the trial. Justice Kennedy, in a concurring opinion, argued that due to the uncertain nature of the effects of antipsychotic drugs, as well as the possibility of seriously harmful side effects, it would be impossible to show that there would be no significant risk that the medication would prejudice Riggins' demeanor or capacity to assist counsel in his defense. According to Justice Kennedy, because there is no medical consensus about the actual effects of antipsychotic drugs *per se* and its effects on a particular individual in particular, a court can never be certain how significantly antipsychotic drugs affect a defendant's ability to assist in his own defense. Therefore, according to Justice Kennedy, until the nature of these drugs is better understood, a state should rely on civil commitment proceedings rather than taint the integrity of the judicial process by chemically inducing competency.

The uncertainties regarding the nature of antipsychotic drugs in general and its effects on an individual in particular casts doubt on the ability to achieve the required degree of reliability and predictability in death penalty cases. Since the state cannot guarantee that the death row convict is sane at the time of his execution, and considering that any error in determining sanity for execution is final and irreversible, the probability of a violation of the equal protection clause is very great. It becomes difficult to ensure that the death row convict to be executed is not insane even if the law were to state that all death row convicts who subsequently become insane while awaiting their execution shall not be executed.

When confronted with the question of whether or not the convict should be executed, the sufficiency of the death row convict's sanity should be addressed rather than whether medical treatment has been voluntary or involuntary. It appears that drug-induced sanity is insufficient for the purpose of execution, whether forcibly or voluntarily induced. A death row convict's decision to accept or refuse treatment

[231] 112 S. Ct. 1810 (1992): Riggins was arrested for murder. During his incarceration, however, he experienced auditory hallucinations and insomnia. A psychiatrist treated him with Mellaril. Riggins was subsequently adjudged competent to stand trial. Riggins, however, moved for an order from the district court to terminate the treatment until the end of his trial, alleging that the continued administration of the drug would deny him due process because the drug would affect his demeanor and mental state at the trial.

should be based on his medical need, not on the state's desire to execute. For the purpose of determining sanity for execution, no basis exists for distinguishing between death row convicts whom the state has forcibly medicated to restore competence and death row convicts whom the state has forcibly treated for other purposes or who voluntarily accepted medication.[232] Therefore, an examination of not only when the execution should occur but whether the death row convict should ever be executed must be addressed.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

This study dealt with an examination of the issues connected with: (1) procedures in raising the insanity claim; and (2) procedures after a death row convict is adjudged insane, with the end in view of formulating guidelines to aid in framing of specific and uniform procedures to deal with the above issues.

When an insanity claim is raised, any procedure formulated to resolve such claim must meet the constitutional mandate of procedural due process. As a life and death situation is involved, sufficient safeguards must be implemented in order to assure that erroneous and discriminatory decisions are not made. The extent of such procedural due process to be accorded the death row convict is to be determined by a balancing process. Specifically, the competing interests of the death row convict, of the State and of society must be taken into consideration in formulating the procedure as to the following specific issues: who may raise the insanity claim, notice, the appropriate forum to resolve the insanity claim, cross-examination, and the degree of evidence required create a right to a hearing on the insanity claim. It would appear generally that in order to give proper deference to the competing interests abovementioned: (1) the death row convict, or his counsel, should be allowed to raise the insanity claim and that counsel should be provided for the death row convict after final sentence is pronounced and before execution for this purpose; (2) that the death row convict is entitled to notice; (3) that a judicial forum is the best alternative to resolve the insanity claim; (4) that there must be cross-examination of the psychiatric experts called upon by each side; and that (5) there should be a distinction as to the evidence required to raise an initial insanity claim as against raising a subsequent insanity claim.

After a death row convict is adjudged insane, the state can order medication but in order for the state to truly meet its *parens patriae* interest in serving the medical needs of the insane death row convict, this treatment should only be for the purpose

[232] People vs. Cayat, 68 Phil. 12 (1939): "It is an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification. And the classification, to be reasonable: (1) must rest on substantial distinctions; (2) must be germane to the purpose of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class." In the case of insane death row convicts, there is no substantial distinction between one who voluntarily agrees to undergo medication and one who undergoes forcible medication. The use of antipsychotic drugs in both cases will produce the same results.

of decision-making, i.e., the treatment should be aimed at regaining so much of the death row convict's sanity to enable him to decide whether or not to continue with the treatment and not for the purpose of execution. However, if the insane death row convict reaches such a stage in the treatment and decides to forego continued treatment, the issue of forcible medication arises. A resolution of this dilemma brings to fore once again the competing interests of the state and of society against certain unconstitutional rights of the death row convict. The possible interests the state can aver in such a situation would be its *parens patriae* function and its police power. The death row convict, on the other hand, can rely on the constitutional guarantees of the right to liberty, right to privacy, right against cruel, inhuman and degrading punishment, right against torture and the equal protection clause. It would appear that from the balancing of these competing interests, the death row convict would have a valid right to refuse continued medication.

More importantly, however, are the other issues that arise in considering the right of the death row convict to refuse treatment. It would appear that the determination of whether a death row convict can be executed should not be based on the method by which sanity is purportedly achieved, i.e., whether voluntary or forced. Rather, the same should be based on the resolution of the question of whether or not sanity has actually been realized. For the purpose of determining sanity for execution, no basis exists for distinguishing between death row convicts whom the state has forcibly medicated to restore sanity and death row convicts who voluntarily accept medication. The real issue, therefore, seems to be whether a death row convict treated with antipsychotic drugs is sane for execution. Because a higher degree of reliability is required in capital cases, the question of the sufficiency of chemical sanity for execution raises concerns regarding the predictability and accuracy of chemical sanity. Questions arise as to how long the medicated death row convict's sanity will last and whether sanity has actually been achieved. Additionally, precisely because of this controversy, executing a death row convict who has been treated with antipsychotic drugs, whether voluntarily or forcibly, implicates the equal protection clause of the Constitution. There can be no assurance that the death row convict being executed is in fact insane. The issue becomes more significant considering that an error in determining competence for execution is final. This leads to the conclusion that once a death row convict is adjudged insane, there should be a permanent stay of execution.

B. Recommendations

On the basis of the conclusions derived from the study, it therefore becomes imperative to recognize that it is possible for a death row convict, after final sentence has been pronounced, to become insane while waiting for his execution date. Clearly, steps should be taken in order to minimize, if not avoid, this occurrence. For this purpose, the executive department should see to it that prison conditions, especially death row conditions, be maintained in such a manner as to minimize the possibility of death row convicts becoming insane while awaiting their execution. While it is true that death row convicts should not be pampered during their incarceration, prisons should be preserved in a way so as to eliminate possible factors which may contribute to the pressures death row convicts face. Prison personnel should

coordinate with psychiatrists and psychologists to aid the death row convict in resolving within himself the fact of his impending execution. Also on the issue of minimizing the possibility of death row convicts becoming insane, hearings of capital cases at the Regional Trial Court level should be expedited, without, however, sacrificing accuracy in their determination. The Supreme Court should examine and analyze the present automatic review system for death penalty cases as an expedited review is also called for for the same purpose and for the more effective implementation of the Death Penalty Law.

It would seem that mere reliance on Article 79 of the Revised Penal Code regarding the suspension of the execution of sentences when the convict becomes insane while serving such sentence does not adequately address the issues presented in this study. Congress should then formulate a law providing for specific and uniform procedures when an insanity claim is raised by or on behalf of a death row convict. Specifically, the law should be made to cover the following aspects: (1) who may raise the insanity claim; (2) notice to the death row convict; (3) the appropriate forum to resolve the insanity claim; (4) cross-examination of experts presented by each party; (5) the evidence required to raise an insanity claim; and such other aspects as may be deemed relevant. This study provides guidelines to aid in the formulation of such procedures. Congress should also provide for the appropriate administrative agency for the formulation of rules and regulations to ensure the proper implementation of the law. The law must likewise provide for procedures after the death row convict is adjudged insane. Specifically, the law must recognize the power of the state to treat the insane death row convict, but only for the purpose of "regaining" so much of his sanity in order for him to personally decide whether or not to continue such treatment. The law must therefore recognize the right of the death row convict to refuse treatment, if he so desires, once he is able to do so. However, the death row convict should not be forced to choose between refusing medical treatment to avoid execution or treating his insanity and risking execution in the process. In this scenario, instead of death, the death row convict is forced to endure a life sentence of suffering from the symptoms of his insanity. The decision of the death row convict as to continued treatment of his insanity should be based on his medical needs and not on the state's desire to execute.

In light of this and considering that the effects of antipsychotic drugs in general and their effects on an individual in particular are uncertain, Congress should formulate an alternative course of action to the imposition of the death sentence once a death row convict is adjudged insane to ensure that the death penalty is applied fairly and equally. Possible alternatives that may be considered are lifetime confinement in a mental institution or life imprisonment without the possibility of parole, with or without the possibility of executive clemency. However, Congress should bear in mind the state's duty to protect society from the death row convict, considering that he has been convicted of committing a heinous crime, in the formulation of such alternatives.

ANCESTRAL DOMAIN OWNERSHIP AND DISPOSITION: WHOSE LAND, WHICH LANDS

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ABSTRACT

"Our demand is just and simple."

—Lubasan

The plight of the indigenous cultural communities for recognition of their ancestral domain is a struggle that has raged for generations. Their demand is just and there is sufficient legal basis for their claim. The Regalian Doctrine has been unjustly and indiscriminately applied to lands occupied by indigenous cultural communities. But under Carino, the indigenous cultural communities' pre-conquest occupation of their lands has removed the same from the coverage of the Regalian Doctrine. Even under the original text of the Manahan Law, as applied by Republic v. Court of Appeals, there is an unmistakable basis today for allowing registration of ancestral lands though they may be classified as forest lands under the present classification.

The issue of ancestral domain is not, however, as simple when viewed in the light of current environmental concerns. This is not to say that traditional indigenous land-use systems are destructive. On the contrary, these indigenous practices can be made the basis of prohibiting the transfer of lands within ancestral domains to non-indigenous persons who lack the indigenous people's conservatory and indigenous knowledge . Thus, while it is conceded that, either under Carino or the Manahan Law, ancestral lands are private with all the rights and attributes of ownership, the writer submits that there must first be a determination of which lands in the ancestral domain are held in a private capacity and which lands are not, in order that registration of communal lands in favor of individuals may be precluded. The writer also submits that, as the march of non-indigenous migrants to the uplands has been shown to precede forest denudation and destruction, as against the ecologically sound indigenous practices, the transfer and alienation of land within such critical areas must per force be limited to members of the indigenous cultural communities. On this score, Carino seems to be an insufficient basis.

It is therefore submitted that while recognition of private ownership is made in favor of indigenous cultural communities over their ancestral lands, a clarification and limitation on the exercise of such rights are in order as an exercise of police power.

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