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On Executing Treatment-Resistant Schizophrenics:
Identity and the Construction of “Synthetic” Competency

Theodore Y. Blumoff*

Madness is beyond imagination, and yet it is profoundly rooted in it; for it consists merely in allowing the image a spontaneous value, total and absolute truth.#

[E]verything which the mad person relates is, in accord with the possibility of an experience, and indeed with the formal law of thought; but, because of falsely inventive imagination, self-concocted ideas are treated as if they were perceptions.##

I. INTRODUCTION

Competency for execution (CFE) has the ring of an oxymoron. As several foreign friends noted in reaction to a program in which I recently participated, “You mean you give them meds to make them competent, then give them more meds to kill them?” “Yes,” I said, “we try to do that. We want to make ourselves certain that those we execute for crime have an existential understanding of why they are being executed before they are killed. And they must suffer, in one way or another.”

*Professor of Law, Mercer University, Macon, GA. Many thanks to friends who have helped along the path to this manuscript, including Drs. Dick Elliot, Chris Riley and Gus Smith, Professors Harold Lewis, Stephen Morse, Jack Sammons and Gary Simson: all provided useful comments and suggestions on earlier parts of this paper. Special thanks to Caitlin Colley and Cameron Saunders (Class of 2015) for superb assistance. I have presented portions of this paper and received wonderful feedback at the Atlanta Neuroethics Consortium’s conference on “Neurointerventions and the Law: Regulating Human Mental Capacity.” As always, I express my gratitude for the ongoing support of Mercer University Law School and Dean Daisy Floyd.


##Immanuel Kant, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 112 (ed. by Hans H. Rudnick, trans by. Victor L. Dowdell (SIU Press 1978/1796-97) (hereafter “Kant, ANTHROPOLOGY”). It is worth noting that Kant subdivided mental illness into a number of categories.

*Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and
My friends were still left befuddled. Their reaction was understandable in its own way: Unlike competency for trial or pleading or sentencing—all of which ask if the defendant is sufficiently rational to assist counsel in his own defense,¹—questions about CFE implicate doubts about the defendant’s sanity, and so raise questions about the defendant’s capacity to comprehend the meaning of his impending death. When that capacity for understanding is probably absent, there is no one to punish.

Such an outcome seems to run counter to our most primal retributive impulses: One who deliberately kills another without justification or excuse is often deemed unworthy of remaining in the community. This reactive response—the loss of membership in our moral community—runs deep in our American culture, which is not surprising from an anthropological or evolutionary perspective.² As to the former, our shared Abrahamic tradition, for example, introduces retribution in GENESIS³, when God punishes Adam and Eve for killing the myth of perfect creation: a consequence of the lost dream of an omniscient, omnipresent, and omni-benevolent Creator—GENESIS 1.⁴ It occurs peaceful—like something any one of us might experience in our final moments.” Wood v. Ryan, No. 14-16310 (Kozinski, CJ., dissenting) (Filed July 21, 2014).


²As to the latter, that is, on the evolutionary foundations for retribution, namely, the need to punish outliers as a necessary condition for social development and stability, see e.g., Robert Boyd et al., The Evolution of Altruistic Punishment, 100 PNAS 3531 (2003); ND Ernst Fehr and Simon Gächter, Altruistic Punishment, 415 Nature 137 (2002). On its relationship to punishment, Morris B. Hoffman, The Punisher’s Brain: The Evolution of Judge and Jury esp. Ch. 2 (Cambridge 2014); Kent Greenawalt, Punishment, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (noting that from a retributive perspective, “punishment is justified because people deserve it”); Jonathan Haidt, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, 108 PSYCHOL. REV. 814 (2001) (sampling social science research and suggesting that the cross cultural intuitional uniformity on punishing serious wrongdoers “are the product of an evolutionarily developed mechanism that predisposes each human toward acquiring these intuitions”).


⁴The conventional wisdom holds that there were at least two authors of the primeval stories, including, “P” the Priestly account which includes Creation I and was written about 600 B.C.E. and “J,”
shortly thereafter in GENESIS 5: The nature of retribution as a divinely-begotten reaction is confirmed, to be reaffirmed frequently thereafter.\(^5\) Created in God’s image\(^6\) and succumbing to the serpent,\(^7\) we are in some ways, at least, exactly who we profess to be: instinctually retributive beings created in God’s image. It can come as no surprise then that a relationship should endure between primitive retributive practices—evolving intellectually, socially and culturally—and some sense of finality. This durability assures us that there always will be questions left open about moral responsibility generally and the jurisprudence of criminal law specifically, including the expressed need to reclaim oneself that often accompanies the murder of a loved one.

So one could say that those who view the most muscular form of retribution—capital punishment—as a necessary incident of punishment are, for that reason, making a judgment that is

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\(^5\)I’m thinking, of course, of Cain’s expulsion after slaying Abel, were retribution includes expulsion and the “mark” of his infamy (and God’s protection) Gen. 4:1-12. See also GEN 8:24-14; GEN.19:24-29, respectively.

\(^6\)E.g., GEN.1:26-27. I do not mean to assign ongoing normative admiration to the retributive stories that begin Hebrew Scriptures. I cite them only to make the point that these expressions have been a part of our shared theological narrative since its inception and, for that reason, we cannot show surprise that they have continued. I tend to agree with Hume that God’s reaction to the weak creatures that are we is overbearing and unjustifiable. In his essay, “Of the Immortality of the Soul,” Hume writes: “Punishment according to our conception, should bear some proportion to the offence. Why then eternal punishment for the temporary offences of so frail a creature as man?” David Hume, SELECTED ESSAYS, 327 (ed. by Copley and Edgar; OUP 1996).

\(^7\) GEN.3:1.
morally suspect. As long as unjustified homicides occur and some among us continue to hold onto these deeply-held reactions and beliefs, reactions will both occur and raise questions.\textsuperscript{8} Vengeance is an elemental driver of retribution, and this observation is nowhere more apparent than the demand that we execute schizophrenic murderers whose competency is believed to have been restored.

Legal execution is in this way a description of the prototypical retributive act—“like for like” in apparent biologic proportions. And yet our tradition also requires us to attempt to justify these feelings in ways that separate us from our evolutionary psychological need to punish outliers. And what if these murderous wrongdoers have lost their sentience after their crimes were committed, after sentencing to execution, but before the execution is carried out? Do we still have a moral warrant for lethal punishment where the defendant’s competency—his ability to acknowledge his responsibility for the crime and thus its relation to the impending death penalty may or may not have been restored prior to execution? So what if we cannot tell whether the actor is fully in touch with reality or not? We still demand a moral justification for execution under such circumstances?

This essay asks whether forced medication of death row schizophrenics whose illness arose after sentencing in a form in which its worst manifestations are only sometimes controlled by medication,\textsuperscript{7} is sufficient to remove schizophrenics from the (almost universal) prohibition on executing those who are not mentally competent for execution. The question presents many facets. To begin with, though, I have to state forthrightly that I cannot write this examination of punishment and schizophrenia


\textsuperscript{7}I am using the term “schizophrenic” loosely to refer to all defendants who suffer psychotic delusions, that is, embedded beliefs which, while they may or may not be realistic in some contexts—not all such sufferers believe the planet has been invaded by Martians—are not plausible or remotely realistic in one who also suffers psychotic episodes. Some will also suffer visual and/or auditory hallucinations.
unless we examine the disease in a real way. This is not simply as a disease for which medications are available to quell the positive symptoms for at least some, but more personally and in a way that raises hard, first-hand questions about personhood, which is central to the issue. The examination thus begins with personal observations of a loved one who descends from brilliance into a mostly muddled schizophrenic world. The prevailing point here is that those who find themselves in such a world are not the same person they were prior to the onset of the disease.

And, more importantly, many lose their moral agency, the one factor that, in a penal context, undermines whatever worth they might have delivered as the objects of our retributive needs. Put simply, those within the description set out above—lost sentience after conviction and sentencing to death but before debatable sentience execution—are no longer able to restore the aesthetic balance in their social lives or ours that the harm they committed has upset. The paper then looks at the affects of schizophrenia outside the purview of the law, next at the nature of personal identity over time, and at the development of legal edifice that permits the execution of those who suffer schizophrenia after sentencing, and then back to aesthetics, to the relationship between our moral justification for executing individuals whose competency is questionable. I conclude that there is no moral rationale for executing the drug-resistant schizophrenic, one who is, in some ways at least, a child-like creature whose attention span is in constant flux.

Persist. On the Nature of Schizophrenia: Some Personal Observations


9I have addressed this phenomenon in Some Thoughts on the Aesthetics of Retribution, 17 CAN. J. L. & JURIS. 233 (2004).
I’ll call her Sheila. That’s not her real name but it will do; it’s from the Latin caecus, I discovered, meaning “blind,” among other things. Sheila wasn’t blind, but she was profoundly blinded-sided. We had been significant friends for nearly three years when, with my encouragement and that of her family, she accepted an invitation to travel to Koscovo in the summer of 2008 to present a paper on, and visit the mass graves of, the survivors of those who were butchered by Serbian forces under Slobodan Milošević. The daughter of a sweet woman of Filipino-American origins who had herself been interned by the Japanese in Manila during World War II, Sheila had earned a Ph.D. in moral philosophy studying issues of identity and adjustment among the children of both the slaughtered and the slaughterers during periods of genocide, and the moral legacy with which they must live. She was quite simply the smartest person I have ever known. When she returned from eastern Europe a week or ten days later, however, she was different person. She was in the prodromal stages of schizophrenia, beginning to embed paranoid delusions. I didn’t then know it.

Her diagnosis came roughly six months later, although much of the Summer and Fall of 2008

10 http://en.wiktionary.org/wiki/caecus This character could also have been called “Simon,” from the Hebrew שִׁמְוֶן or Shim’on, meaning “he has heard.” Behind the Name Simon, http://www.behindthename.com/name/simon. I will limit my discussion in the text to observations I have myself made over a four year period of time living with a schizophrenic. These are not my only observations. One of my oldest and dearest friends was also diagnosed with paranoid schizophrenia late in life. Observing him and questioning his loved ones only confirmed what I had seen more closely.

11 It is possible that during the early periods of schizophrenia, the “prodrome” period, some long term help may have been possible. M. Mokhtari and R. Rajarethinam, Early Intervention and the Treatment of Prodrome in Schizophrenia: a Review of Recent Developments, 19 J PSYCHIATR PRACT. 375 (2013), but even this is just a guess. There is not sufficient evidence at present to conclude that there is any treatment, early or late, that eliminates schizophrenia after it is fully developed. E.g., Laurence Mees et al., Adolescents and Young Adults at Ultrahigh Risk of Psychosis: Detection, Prediction and Treatment: A Review of Current Knowledge, 32 PSYCHIATRIA DANUBINA 118 (Supp. 1 2011). A PDF of the paper is available online. An abstract is available at http://www.ncbi.nlm.nih.gov/pubmed/21894117.
was spent searching for an individual who probably existed only in Sheila’s mind, a possibility she
conceded—only once, early on, in a rare moment in the disease when she enjoyed nearly full sentient
clarity in a matter that concerned her psychological well being; otherwise, she did not suffer my
skeptical questioning for long. She had become abjectly fearful that some shadowy person was
pursuing her for reasons that lacked any plausibility. Every phone call, although in fact there weren’t
many, was perceived as an imminent threat, sometimes, after an hangup call, generating a storm that
was comprehensible only after several similar raging occurrences. (And this was before the
ubiquitous presence of caller ID.) When the search for the delusory fellow traveler ended some ten
weeks or so later, neither the FBI, the Georgia Bureau of Investigation nor Delta security could even
verify that such a person, in the seat he purportedly sat in (or any person meeting Sheila’s
description), existed.

But all this preceded the initial diagnosis and its massive consequences. I first became aware
of the diagnosis in December of that year. Sacrificing (abandoning) her faculty position and the hard
earned tenure she had just received, Sheila traveled from Georgia to New York City to spend some
time with her teenage son, who was then living there with his father. I hadn’t heard from her for
several days after she left, which was not entirely unusual but was nonetheless disturbing given what
I knew to be her fragile, fragmented condition. After a couple of nearly panicky days trying to find
her and getting no returns from messages left on her cell phone, I heard from her ex-husband and her
mother, with both of whom I had spoken and conveyed my concerns, and who then contacted me to
let me know that they had found her. She was on the thirteenth floor, the psych floor, at a first-rate
medical facility on the Upper East Side. She had checked herself in to deal with an excruciating pain
that shot down the back of her head and into her entire nervous system. I was in the city before the
next day ended. The first diagnoses was schizophrenia undifferentiated type.\textsuperscript{12} What that would come to mean I could not then have imagined.

I wasn’t permitted to see her until that next morning, and didn’t happen upon the diagnosis until several days later. She was tranquil when we first, on Chlorpromazine, I believe, and we sat together on upholstered chairs in near silence for a very long time, looking out a large plate glass window over-looking the East River and Roosevelt Island. We were both lost. We held hands—a violations of the rules, I was later told—and I tried in my most gentle, cheerleading way to tell her that things would get better with time. She would be released from the hospital soon, rest and recover—three weeks in the hospital it turned out—and then go back to work somewhere teaching ethics or moral philosophy. She would return to a normal life. (I would repeat the basic message for the next couple years.) She told me then in a chillingly calm and utterly certain but resigned and forsaken voice that she would not get well, ever, that whatever changes had taken place in her brain would not be undone. And she often told me that repeatedly and less manifestly in the days to follow. Her prescience was on target. Nearly four years, two additional diagnoses (delusional disorder and paranoid schizophrenia), several additional trips to the psych ward, and a bevy of psychotropic drugs later, she killed herself.

I mention all of this to make a point about the effects of psychotropic medications—CFE restoreres—on some patients. Before the end, Sheila had also taken Haldol, Risperdal, Zyprexa and, last, Geodon. (Xanax for sleep and Wellbutrin were regulars.) With each psychotropic drug, she

\textsuperscript{12}“When a person is exhibiting symptoms which meet many of the symptoms of schizophrenia, but does not fully or clearly fit one of the other types of schizophrenia (paranoid, catatonic, disorganized or residual), then s/he is given a diagnosis of undifferentiated schizophrenia.” Cheryl Lane, \textit{Undifferentiated Schizophrenic}, at \url{schizophrenic.com/content/schizophrenia/diagnosis/undifferentiated-schizophrenia}. 

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got some temporary symptomatic relief and unbearable side effects and lost sentience, and she never cast off the schizophrenia. Although she was capable of great tumult and violent language and behavior, she also evinced speech that was slow and imperfect; and she was confused about her state of mind at all time, even when she could nearly calm herself enough to watch a BBC production of a Jane Austen novel or listen to the news. Her delusions, sometimes in more mildly expressed forms than at other times, never left her. With time, they would invariably and effortlessly interject themselves into whatever we were watching, doing or talking about—news, movies, occasional sport. Each occasion became the vehicle illuminating her delusional thinking; that is to say, she was always a schizophrenic, regardless of the medications she took. Signs and symbols and salient stimuli that were visible only to her intruded into every event. A stranger on a subway wearing a North Face jacket or carrying the company’s backpacks, with its unique symbol, was a threat, because the symbol spoke to her in some unfathomable language that heralded danger.

Unlike the rest of us, schizophrenics lose the capacity to disentangle their own internally generated images and thoughts and perceptions from those that are evoked by real things from outside. They are child-like in the way in which their attention is constantly redirected inward in cryptic ways. And for many this is true regardless of attempts to synthesize competency. There is a kind of black painfulness for one living in a reality to which no one else has access; the loneliness within that tiny orbit of misplaced certitude is unacknowledgable by the rest of us but must be so overwhelming that, eventually, the suicidal or homicidal schizophrenic cannot move on. Not all get individuals find drugs that suppress the positive symptoms of schizophrenia entirely although many do get some symptomatic relief, often at a great cost. But the bottom line is the same:

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Schizophrenia creates a new person, as if the old person had died.

Who does the schizophrenic become? And how should the law respond to her when knockout punishment is the default option? What is undeniable is that the schizophrenics are not the same psychological persons over time as they once were. John Locke provided the foundation on which much contemporary thinking about the relationship between personal identity and ethically appropriate assessment over time rests. He put down a marker that remains as a starting point for the discussion to this day: Should one be “punished now for what he had done in another life, whereof he could be made to have no consciousness at all, what difference is there between punishment and being CREATED miserable?”

Sheila was not completely without consciousness, and I doubt that many schizophrenics are. Moreover, Locke’s views were overstated; but Sheila was recreated miserable; her life as a schizophrenic, on medications or (eventually) off, was “a living hell,” a phrase she used often near the end.

III. Some Thoughts About the Schizophrenic and Rationality

The ultimate language of madness is that of reason, but the language of reason enveloped in the prestige of the image, limited to the locus of appearance which the image defines.

What is evident to those who spend time with and observe schizophrenic individuals closely is that many suffer from chronic paranoid ideations. These forlorn individuals occupy a

14John Locke, Of Identity and Diversity, in An Essay Concerning Human Understanding Ch. XXVII, at ¶26 (Project Gutenberg, 2d ed.) (emphasis in the original) at www.gutenberg.org/cache/epub/10615/pg10615.html

15There are an abundance of well documented critiques of Locke’s view. E.g., Walter Glannon, Moral Responsibility and Personal Identity, 35 AM. PHILOS. Q. 231, 236 (1998).

psychological terrain that consumes their lives with a fiction-driven loss of self-control. Many suffer from unfathomable, conspiratorial delusions that are sometimes accompanied by uninvited visual and/or auditory stimuli, sometimes neither: just insane delusions in which they feel as if they have lost command of their lives; and it’s true, they have. In all manifestations, the schizophrenic endures the ongoing presence of endless self-reinforcing, invisible signs and signals that the sufferers try almost inexhaustibly and unsuccessfully to grasp.17 The ordinary conventions of comprehension do not apply because she is in the grip of an illness that is above all destructive of ordinary rational thought about one’s self-in-the-world and her affect. Her condition is sad and painful and tragic.18

That said, this phenomenon seems to have a meandering logic all its own, one that wavers along mercurial and so indeterminate paths. The beginning of a conversation whose boundaries seem to be clearly defined often end with irrepressible delusions. If one could step into the shoes of a schizophrenic who is generally drug-ungovernable—thus on medication or off—and view the world as informed by covert menacing controllers, then attempts to find an answer to the question—Who is controlling me?—can sometimes have a deeply logical, even linear effect, provided one grants the delusional premises and excuses the similarly incomprehensible conclusion. She pursues an apparently unlimited list of alternative interpretations for a madness that is as invisible to her as her demons are invisible to us. Every new sign that catches her attention—and it can come

17See Roisin Kemp et al., Compliance Therapy in Psychotic Patients: Randomised Controlled Trial, 312 BMJ 345, 345 (1996) (estimating that up to 80% of psychotic patients to whom neuroleptic drugs have been prescribed fail to comply); Hans Rittmannsberger, et al., Medication Adherence Among Psychotic Patients Before Admission to Inpatient Treatment, 55 PSYCHIAT. SERV. No. 2 (2004), at http://journals.psychiatryonline.org/article.aspx?Volume=55&page=174&journalID=18 (page cites unavailable) (noting that 57% of their patients (54 patients in all) were fully or partially noncompliant within a year after discharge from inpatient treatment).

18Notes Foucault, “Madness, as simple delirium, is projected onto others; as perfect unconsciousness, it is entirely accepted.” Foucault, supra note # –, at 263.
at any time and from any source—leads to a linear conclusion which, invariably, presents another
dead-end into which her mind travels and which, in turn, leads to another potential explanation; there
is always another potential explanation, another dead-end. Like a child, she can lose her ability to
effect a simple cause and effect relationship, for example, that punishment often follows from crime.
The accounts she provides usually begin with genuine moral certainty that this lead, this new clue,
is the appropriate one; it will unlock the mystery of her captivity. In fact, she has articulated another
global overstatement of purported understanding that, grievously, lacks careful thought, a capacity
which, in the past, was second to her nature. The patient struggles until the pain is overwhelming,
then violence often follows—to herself or to another. Controlled affect and the reasoning privileged
thereby are dead. And when violence to another is particularly egregious, the defendant who was
previously undiagnosed or misdiagnosed or noncompliant now becomes schizophrenic after trial,
and may yet relinquish his life in many jurisdictions. This has not always been the case. Before
moving to the jurisprudential history, however, I examine the attributes of identity and ask, What
does it mean to perdure as a competent person over time?

IV. Identity, Culpability and Retribution

A. The Minimal Components of Personhood and its Continuity Over Time.

“PERSON, as I take it,.... is a forensic term, appropriating actions and their merit; and so
belongs only to intelligent agents, capable of a law, and happiness, and misery.”19 “Forensic,” in this
context, means “subject to tests or techniques used in connection with the detection of crime,
namely, ‘Who dunnit?’ Historically, the term forensic is from the “mid 17th century: Latin forensis

19Locke, supra note # –, at ¶28.
[meaning presentable] in open court, [in] public.”

In an important essay in which sets out to describe the connection between the components of an individual person’s identity and our appraisals of that individual’s culpability over time, John Locke raises the question of what the criteria of “personhood” are for genuine ascriptions of on-going responsibility.

Locke’s definition of a person encompasses the minimum attributes of agency. A person is “a thinking intelligent Being,” he wrote, one who “has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as it seems to me essential to it.”

It is in self-consciousness, he insisted, that personal identity resides, “i.e. the sameness of a rational being: and as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person.”

Nothing we can say about theories of punishment—utilitarian, retributive, or otherwise—coheres unless the object or subject of these understandings has the capacity to be acknowledged as an “Agent.” This section and the next begin speaking to that issue: Does our understanding of agency permit us to inflict death on individuals who suffer from schizophrenia after being sentenced to death.

I will not pursue in depth the important question of what constitutes moral agency such that we can hold a person responsible for his or her actions or culpable omissions other than making note


21 John Locke, ESSAY CONCERNING HUMAN UNDERSTANDING 2.27.9, at http://oregonstate.edu/instruct/phl302/texts/locke/locke1/Book2c.html#Chapter%20XXVII

22 Id. at 2.27.11. It is, of course, the case that no one can remember everything about one’s own past, which has been a central criticism of Locke’s viewpoint, and that his definition relegates neonates to an unknown category of biology. See, e.g., Carsten Korfmacher, Personal Identity, INTERNET ENC. PHILOS. Intro. And sec. 1b., at http://www.iep.utm.edu/person-i/.
of two conditions that are universally required for a determination of “agency: (1) genuine freedom of choice and (2) something more than minimal instrumental rationality. By the former, we mean that “one must be the direct cause of one’s behavior in order to be characterized as freely choosing that behavior; something whose behavior is directly caused by something other than itself has not freely chosen its behavior.”

Rationality, whose centrality to retributive views of punishment is taken up briefly below, requires more than the ability to effect a simple syllogism; it requires some consistent measure of control over the premises of one’s thoughts in seeking to meet one’s needed and desired ends. On both scores, individuals who lack competency or those who are only apparently synthetically competent fail to meet even these most basic components of moral agency, and they are not, therefore, proper subjects of retributive punishment.

B. Retribution, Rationality and Autonomy

Conceptions of retributive goals vary on a ferocity continuum. Those who describe

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24To be an “agent” thus requires more than an ability that my dogs are capable of achieving; they have “primary consciousness,” that is, “the ability to generate a mental scene in which a large amount of diverse information is integrated for the purpose of directing present or immediate behavior [food or sex, for example] – occurs in animals with brain structures similar to ours.” Gerald M. Edelman and Giulio Tononi, A Universe of Consciousness: How Matter Becomes Imagination 103 (Basic Books 2000). See also Joseph LeDoux, The Emotional Brain: The Mysterious Underpinnings of Emotional Life 126 (Simon & Schuster 1996).

25There is research suggesting that individuals who suffer late onset delusional disorders (defined broadly) are more likely to respond positively to drugs that attack its positive symptoms. See Ipsit V. Vahia et al., Is Late-Onset Schizophrenia a Subtype of Schizophrenia?, 122 ACTA PSYCHIATR SCAND. 414 (2010). If that is the case, it raises a question I have deferred for present purposes: Were these individuals appropriately diagnosed at earlier times. See note – infra.

26In Morality and the Emotions, J. L. Mackie offers diverse accounts of retribution in efforts to provide moral justification for the transcendent principle that might, should, or could be advanced by one or another notion of “desert.” 1 CRIM. JUSTICE ETHICS 3, 4 (1982). He describes three variants of
retribution as a morally warranted approach to punishment offer diverse narratives to justify the transcendent principles of morality that might, should, or must be advanced by one or another notion of “desert.”27 All such theories do, however, share several common assumptions.28 The first is that all modern theorists take off from Kant. Their shared major premise is grounded in intuition and pure reason.29 It asserts that each individual, by virtue of his or her humanity simpliciter, is an autonomous, rational decision-maker. For that very reason, each actor is regarded as exercising unfettered choice to commit or not to commit a crime. A second (more-or-less) empirical premise holds that if the wrongdoer then chooses to break the law, he or she gains (or potentially gains) an undeserved advantage or benefit.30 Three inferences follow: (a) punishment—the intentional, societal infliction of physical harm upon, and/or deliberate confinement of, the wrongdoer—is at least

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retributivism: negative, “the principle that one who is not guilty must not be punished” (that is, guilt is a necessary condition for punishment); permissive, “one who is guilty may be punished” (guilt is a sufficient condition for punishment); and positive, “one who is guilty ought to be punished” (guilt obligates the state to punish. He also adds a “quantitative variant” to the mix: “[E]ven one who is guilty must not be punished to a degree that is out of proportion to his guilt, that one who is guilty ought to be punished in proportion to guilt, or may be punished in proportion to his guilt.” Id.


28See, e.g., Anderson, supra note # –, at 365 (describing the five propositions summarized in the text that follows); Richard W. Burgh, Do the Guilty Deserve Punishment, 79 J. PHILOS. 193 (1982); Alan H. Goldman, The Paradox of Punishment, 9 PHILOS. & PUB. AFF. 42 (1979).

29On the primacy of pure reason, that is, a human faculty deemed to exist immune from empirical affects, see H. J. Paton, ed., KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS 55 (New York: Barnes & Noble, 1873).

permissible (if not obligatory\textsuperscript{31}); (b) the harm visited upon the wrongdoer must be rationally and morally defensible as proportionate to (as “fitting”) the wrong done, a distributive rationale; and (c) the purpose of punishment must not be utilitarian. To count as a just theory of retribution, therefore, its “principles must be thought of as having some immediate, underived moral appeal or moral authority.”\textsuperscript{32} That is, retributive punishment must have, as its origin, some non-consequentialist foundation rooted in a universally applicable, \textit{à priori} conception of justice. Social goals, be they rehabilitative, constraining, or deterrent are, accordingly, categorically impermissible.

The deeper point is that because the wrongdoer is regarded, at least formally, as a moral agent, we honor him or her retrospectively as a rational and autonomous individual by imposing “just” punishment. Herbert Morris famously elaborated on this thesis:

first, that [w]e have a right to punishment; second, that this right derives from a fundamental human right to be treated as a person; third, that this fundamental right is a natural, inalienable, and absolute right; and, fourth, that the denial of this right implies the denial of all moral rights and duties.\textsuperscript{33}

We are bound, therefore, to abide by the first formulation of Kant’s categorical imperative: “\textit{Act in such a way as you always treat humanity, whether in your own person or in the person of any other,}

\textsuperscript{31}Writing in 1796, Kant concluded that punishment, at least following murder, is a categorical obligation: “Even if a Civil Society resolved to dissolve itself with the consent of all its members--as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world--the last Murderer lying in the prison ought to be executed before the resolution was carried out.” Immanuel Kant, \textit{General Introduction to the Metaphysics of Morals}, in \textsc{The Philosophy of Law} 198 (trans. by W. Hastie; Edinburgh, Augustus M. Kelley, 1974 ed.).

\textsuperscript{32}See Mackie, \textit{supra} note --, at 4.

\textsuperscript{33}Morris, \textit{supra} note --, at 476.
never simply as means, but always at the same time as an end.”34 As will be shown later, no existing elaboration of the reason to inflict lethal punishment on drug-resistant schizophrenic killers meets the foundational moral criteria of retributive punishment.

C. The drug-resistant Schizophrenic

From this minimal statement of the requirements of identity and agency, one can conclude that true moral identity and culpability over time require more than minimal psychological memory along with the extension of substance to project culpability forward. So we appear to be stuck.

[W]e may say that there is more to the practical significance of human life than the capacity for moral agency, reflective self-consciousness, and reason, and this is why, when they are lost, we are confused not just about metaphysical identity questions but also . . . about how someone should be treated.35

How should we treat the villain who loses his identity to the ravages of schizophrenia? Is it enough that an adjudicated guilty defendant who seems to be the same psychological person as he was at the time he committed the crime (t1), at trial (t2), or at sentencing (t3)? Or do we have to face the additional question of whether, even if the continuation of some measure of psychological identities is the same, it is just and meaningful to execute an individual whose identity is unknowable at the time of execution, t4?36

34Kant, Groundwork, supra note # –, at 91 (emphasis in the original). Justifying punishment in the Philosophy of Law, supra note # –, at 195, he wrote: “For one man ought never to be dealt with merely as a means subservient to the purpose of another.”

35Schectman, Personhood, at 277. The authors illustrates this point by describing the bioethical dilemmas related to determining the beginning and end of life in a clinical setting.

This is neither the proper occasion for (nor am I the proper individual to) deliver an accomplished theory of the relationship between identity and morality or ethics. My goals are necessarily more modest. I hope to have depicted some of the fairly well accepted criteria on what it is to be a “person,” and to explore the link between personal identity and considerations of criminal responsibility, acknowledging that at the level of metaphysics, I am leaving many questions unanswered. Clearly, though, the law’s unwillingness to execute those who have lost competency after trial but prior to execution suggests, at the very least, that some psychological continuity in the relationship between the defendant \( t_1 \) and \( t_4 \) is a necessary condition for inflicting life-ending punishment.\(^{37}\) There may, therefore, be a useful “conceptual separability of identity and survival . . . leveled against theories of practical and moral rationality that operate with the classical [dualist] notion ‘Cartesian self.’”\(^{38}\) But our essence is not disembodied. The normative question, which will be taken up in part now, asks what being a person, even one scheduled for execution, entails, and does it apply to a drug-resistant schizophrenic (or at least an actor whose personhood is questionable). The question demands the existence of some rationale for purportedly restoring the competency to an individual slated for execution; whether there is such a rationale is debatable, but which I will later identify it as a perversion of the classic principles of retribution.

\(^{37}\)Ford, 477 U.S. at 410 (“The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane.”).

\(^{38}\)Johanna Seibt, *Fission, Sameness, and Survival: Parfit’s Branch Line Argument Revisited*, 2 Metaphysica 96, 97 (2000). On the Cartesian approach, see Parfit, *supra* note # –, at 223-26. Descartes famously concluded that even if he were absolutely convinced himself “that there was no sky, no earth, no minds, and no bodies; have I not thereby convinced myself that I did not exist? Not at all; without doubt I existed if I was convinced or even if I thought anything. . . . *I am, I exist,* is necessarily true every time that I pronounce it or conceive it in my mind.” Rene Descartes, *Second Meditation*, in *Meditations on First Philosophy* 24 (Trans. by Laurence J. Lafleur; Bobbs-Merrill 1960) (emphasis in the original). On this view, Descartes’ ego is distinct from mind and body and is the essence of identity. See Korfmacher, *supra* note # –, at §2.a.
And one writes here on a fairly blank jurisprudential slate. Interestingly, although the protections of due process and equal protection apply expressly to “persons,” except for extending that term to corporations in the late nineteenth and early twenty first centuries, the United States Supreme Court has refused to define the attributes of personhood for humans, either in terms of beginning of life or the end. The drafters of the Model Penal Code (MPC) avoid the term “person,” using the term “actor” instead and providing no definition for that term. Thus I approach this topic with only general principles in mind. But one thing is certain: With only a few exceptions, if an individual had committed the crime while insane, and the insanity “affected the person’s thinking in some relevant way,” that person would be exempted from accountability in most jurisdictions. And this exemption exists because the insane person is no longer morally

39 Noble v. Union River Logging R Co., 147 U.S. 165 (1893) (holding that the effort by the Secretary of Interior to revoke the approval of a map to certain rights of ways granted to the railroad by the Territorial Code of Washington was an attempt to deprive the company of its property without due process of law); Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886) (providing the basis for a conclusion that the corporation was protected by the equal protection clause); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), (holding that the First Amendment prohibits the government from restricting independent political expenditures by corporations, associations, or labor unions).

40 See, e.g., Roe v. Wade, 410 U.S. 113, 158 (1973) (holding “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn” and concluding that “[w]hen those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer”). Id. at 159.

41 See generally Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990) (permitting the states to provide their own evidentiary standards for determining when a guardian may, in good faith, terminate the life consistent with the ward’s understood desires).

42 MPC §1.13(6) (“‘actor’ includes, where relevant, a person guilty of an omission”); §1.13(8) (“‘person,’ ‘he’ and ‘actor’ include any natural person and, where relevant, a corporation or an unincorporated association”).

V. The Death Penalty and Post-sentencing Insanity

At least since 2003, when the full Eighth Circuit Court of Appeals approved the State of Arkansas’ determination to execute Charles Laverne Singleton, an occurrent schizophrenic adjudicated guilty of a brutal murder, death penalty jurisdictions have been permitted to use psychotropic drugs to “restore” the competency of schizophrenics so they can execute them.\textsuperscript{45} Exactly why it is permissible to execute a “synthetically” or “artificially” competent individual is unclear in light of \textit{Ford v. Wainwright}, a 1986 decision in which the United States Supreme Court, following ancient custom and common law rule, held that the cruel and unusual prohibition of the Eighth Amendment forbid execution of the insane.\textsuperscript{46} The lack of clarity follows from the inability of the Court to agree on the reason the tradition persists. Nonetheless, health care providers have faced an apparent ethical dilemma, one expressed by a dissenting judge in the Circuit Court: “[D]octors who are treating psychotic, condemned prisoners [are] in an untenable position: treating the prisoner may provide short-term relief but ultimately result in his execution, whereas leaving him untreated will condemn him to a world such as Singleton’s, filled with disturbing delusions and

\textsuperscript{44}Id. at 67; Sanford H. Kadish, \textit{Excusing Crime}, 75 CALIF. L. REV. 257, 264 (1987) (“To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him.”); MPC §4.01, cmt. 2 at 166 (noting that those who are deemed irresponsible under \textit{M’Naughten} “are plainly beyond the reach of the law”).


\textsuperscript{46}See note – \textit{supra}.
hallucinations.” They confront a kind of SOPHIE’S CHOICE of neuroethical evils.

The dilemma posed undoubtedly affects ethical decision-making. It rests on a narrative according to which certain drugs “restore” competency. The basis for concluding that one can restore competency for execution (CFE), however, is often questionable, both in its reliance on the observation of the behavioral phenomena of state-supervised, hostile captives and, so, in its application in criminal cases. First, its factual inaccuracy results from routinely conflating schizophrenia with psychosis. As noted above, neuroleptic (or psychotropic) drugs can—with meaningful patience, a cooperative patient, time to find the right drug, the elimination of sometimes hellacious side-effects, and ample counseling—provide some fortunate individuals with a buffer from psychotic episodes. None of them, however, can eliminate the schizophrenia: There is no drug that can accomplish that feat. Moreover, many schizophrenics are resistant to drug treatment.48 What that means is that the punishing authorities exercise their license to execute some individuals when the states of mind of those individuals is not only unknown, but presently unknowable in any but the most primitive childlike sense. A schizophrenic whose psychotic episodes are temporarily quelled is still a schizophrenic, and for some the episodes are never quelled or quelled only periodically.

47Singleton, 319 F.3d at 1037 (Heaney, dissenting).

48The estimates of drug resistance vary widely, from a popular number of 20-60%, Seong S. Shim, Treatment Resistant Schizophrenics, PSYCHIATRIC TIMES, Aug. 17, 2009, at http://www.psychiatrictimes.com/schizophrenia/treatment-resistant-schizophrenia, to roughly 30%, Treatment-Resistant Schizophrenia—The Role of Clozapine, H.Y. Meltzer, 14 CURR MED RES OPIN. 1 (1997) (“Approximately 30% (range 10-45%) of schizophrenic patients meet these criteria. While this definition is adequate for many purposes, it should be realized that the remaining 70% of schizophrenic patients, whose positive symptoms respond adequately to neuroleptic treatment, may also have clinically significant negative symptoms, poor social and work function, clinically significant cognitive dysfunction, poor quality of life relative to the normal population, and constitute a significant burden to family and society.) Moreover, it is not even clear what “resistant” means. Id. See generally, Robert R. Conley and Robert W. Buchanan, Evaluation of Treatment-Resistant Schizophrenia, 23 SCHIZOPHRENIA BULL. 663 (1997).
That indisputable fact leads to a misconception predicated on naive intuitions. Third party punishers and their staff of supporters who execute drug-resistant schizophrenics who CFE has been synthetically restored are often not killing the person whose conduct met the prima facie case of murder beyond a reasonable doubt. All those whose assistance sustains the death penalty under these circumstances are engaged in executing a different person than the person who committed the heinous crime and found guilty at t₁, the one whose competency has purportedly been restored. As to them we must ask, restored to what? The consciousness of some schizophrenics, even one whose positive symptoms have at times been temporarily repressed, is not the consciousness of the sane killer.

A. Psychological and Physical Continuity over Time.

As noted above, there are four crucial times for pushing the levers of state authority against those who violate its criminal prohibitions after charging. We generally assume without much reason to doubt our assumption that the convicted defendant is the same person on each occasion; that is, he or she is at all times numerically identical from t₁ through t₄; and he is temporally extended: he is the same psychological person at all times with roughly the same memories, experiences and consciousness.⁴⁹ Insanity at any one of these crucial times either excuses him from

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⁴⁹E.g., Glannon, supra note # –, at 235; Johanna Peetz and Anne E. Wilson, The Temporally Extended Self: The Relation of Past and Future Selves to Current Identity, Motivation, and Goal Pursuit, 2 SOCIAL AND PERSONALITY PSYCHOL. COMPASS 2090 (2008),
accountability at \( t_1 \),\(^{50}\) renders him incapable of being tried at \( t_2 \),\(^{51}\) delays sentencing at \( t_3 \),\(^{52}\) or undermines his sentence of death at \( t_4 \).\(^{53}\) As to \( t_2 \) and \( t_3 \), the suspension of proceedings exists as long as the defendant lacks the rational capacity to participate and assist in the presentation of his case. It is the case, then, that when the assumption of temporal extension is grievously eroded, the criminal process halts.\(^{54}\) The question Nicole Vincent appropriately asks is this: “Are we entitled to assume that responsibility will keep on tracking such restored mental capacities, or that responsibility can be restored this way?”\(^{55}\)

A case that could have raised the issue of temporal extension more clearly than it did arose more than twenty years ago in *Riggins v. Nevada*.\(^{56}\) There the Court, reversing a death sentence, held that the defendant’s Sixth and Fourteenth Amendment right to a fair trial were denied when, without a showing of medical propriety and without considering whether less intrusive means of controlling him existed, the State of Texas forcibly medicated Riggins at \( t_2 \) and \( t_3 \). Although the majority found it unnecessary to determine whether the administration of the antipsychotic drugs “denied him an

\(^{50}\)See, e.g., Model Penal Code §4.01 (“Mental Disease or Defect Excluding Responsibility) (American Law Institute 1985).

\(^{51}\)Id at §4.04 (“Mental Disease or Defect Excluding Fitness to Proceed”).


\(^{53}\)See note – supra.

\(^{54}\)See, e.g., MPC §4.06(2) (requiring the trial court to suspend proceedings until fitness to proceed is regained).


opportunity to show jurors his true mental condition at the sentencing hearing,” Justice Kennedy, concurring in the result, raised the issue of continuity of identity and one aspect of its logical relevance. He noted that forcibly medicating the defendant, which seemed to temporarily abate his otherwise manifest psychotic tendencies, permitted the jury to view a different person at t2 and t1 than the person who committed the crime at t1. “It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table,” Justice Kennedy wrote.

At all stages of the proceedings, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. * * *

As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness.  

Regrettably, Justice Kennedy did not consider the possibility that, in his psychotic state, the jury might find him a lost sympathetic individual. Still, Kennedy’s concerns raise the issue addressed here: Who is the person the state hopes (a) to have restored to competency so that (b) he can be executed? Is he the same person he was earlier in the proceedings? As Vincent points out, “some medications might make (or leave) a person competent, but nevertheless too different to be treated

57 Riggins, 504 U.S. at 133.

58 Id. at 143-44 (Kennedy, J., concurring) (citations omitted).
as the same person.” The “same person” ought to be the same individual whose numerical and qualitative capacities are substantially unchanged over time. As the observations of real individuals suffering schizophrenia points out, the person at t₁ or t₄ is not necessarily that same person at t₁ after schizophrenia has intervened. And it cannot be overemphasized that medications cannot and do not remedy schizophrenia; they provide only relief from positive symptoms for some individuals some of the time.

B. CFE: History, Law and Policy

After setting out an unvarnished picture of dealing with insane people in any context over time, the paper considered the relationship between rationality, agency and retribution. The next section then questioned the continuity of personhood and moral responsibility over time, a clear problem for the criminal justice system in all of its stages when dealing with competency or sanity. The conditions are more difficult to manage, of course, when the person is capable of and has already inflicted deadly injuries on undeserving victims. Absent an excuse, those who kill innocent others are justly deserving of intense punishment. Take Scott Panetti, for example, the deranged man who killed his in-laws and held his wife and daughter hostage for reasons that defy logical explanation and summon our ordinary language—“He must be crazy!” And, of course, he is. Nevertheless, he was adjudicated competent and not insane before his trial, although he carried a heavy bag of mental health problems. He was sentenced to death, an occasion put on hold by the subsequent determination that there was a substantial likelihood that he became insane on death row. How does

Vincent, supra note # –, at 30 (concluding that “although responsibility indeed tracks mental capacity it may not always track restored mental capacity”).

The initial Supreme Court decision is at Panetti v. Quartermaster, 551 U.S. 930 (2007).
the law deal with a person who, whatever mental baggage he carries around before and at \( t_1 \), is thereafter undoubtedly insane prior to \( t_2 \), a conclusion that should sometimes be clear even to prosecutors with an outsized appetite for death?\(^61\) How should the law punish the many Panettis in our midst?\(^62\)

This section begins with a brief historical survey of Anglo-American responses to insane defendants generally, then drills into CFE, focusing primarily on the issues not resolved in the Panetti opinion, including the nature of rationality, the goals of retribution in the context of post-conviction insanity diagnoses, and the absence of and need for uniform protections under the Eighth and Fourteenth Amendments. Finally, I return in Section VI to restoring competency and the identity of the “synthetically” restored individual.

**C. The Childish Nature of Insanity**

Recognition that insanity changes assessments of blameworthiness precedes by millennia issues related to the synthetic restoration of competency. In the Iliad (XIX, 86-134), King Agamemnon, reconciling with Achilles, seeks to absolve himself of stealing Achilles prize by blaming Zeus and Fate, which “struck me mad.”\(^75\) Cleinias, speaking to a stranger in Athens, found


an exemption from punishment for the madman and for one who suffered from disease, because the
madman “in a fit of childish wantonness, [is] himself no better than a child.” Under such
circumstances, even if death was the result of his wrongdoing,

. . . and he be judged to have been in this state when he committed the offence, he
shall simply pay for the hurt which he may have done to another; but he shall be
exempt from other penalties, unless he have slain some one, and have on his hands
the stain of blood. And in that case he shall go to another land and country, and there
dwell for a year; and if he return before the expiration of the time which the law
appoints, or even set his foot at all on his native land, he shall be bound by the
guardians of the law in the public prison for two years, and then go free.76

Thus, the challenging admixture of justice and madness was not invented in the nineteenth
century at the time of M’Naghten’s Case,77 or one hundred years later, when John Hinckley
attempted to assassinate President Reagan.78 From the Greeks onward, the conventional law
developed a consistent theme: Madmen, once deemed beasts79 but actually more like children with
a permanent loss of intentional control,80 were not proper persons for purposes of criminal
punishment.81 Kant would conclude that the insane individual who committed even an egregious

76Plato, LAWS: BOOK IX (306 b.c.e., trans. by Benjamin Jowett), at
http://classics.mit.edu/Plato/laws.9.ix.html; see Robinson, supra note # –, at Ch. 1.

7710 Cl. & F. 200, 8 Eng. Rep. 718 (1843),

78See, e.g, Sanford Kadish, et al., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS
980 (9th ed. (2012); Kimberly Collins et al., The John Hinckley Trial & its Effect on the Insanity
Defense, at http://law2.umkc.edu/faculty/projects/ltrials/hinckley/hinckleyinsanity.htm

79Foucault, supra note # –, at Ch. 3 (discussing the seventeenth and eighteenth century views of
the insane).

80Andreas Heinz and Martin Heinze, From Pleasure to Anhedonia: Forbidden Desires and the
Construction of Schizophrenia, 9 THEORY PSYCHOLOGY 47,49 (1999) (critiquing anhedonic theories of
schizophrenia).

81Id. at Ch. 4.
crime suffered from a lack of autonomy.\textsuperscript{82}

The old judges and jurisprudence scholars never spoke with one voice about its rationale, an absence of consensus that continues to this day. They recognized, however, that the insane were childlike in their unquestioned obedience to unseen motivators; they require that we care for them. Lord Bracton, writing in the Middle Ages (circa 1265 ce), opined that a ‘madman’ (\textit{furious}) is one who does not know what he is doing, who lacks in mind and reason (\textit{animo et ratione}), and who is not far removed from the brutes (\textit{et non multum distat a brutis}).\textsuperscript{83} Over time, Bracton’s axiom morphed into \textit{M’Naghten}, a cognitive test of mental capacity according to which a defendant was deemed to be insane if “at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.”\textsuperscript{84} Since the mid-nineteenth century, most American jurisdictions have opted for a variation of the \textit{M’Maghten} rules among others.\textsuperscript{85} Some have abolished the defense entirely.\textsuperscript{86} Of course the

\textsuperscript{82}On Kant’s anthropological approach to mental illness, see Patrick Frierson, \textit{Kant on Mental Disorder. Part 2: Philosophical Implications of Kant’s Account}, 20 HIST. PSYCHIATRY 293 (2009). See text accompanying notes – infra.

\textsuperscript{83}Quoted in S. Sheldon Glueck, \texttt{MENTAL DISORDER AND THE CRIMINAL LAW}, 126 (1927) (quoting Henry de Bracton, \texttt{DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE}, (Sir Travers Twiss, ed. 1878) (‘On the Laws and Customs of England’)). This is not to say, of course, that the madman was left to his own devices in the age of reason. He was confined in circumstances no sane person would wish to tolerate. Foucault,\textit{supra} note # – at Ch. III. Many were made spectacles. \textit{Id} at 68-70.

\textsuperscript{84}\textit{M’Naghton’s Case}, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843) (emphasis added).

\textsuperscript{85}See MPC § 4.01, cmt. 2; Carl Elliott, \textit{THE RULE OF INSANITY: MORAL RESPONSIBILITY AND THE MENTALLY ILL OFFENDER} esp. Ch.1 (SUNY Albany 1996).

\textsuperscript{86}See Findlaw, \textit{The Insanity Defense Among the States}, \texttt{http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html}. Four states, including Kansas, Montana, Idaho, Utah, have abolished the insanity defense altogether.
ancients did not have to deal with drug-resistant schizophrenics.

Administering insanity in the context of capital cases has been fraught with unanswered questions since the death penalty was re-instituted after a four year hiatus in 1976. Writing more than a half century ago, Justice Frankfurter noted that “[i]n the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.” Justice Brennan agreed, adding that “mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.” Although usually the painfulness of execution is removed with the advent of lethal injection, the number of questions that are unanswered has not changed much.

Barbara Ward listed the open questions in the administration of the death penalty and the determination of CFE nearly thirty years ago. Still to be determined then were issues concerning standing to raise questions of competence, what process is necessary when such issues arise, who examines the condemned and how thoroughly, what standard of competence is to be applied, who

87 In Furman v. Georgia, 408 U.S. 238 (1972), a bare majority of the Court halted executions, stating that it is “‘cruel and unusual’ to apply the death penalty—or any other penalty-selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.” Id. at 245. After state efforts to codify death penalty statutes to achieve great objectivity in application, the Court permitted the state to begin executions again. Gregg v. Georgia, 428 U.S. 153 (1976).

88 Solesbee, 339 U.S. at 14 (Frankfurter, J., dissenting).

89 Furman, 408 U.S. at 288 (Brennan, J., concurring).

makes the decision, and how does one determine the restoration of competency.\textsuperscript{91} Most of these crucial questions have been answered only equivocally, if answered at all, in the intervening generation since the Supreme Court reinstated the death penalty. Many \textit{cannot} be answered unambiguously either because there \textit{are} no definitive answers or because the Supreme Court is unable to fully answer them. There are only constructions that fulfill the punisher’s apparent need to inflict maximum brute retribution. And an examination of “synthetic competency” at the meta-level reveals that there can never be uniformly satisfactory safeguards, because competence is, at all times, a legal construct; it has traditionally focused solely on cognition and lacks uniform standards among the jurisdictions “to identify the relevant abilities that, when impaired, constitute incompetence.”\textsuperscript{92}

\textbf{B. The Law and CFE}

Here I will first examine the evolution of the law concerning coerced medication of prison inmates and then return to CFE. The final subsection turns to the \textit{Panetti} decision, and especially to the important questions it left unanswered: the nature of rationality and the requirements of due process.

\textbf{1. Involuntary Medication}

The Supreme Court put its imprimatur on the use of psychotropic medications to control the

\textsuperscript{91}\textit{Ward, supra} note # –, at 35-6.

behavior of dangerous, mentally ill defendants in *Washington v. Harper*,93 and, with some refinement, in *Riggins v. Nevada*.94 Over time, the Court would hold that it was constitutionally permissible to involuntarily medicate the defendant to render him competent to stand trial if a number of conditions were met.95 The third in a trilogy of involuntary medication cases arose in *Sell v. United States*, a non-capital case, where the Court summarized prior case law and reiterated that the state may forcibly inject antipsychotic medication,

but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.96

Importantly, even before *Sell*, the Court had held that the Eighth Amendment prohibits the execution of an individual who is “insane” or “incompetent.”97 As noted, the reason for the prohibition was not clear. Beginning with the common law, the *Ford* Court noted that Blackstone and Coke opined that executing “idiots or lunatics,” *even when the insanity arose after sentencing*, offended “humanity,” and was “a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others.”98 In addition to the inhumanity of the practice and the supposed lack of deterrent value, the common law added religious scruples. It was declared

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95*Riggins*, 539 U.S. at 179.
97477 U.S. 399, 402-03 (1986).
98*Id.* at 407 quoting 4 W. Blackstone, COMMENTARIES * 24-* 25, and 3 E. Coke, INSTITUTES 6 (6th ed. 1680), respectively.

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“uncharitable to dispatch an offender ‘into another world, when he is not of a capacity to fit himself for it;’” and it was also opined that execution serves no purpose in these cases because madness is its own punishment: ‘furiosus solo furore punitur.’” And, the Court suggested that retributive values could not be served because, echoing Kant’s “pointer of justice” metaphor, “execution of an insane person . . . has a ‘lesser value’ than that of the crime for which he is to be punished.” Justice Powell, who endorsed the retributive explanation and provided the fifth vote for Ford’s Eighth Amendment holding, articulated the standard that courts followed for twenty years and perhaps still today. In language that would provide the Court’s standard, he wrote that a petitioner seeking a stay of execution must first make “a substantial threshold showing of insanity and then the state must provide some unspecified opportunity to be heard, which it failed to do.” Before execution, the state must find that the inmates are “aware [1] of the punishment they are about to


100“[W]hat is the mode and measure of Punishment which Public Justice takes as its Principle and Standard?,” Kant asked, “It is just the Principle of Equality, by which the pointer of the Scale of Justice is made to incline no more to one side than the other. It may be rendered by saying that the undeserved evil which any one commits to another, is to be regarded as perpetrated on himself. Immanuel Kant, General Introduction to the Metaphysics of Morals,” in THE PHILOSOPHY OF LAW 196 (Trans. by W. Hastie, 1974 ed.) .


102Ford, 477 U.S. at 426 (Powell, J., concurring). Under Florida law, the governor would charged with appointing psychiatrists to examine the inmate and write a report. The inmate was not provided with any opportunity to question the experts. The absence of the ability to take issue with the report and to present his own evidence denied due process as did the conferment of authority on the governor, hardly a neutral fact-finder. Id. at 413-16.
suffer and [2] why they are to suffer it.”103 Because the nature of “awareness” was left undefined, that is, no effort was made to provide any epistemological basis for assessing the basic requirements of awareness,104 the majority of jurisdictions have taken the opportunity to pursue a formalistic approach this to two part test.

The Ford standards were thus troubling from their onset. The Court not only neglected to define insanity or (in)competence, as with the nature of “awareness,” it also failed to describe the requirements of due process. After a showing of probable insanity, would a paper hearing satisfy the process requirement before the state takes a life? Was it sufficient that the defendant knew he would be executed, but did not understand what execution entailed because of his insanity? As often happens with drug resistant delusional individuals, the idea of punishment (or any other idea) becomes embedded in the psychosis itself, just as Sheila’s life became defined by implanting all of the life around her into her psychosis. Does that matter? What does matter?

Bafflingly, most courts that have addressed the last question have held that the embedding of execution in the delusion itself was not relevant to the determination of CFE. For example, in Walter v. Johnson, the Fourth Circuit affirmed an execution warrant despite “substantial evidence that [defendant] does not understand that his execution will mean his death.”105 In Provenzano v. State, the Florida Supreme Court duly noted that the defendant had been found competent by the circuit court “despite his delusional belief that he is Jesus Christ,” because he had “a factual and rational understanding of the details of his trial, his conviction, and the jury’s recommendation by

103Id. at 422 (emphasis added).
a vote of seven to five that he be sentenced to death.”106 Rational? By what definition?107 In a similarly obtuse fashion, the Mississippi Supreme Court found the defendant CFE despite an unchallenged diagnosis that he had “chronic schizophrenia—a longstanding, probably irreversible mental illness.”108 And in Garrett v. Collins, the Fifth Circuit reversed a rare district court stay of execution despite the trial court’s understanding that the defendant believed he would be “saved from death by his aunt.”109 All employed Justice Powell’s “awareness” standard despite the defendants’ certifiable insanity. These findings cannot be portrayed as instantiating CFE or any understanding of rationality. And it goes on in some jurisdictions despite Panetti.

What, one might insist, is the point?

2. Revisiting Panetti, Rationality and “awareness.” As Texas prepared to execute Scott Louis Panetti, the Supreme Court stepped in; it seemed to add a new layer of analysis to the CFE calculation of rationality. Not surprisingly, Panetti, as is frequently the case with individuals who were adjudicated sane and competent to stand trial but have a history of mental illness, had been saddled “with diagnoses that included schizophrenia, schizoaffective disorder, and bipolar disorder—all serious mental disorders that, in his case, were accompanied by psychotic symptoms such as auditory hallucinations and delusions of persecution and grandiosity.”110 Panetti’s initial


109 951 F.2d 57, 59 (5th Cir. 1992).

110 Brief of Amicus Curiae Americn Psychological Ass’n. et al., Panetti v. Quarterman, 2007 WL 579235 (U.S.), 12 (U.S.,2007). His ex-wife had testifies six years before the 1992 killings that Panetti “had become convinced the devil had possessed their home and that, in an effort to cleanse their
diagnosis of mental illness predated his homicidal rage by at least ten years. Notwithstanding serious ongoing psychiatric problems, he was adjudicated competent to stand trial and to be executed.\textsuperscript{111} In his habeas corpus petition to the federal district court, the judge made an extraordinary finding in the context of determining CFE: “Significantly,” the judge wrote, “no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed,” i.e., for his crimes.\textsuperscript{112} Despite this “significant” finding, which should have ended the planned (or at least delayed) execution, the district court held that under Fifth Circuit precedent “a petitioner's delusional beliefs–even those which may result in a fundamental failure to appreciate the connection between the petitioner’s crime and his execution–do not bear on the question of whether the petitioner ‘knows the reason for his execution’ for the purposes of the Eighth Amendment.”\textsuperscript{113} The petitioner failed to satisfy his burden of proof. The Fifth Circuit affirmed. As was the case in the other opinions noted above, the trial courts used an approach to “awareness” that failed to distinguish the insane defendant from a clueless child or beast.\textsuperscript{114} As noted above, the majority of courts that employed

surroundings, [he] had buried a number of valuables next to the house and engaged in other rituals.” \textit{Panetti}, 551 U.S. at 936.

\textsuperscript{111}Just two months after sentencing, the trial court found him incompetent to waive appointment of state habeas counsel. \textit{Panetti}, 551 U.S. at 937.


\textsuperscript{113}\textbf{Panetti} v. Dretke, 401 F. Supp. 2d at 712 (citation omitted).

\textsuperscript{114}“Primary consciousness [is the] ability to generate a mental scene in which a large amount of diverse information is integrated for the purpose of directing present or immediate behavior – [it] occurs in animals with brain structures similar to ours.” Gerald M. Edelman and Giulio Tononi, \textit{A UNIVERSE OF CONSCIOUSNESS: HOW MATTER BECOMES IMAGINATION} 103 (Basic Books 2000). For example, a dog knows that where his bowl is located, and that when food is in the bowl, it there for him to eat. Similarly, even a schizophrenic inmate in suffering a psychotic episode may understand that there are plans to punish him for a crime.
Justice Powell’s “awareness” standard applied a standard that “require[d] no more than the ability to articulate a semantic connection.”\textsuperscript{115} Crime ⇔ Punishment ⇔ Execution. Professor Richard Bonnie goes on: The kind of “psychotic decompensation associated with severe mental illness can leave such a formal understanding intact, while erasing or distorting a person’s ability to recognize the meaning and significance of his behavior and the behavior of others.”\textsuperscript{116} To live with a schizophrenic—to live with Sheila, for example—is to appreciate the accuracy of this observation.

The Supreme Court rejected the Fifth Circuit’s cramped understanding of competency, according to which competency was established if the defendant notes that “his crimes [are] the reason for his execution.”\textsuperscript{117} But it left as many questions unanswered as it did those it sought to answer. The Court’s majority again refused to describe the content of the process required by the Fourteenth Amendment;\textsuperscript{118} instead, it reiterated Justice Powell’s statement that the states “should have substantial leeway to determine what process best balances the various interests at stake.”\textsuperscript{119}


\textsuperscript{116} \textit{Id.} at 270-71.

\textsuperscript{117} \textit{Panetti}, 551 U.S. at 958.

\textsuperscript{118} Justice Kennedy duly noted that, under \textit{Ford}, Texas was required to provide “a constitutionally acceptable procedure far less formal than a trial,” \textit{Panetti}, 551 U.S. at 949, \textit{quoting} \textit{Ford}, 477 U.S. at 424. It not only failed to do so, it apparently failed to meet its own statutory requirements. \textit{Panetti}, 551 U.S. at 950-53.

\textsuperscript{119} \textit{Id.} at 949, \textit{quoting} \textit{Ford}, 477 U.S. at 427. This is not the occasion for a long disquisition on the requirements of due process, but it passing strange that the Court has consistently relegated the Fourteenth Amendment procedural requirements to the state. This is not an instance in which the State has traditionally defined the scope of process due when, for example, state-created property or reputational rights are at issue. Property rights have from the beginning of the Union been defined by state law. \textit{See e.g.}, Goldberg v. Kelly, 397 U.S. 254, 266-270 (1970) (requiring a hearing before termination of welfare benefits but leaving the nature of the hearing to the states). In contrast, the issue implicated here is about the process required before taking a life, a condition the Court has refused to permit the states to define. \textit{Roe v. Wade}, 410 U.S. 113, 158 (1973) (concluding that “the word ‘person,’
Why was this was the chosen approach to death invokes federalism principles requiring the process due to be left to the states is unclear, given the Eighth Amendment prohibition on executing the insane, and why enounce an approach that will unavoidably ensure inconsistent approaches to the determination of CFE?120 What the Panetti Court attempted to do was tighten Justice Powell’s “awareness” requirement to prohibit the execution of those who had engrafted their pending demise into their madness. And why would lower courts reject an approach, according to which the inmate’s delusional beliefs—those which may result in a fundamental failure to appreciate the logical link between the petitioner’s crime and his execution—are not relevant to the question of whether the petitioner knows the reason for his execution for the purposes of the Eighth Amendment?121 The majority construed Ford to mean that “delusions are []relevant to ‘comprehens[ion]’ or ‘aware[ness]’ if they so impair the prisoner’s concept of reality that he cannot reach a rational understanding of the reason for the execution.”122 As noted, although the Court never defined the phrase “rational

120The Ford plurality simply analogized to the leeway given to the state to determine competency at other stages of the proceeding, Ford, 477 U.S. at 417 n.4. But, as the Court recognized, the interests at stake in the death penalty context is different than the competency standards in the ordinary case. Id. at 411-12. Generally speaking, once the inmate makes a “substantial threshold showing of insanity,” Ford, 477 U.S. at 426 (Powell, J., concurring), it must provide some sort of hearing and the opportunity to present and challenge psychiatric testimony before an impartial decision-maker. Id. at 415-16. What is left unsaid is up to the states. Georgia, for example, by statute requires the inmate who has demonstrated a substantial likelihood of an condition that thwarts execution to prove his condition by proof beyond a reasonable doubt. See generally Hill v. Humphrey, 662 F.3d 1335, 1359 (11th Cir. 2011) cert. denied. 132 S.Ct. 2727 (2012) (refusing to examine Georgia’s proof beyond a reasonable doubt standard for mental retardation).

121Panetti, 551 U.S. at 958, quoting Panetti v. Dretke, 401 F.Supp.2d, at 712. According to one of Panetti’s experts, in his delusional state, he “recast [his] execution as “part of spiritual warfare ... between the demons and the forces of the darkness and God and the angels and the forces of light.”” Panetti, 551 U.S. at 954 (citation to record omitted).

122Id. at 958 (emphasis added).
understanding,” it did put constraints around it: Psychopaths, those who are “so self-centered and devoid of compassion as to lack all sense of guilt,” are manifestly not lacking rational understanding under this approach.\textsuperscript{123}

The need for a rational understanding followed from a rationale for requiring CFE that apparently won at least a majority of the Court: retribution. Although Justice Marshall had listed retribution as one of the reasons for the prohibition in \textit{Ford},\textsuperscript{124} Justice Kennedy mentioned the existence of others, but he elaborated only the retribution rationale in \textit{Panetti}.

Considering the last—whether retribution is served—it might be said that capital punishment is imposed because it has the potential [1] to make the offender recognize at last the gravity of his crime and [2] to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed. The potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner’s mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.\textsuperscript{125}

As others have pointed out, the Court’s suggestion that retribution would serve neither subjective nor objective values is questionable.\textsuperscript{126} It seems clear that, subjectively, the insane inmate cannot recognize the seriousness of his crime if, as with Panetti,\textsuperscript{127} he believes that execution is part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels.

\textsuperscript{123} Id. at 960. \textit{Accord} M.P.C. § 4.01(2) (“the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct”).

\textsuperscript{124} 477 U.S. at 407-08.

\textsuperscript{125} \textit{Panetti}, 551 U.S. at 958-59 (emphasis added). Justice Kennedy suggested that the additional rationales set forth in \textit{Ford} “fail to align with the distinctions drawn by the Court of Appeals. \textit{Id.} at 959.

\textsuperscript{126} Bonnie, \textit{supra} note # –, at 276.

\textsuperscript{127} See note — \textit{supra}.
and the forces of light. But that fact does not obviously undermine all retributive explanations of punishment generally or capital punishment particularly. The Kantian foundation for modern versions of retribution rests on the wrongdoer’s autonomy and rationality in committing the crime, such that one can conclude that the wrongdoer chose to do wrong. (Thus, we do not convict those who were insane at \( t \), the time of the homicide.) The punishment or distributive rationale for retribution is sometimes said to rest, in addition, on the need for the individual to disgorge the benefit he wrongly gains: When the wrongdoer then chooses to break the law, he or she gains (or potentially gains) an undeserved advantage or benefit. That advantage and the communitarian values it serves, if they are not satisfied by life in prison without parole, would be satisfying for some by execution regardless of the sanity or competency of the inmate. Thus if retribution rests on a

128Panetti, 551 U.S. at 954 (citation omitted).


130“When I am said to have done something of my own free will, “it is implied that I could have done otherwise; and it is only when it is believed that I could have acted otherwise that I am held to be morally responsible for what I have done.” A.J. Ayer, Freedom and Necessity, in FREE WILL 15 (Gary Watson ed., OUP 1982).

131It is worth noting that what constitutes the “gain” is unclear. See Richard W. Burgh, Do the Guilty Deserve Punishment?, 79 J. PHIL. 193, 203 (1982) (describing four possibilities). Moreover, even in those areas where the “benefit” gained is almost obvious, e.g., property crimes such as theft or fraud, there is a question whether an advantage is, in fact, gained, at least in all cases. With respect to theft, for example, the advantage to the wrongdoer who is caught is often short-lived at best. More generally, the benefit derived by crime exists only, or at least usually, if the wrongdoer remains unpunished. If the wrongdoer is apprehended, convicted, and punished, the whole calculus must change, for the wrongdoer’s gain, if any, may disappear. This point raises thus raises an additional, third problem: Excepting the rare Gary Gilmores who seek punishment as expiation or self-restraint or capitulation, see Norman Mailer, The Executioner’s Song (New York: Vintage Press, 1998); Gilmore v. Utah, 429 U.S. 1012 (1976) (denying standing to his mother to challenge her son’s otherwise unchallenged execution), we assume criminals do not want to get caught, and that a substantial portion of the benefit to be gained exists only if they evade capture and the legal process that follows.
community’s expressive values, as the Court and others have claimed, those values will be achieved to the satisfaction of at least some members regardless of the defendant’s sanity, and such an approach might add a bit of general deterrence to the mix. But none of the original rationales are served and “expressiveness” seems thin and even abrasive as a moral justification for executing defendants said to be CFE; that is to say, satisfying some by executing those whose competency is permanently unknowable fails to provide an unambiguous explanation for Ford’s prohibition on executing incompetent or insane individuals. What provides a more complete answer is a thicker, more enriched understanding of the role retribution, one that adds flesh to the jurisprudence of death but makes a crucial distinction between the moral rationale for punishment as an institution, and the particular practices used to express that rationale. And it returns us to original understandings.

VI. The Evolution of Retribution, Insanity and Rationality

Kant famously linked punishment in two domains, one formal, the other somewhat earth bound, and the former clearly informs the latter. The formal view rests on a conception of autonomy

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132 See, e.g., Joel Feinberg, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 149 (Oxford 1990) (noting that the relevance of moral blameworthiness “derives from its correspondence to an essential function of legal punishment which, as a symbolic device for expressing public reprobation, automatically stigmatizes the condemned offender”).


134 Among the seminal works in this area is John Rawls, Two Concepts of Rules, 44 PHIL. REV. 3 (1955); H. L. A. Hart, Prolegomenon to the Principles of Punishment, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 9(Oxford 1968) (distinguishing between the general justificatory aims of punishment and its distribution (to whom, for what offenses, for how long). Rawls’ and Hart’s breakdowns of the two conceptions preceded by many years our understanding of evolutionary psychology and the need for retributive punishment as a mechanism for insuring evolutionary stability. See, e.g., Werner Güth et al., On the Co-evolution of Retribution and Trustworthiness: An (Indirect) Evolutionary and Experimental Analysis, (Max Planck Society 2006) at http://edoc.mpg.de/292517; Robert Boyd, Peter J. Richerson, THE ORIGIN AND EVOLUTION OF CULTURES (Oxford 2005).
and rationality as human capacities purged of all things anthropological. The earthbound (practical) view addresses the distribution of punishment: for what violations, how to punish and how much. A person (an agent) is praiseworthy or blameworthy (and deserves recognition of merit or demerit) insofar as his deeds align with or against the moral compass described by the formal approach to metaphysics. In a word, the baseline for human moral perfection is an unreachably formal view of metaphysics—a maxim to be applied to all individuals at all times throughout history. This is the principle of the categorical imperative.

But Kant was neither insensitive to nor unobservant concerning anthropological topics. In fact, he taught a course called “anthropology” at the University of Königsberg for many years. He devoted a text to ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW, a somewhat surprising title from the father of modern retribution who railed against anyone who “creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment.” In the context of meting out punishment, his general maxim was “an eye for an eye—

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135 H. J. Paton, ed., KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS, 55 (New York: Barnes & Noble, 1873 (“Do we think it a matter not of utmost necessity to work out for once a pure moral philosophy completely cleansed of everything that can only be empirical and appropriate to anthropology?”)).

136 See note –, supra.

137 Kant, GROUNDWORK, supra note # at 73. For an accessible introduction to this matter, see John Rawls, LECTURES ON THE HISTORY OF MORAL PHILOSOPHY esp. 167-70 (ed. by Barbara Herman; Cambridge, MA: Harvard, 2000).

138 For a sense of how Kant approached anthropology, see Patrick Frierson, Kant on Mental Disorder. Part 1: An Overview, 20 HIST. PSYCHIATRY 293 (2009).


**jus talionis** (Right of Retaliation)—thus for causing death, with few exceptions, the only punishment option was death for the killer. And yet he had very different views when it came to punishing the insane, because as to them, retribution runs out.

Insanity, he argued, was not an appropriate subject for the judicial processing, which follows logically from his view that the mad man, even one who committed a homicide, suffered from a lack of rationality and autonomy.

Concerning the question whether the mental condition of the agent was one of derangement or a fixed purpose held with a sound understanding, forensic medicine (*medicina forensis*), is meddling with alien business which the judge knows nothing about. He must at least refer [the insane] to another faculty as something not belonging to his competence.

Kant also seemed to understand a fact about the insane that all too often escapes the comprehension of our courts: insane individuals are not deprived of the ability to engage in simple deductive reasoning, a point emphasized in the description of schizophrenia set out above. As to the lunatic he notes, “everything which the mad person relates is, in accord with the possibility of an experience, and indeed with the formal law of thought; but, because of falsely inventive imagination, self-

141Kant infamously wrote: “A child that comes into the world apart from marriage is born outside the law . . . and therefore outside the protection of the law. It [is] like contraband merchandise, so that the commonwealth can ignore its existence (since it rightly should not have come to exist in this way), and can therefore also ignore its annihilation.” *Id.* at 336.

142*Id.* at 198 (“Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out.”).

143On Kant’s general anthropological approach to mental illness, *see* Frierson, *Part 2, supra* note –.

144Kant, *ANTHROPOLOGY*, at 111.
concocted ideas are treated as if they were perceptions.” He concludes, “[n]ature even strives to bring a principle of unity to unreason, so that the thinking faculty does not remain idle.”

Kant’s understanding of schizophrenia was spot on, and the fact that medication of one type or another might temporarily quiet the mind of the insane is hardly surprising. Competency is not restored in the inmate simply because he can readily articulate the following: 1. I killed someone under appalling circumstances; 2. I am on death row and have been for a long time; 3. I am going to be executed; and 4. I know it. Full stop. The problem schizophrenics face is not one of theoretical reasoning; it is one of practical reasoning. But having that capacity alone does not free the executors

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145 Id. at 112. It is worth noting that Kant subdivided mental illness into a number of categories.

146 Id.

147 See note — , supra.

148 See; Gareth S. Owen et al., Are People with Schizophrenia More Logical than Healthy Volunteers?, 191 BR. J. PSYCHIATRY 453 (2007) (“Given that schizophrenia is at its core a pathological state of thinking, our results suggest that concepts of rationality that prioritise theoretical reason over and above practical reason might apply more accurately in a pathological example of human thinking than in a healthy one.”) available at http://bjp.rcpsych.org/content/191/5/453.full page cites unavailable online. See also Dario Mirian et al., Exploring Logical Reasoning Abilities in Schizophrenia Patients, 127 SCHIZOPHRENIC RES. 178 (2011) (“Patients performed below control participants in all [deductive] reasoning task conditions, but group differences were non significant after controlling for IQ. There were no significant interactions between group and argument type in terms of reasoning accuracy and both patients and controls performed better when reasoning with belief congruent material. In addition, no relation between deduction and paranoid symptoms was found.”), abstract available at http://www.schres-journal.com/article/S0920-9964%2811%2900020-X/abstract.

149 A summary of the trial court’s findings on CFE go like this:

First, Panetti is aware he is to be executed. This fact is undisputed, and each of the expert witnesses agreed he is aware of his impending execution.

Second, although there was some disagreement on this point, Panetti is aware he committed the murders that serve as the basis for his execution. Dr. Conroy and Dr. Rosin both testified Panetti knows he murdered his in-laws. However, Dr. Silverman expressed doubt about this. The Court notes Dr. Silverman seemed to base his doubts, in large part, on the fact Panetti did not demonstrate his awareness by stating he committed the murders during the course of their interview. The fact Panetti did not make such a
of schizophrenics from committing an act of “extream inhumanity and cruelty.” Again, what did they have in mind?

As noted earlier, the capacity to move from a major to a minor premise is not even peculiar to humans. Our facility with that capacity, our practical reasoning skill, is peculiarly human, which is why the simple test of formal competency used by the lower courts is profoundly inadequate. The current content for CFE has been and still may be so hopelessly formal that, to many of us, the whole process looks like mindless revenge. As applied, the analysis of CFE test results is formal Kant, not practical Kant-on-the-ground as an acute observer. Our ability to move from desire-to-belief-to-

statement in the course of a single interview is insufficient to demonstrate by a preponderance of the evidence he is unaware of the crimes he committed.

Finally, Panetti understands the State's stated reason for executing him is that he committed two murders. Again, both Dr. Conroy and Dr. Rosin offered testimony Panetti was aware of this fact. Dr. Silverman, though, disagreed on this point too. However, his conclusion Panetti does not understand the State's stated reason for his execution is inextricably intertwined with his determination Panetti is not even aware he committed the murders for which he is to be executed. Since the Court disagrees with the predicate of Dr. Silverman's determination on this question, it accords his ultimate conclusion little weight.

Dr. Cunningham's testimony, on the other hand, raises a somewhat more difficult issue on this point. He suggests Panetti does not even understand that the State of Texas is a lawfully constituted authority, but rather, he believes the State is in league with the forces of evil that have conspired against him. His testimony is consistent with that of Dr. Conroy, Dr. Rosin, and Dr. Silverman, each of whom testified Panetti believes the real reason he is to be executed is for preaching the Gospel. However, as discussed above, under the precedent of the Fifth Circuit, a petitioner’s delusional beliefs—even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution--do not bear on the question of whether the petitioner “knows the reason for his execution” for the purposes of the Eighth Amendment.

Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed.


See note – supra (describing the shared quality neuroscientists call “primary consciousness”).
action does not insure that human desires are always desirable—hence, *akrasia*.\(^{151}\) To the schizophrenic, the delusion often evolves into an irrepressible hope to escape from its capture, to have purpose, to relieve torment, to whatever makes life bearable. The take-home point here is that the construction of competency still in use, despite *Panetti*, does not serve its retributive foundation.\(^{152}\)

Although a rigorous discussion of rationality is also beyond the needs of this paper, one can still make a full-throated assertion that instrumental rationality does *not*, standing alone, satisfy even a minimalist approach to rationality in this context.\(^{153}\) Minimal instrumental rationality is the default position because it permits us to omit some difficult questions. As Robert Nozick points out, 

\(^{151}\)See, e.g., Donald Davidson, *How Is Weakness of the Will Possible*, in ESSAYS ON ACTIONS AND EVENTS 22, 31-3 (concluding that Aristotle provided no fully satisfactory explanation for “incontinent actions.”).

\(^{152}\)See, e.g., Basso v. Stephens, 555 F. App'x 335 (5th Cir. 2014) (applying Justice Powell’s test in *Ford*, reading *Panetti* as a due process case, and denying a certificate of appeal); See, e.g., Ferguson v. State, 112 So. 3d 1154, 1157 (Fla. 2012) (finding the defendant competent under *Panetti* and noting that “the circuit court found that Ferguson has a documented history of paranoid schizophrenia, [and] . . . belief that [his] ‘Prince of God’ delusion is anything other than genuine belief”), *habeas petn. den. sub nom* Ferguson v. Secretary, Florida Department of Corrections, 716 F.3d 1315 (11th Cir. 2013); State v. Haugen, 351 Or. 325, 342, 266 P.3d 68, 78-79 (2011) (*Ford* and *Panetti* “stand for the principle that, when a prisoner seeks a stay of execution and makes a “substantial threshold showing of insanity,” due process requires that the state provide the prisoner with a hearing at which both the prisoner and the state are free to put on evidence”); State v. Brooks, 2011-Ohio-5877, 2011 WL 5517300 (Ct. App. Ohio 2011) (“ Although the trial court found Brooks to suffer from paranoid schizophrenia, *Panetti* does not stand for the proposition that a person suffering from paranoid schizophrenia may never be competent to be executed. Moreover, one does not have to admit that he committed the underlying crimes. Indeed, even under *Panetti*, one who suffers from delusions may still be found competent to be executed if those delusions do not prevent him from rationally understanding the connection between the underlying conviction and his sentence of execution.”); Overstreet v. State, 877 N.E.2d 144 (Ind. 2007) (finding that “it is clear that [the inmate] suffers from a severe, documented mental illness and that the mental illness is a psychotic disorder that is the source of gross delusions,” but finding him competent because he failed to produce evidence that he failed to produce evidence that his “psychotic delusion “prevent [ ] him from comprehending the meaning and purpose of the punishment to which he has been sentenced,” citing *Panetti*. 551 U.S. at 960). See also Hill v. Humphrey, 662 F.3d 1335, 1359 (11th Cir. 2011) (same due process reading of *Panetti* concerning mental retardation and refusing to examine Georgia’s proof beyond a reasonable doubt standard); Jonathan Greenberg, (Note) *For Every Action There Is A Reaction: The Procedural Pushback Against Panetti v. Quarterman*, 49 AM. CRIM. L. REV. 227 (2012).

\(^{153}\)On the relationship between rationality and insanity, see my article at note –, supra.
delegating the practical syllogism to the default definition of rationality seems to be self-justifying; it’s just what we do. In contrast, anything that exceeds instrumentality seems to require an elaborate justification. The absence of a perceived need to justify instrumental rationalism eliminates the satisfaction of needs and desires in the most efficient way: it is accepted as given. But even this truth is subject to infinite epistemological regress: Why do we want to achieve our desires most efficiently? Why, for example, did Panetti come to the belief that he was a player in a contest between the forces of the darkness and God and the angels? What affective mechanisms were out of order? We may not care to find the answer, but that lack of concern does not create a non-circular way to justify even instrumental rationality. As Nozick explains, any extension of instrumental rationality may itself require an instrumental answer, although that conclusion fails to make clear that the resultant form of rationality is not thereby instrumental: “If other modes of rationality cannot justify themselves without circularity, the same can be said of instrumental rationality.”

The Panetti Court seemed to reject a simplified form of instrumental rationality in favor of an approach that warranted the conclusion that the prisoner fully comprehends the reason for his imminent death. Panetti’s life was spared because, although he was aware that he had killed, that he had been convicted, and that the would execute him, he failed to grasp the affect of that awareness. That he was slated to suffer death, a permanent state, because of his crimes, but his cognitive skills did not reflect an understanding on his part that served any explanation of the retributive goal except an-eye-for-an-eye: primitive biblical beliefs. That his execution was, to his

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154 Nozick, supra note # –, at 133.

155 Id. at 134.

156 “Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.” Deut., 19:21; Matt. 5:38.
mind, “part of spiritual warfare” indicates that he did not know why he was being executed. And so, again, what is the point? Why would anyone or any entity wish to execute a person who did not know why he was about to be executed?

VII. Insanity, Identity and “Synthetic” Competency

This final section begins by reiterating an incontrovertible truth: Psychotropic medications and efforts at restoring competency may provide temporary relief and a rough sort of management for some schizophrenics, given time and the conditions necessary for effective treatment; however, they do not cure the disease and they cannot restore competency sufficient for any but the most barbaric forms of retribution. Moreover, antipsychotic medications “generally do not treat the cognitive deficits (attention, memory) or functional disabilities (social, occupational) that are often the most chronic and intractable features of schizophrenia.” There is no cure for schizophrenia.

Moreover, no one—no one—can enter the mental landscape of the delusional individual, whether she is medicated or not. It is inaccessible to rational individuals. Even those who enjoy some temporary relief in the form of medications find out that the effectiveness of the drugs often run down over time; whether this is from the disease or the long term use of powerful medications we do not know and, generally, mental health professionals do not ask.

157 Tyrone D. Cannon, Cures for Schizophrenia, IMHRO (2014), at https://www.imhro.org/education/about-schizophrenia/cures-schizophrenia; Sungkun Chum et al., Specific Disruption of Thalamic Inputs to the Auditory Cortex in Schizophrenia Models, 344 SCIENCE 1178, 1178 (2014) (noting that some antipsychotic agents can alleviate auditory hallucination “but do not treat other symptoms (such as cognitive deficits, dampened emotion and social withdrawal”).

158 Id.

159 It is difficult to provide a citation to data that do not exist. One can only speculate as to why mental health practitioners do not address this question. That said, there is voluminous information easily available on the side effects of antipsychotic drugs but virtually nothing on why these side effects occur. See, e.g., Richard E. Powers, Understanding the Side Effects of Neuroleptics, BUREAU OF
So who is Panetti after he became undeniably schizophrenic? Who would Panetti be if he were forcibly medicated? There is an undisputed answer to these questions: We do not know, we cannot know, and, given the state of the medical arts, we are not close to knowing. In such circumstances, it beggars reason to conclude that “the offender recognize at last the gravity of his crime,” as Justice Kennedy put it. And, here, Kant is importantly on point: the ability to recognize the depth of fault is a step toward reentering a moral reality that serves as both a norm for directing conduct and a prescription for punishment. Which raises again the question left dangling at the end of the previous sections: What explains the prohibition on executing the insane?

It is reasonable to say that retribution provides a partial answer, but not in a form that courts have expressly adopted. Punishing outliers is a necessary condition for the sustenance of any community; in this sense, retribution serves an evolutionary goal. We have understood for a long time that evolutionary theory, tweaked this way and that as the evidence warrants, is not only the best practicable account of our natural human history, it has driven and will continue to drive well beyond the foreseeable future a vast and vital portion of our successes in the biological sciences, and in our understandings of ourselves. And this fact of existence serves our moral intuitions, which are

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diverse, driven by complementary neural systems that meets the environment head on: one system serves to facilitate the necessary punishment of outliers, while the other works to create the conditions both inside us and without that make cooperative living possible.\textsuperscript{161} Stable cooperation would be impossible without punishment, and retribution is an engine that facilitates cooperation.\textsuperscript{162} If, as Justice Kennedy proposed, a second purpose of the death penalty is “to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed,” then executing individuals whose competency in unascertainable can satisfy that goal for only a few and it cannot fulfill the office of retributiony. Norms reflect the value of the conduct we judge and the exact same considerations—meaningful autonomy and rationality—should be applied as a brake on our lesser values when they are absent. We are also forgiving and helpful consequentialists, driven by a different distributional system when it comes to meting out punishment.\textsuperscript{163} For these reasons, retribution is a fully justified moral rationale for punishment but lacks distributive precision.\textsuperscript{164}

So when seventeenth and eighteenth century scholars described the “extream inhumanity and


\textsuperscript{164}Rationale for punishment often distinguish between rational and moral justifications of punishment, the former of which “is the reason for engaging in this social practice” and the latter “why the practice is morally permissible.” David Dolinko, Measuring Unfair Advantage: A Response to Michael Davis, 13 Law & Phil. 493, 484-95 (1994).
cruelty" of executing the insane, what did they have in mind? What was it about the act of executing an insane person that composed a spectacle described as extremely inhuman and cruel? It is the case that early common law commentators were focused on methods of punishment in general, and did not have to face a “synthesized” person. Recall that the profoundly mentally ill were excused, even when the mental illness arose after sentencing. It is also the case, however, that executing a person whose identity we cannot know is inhumane because it cannot serve the fundamental principles of retribution: a person must be able to not only choose freely and rationally, and without recurring to medications; he should also know the reason for his punishment beyond a mere formalism. The early understanding of what constituted a “person” cannot be applied to a situation in which we do not know the person we are killing. When we no longer know the person who is the target of our punishment, we are simply terrorists, and such conduct is extremely inhumane and cruel and pointless.

Pointlessness in the context is feral, like setting a bully pounding a child on the playground: a crude and vicious unsanitized form of revenge against a weak object that allows penance for no one. The schizophrenic in any condition lacks lethal, personal accountability. Penalizing “makes no sense unless it implies that transgressors deserve punishment—that is, they are owed retribution.” Executing a person who no longer exists instantiates an approach to punishment—a moral and rational justification—that we are unwilling to suffer because we “would not countenance general application of the same

\[\text{165 Id. at 407 quoting 4 W. Blackstone, COMMENTARIES * 24-* 25, and 3 E. Coke, INSTITUTES 6 (6th ed. 1680), respectively.}\]

\[\text{166 Incidentally, during the centuries when the early commentators were at work, there were a host of “cures” for insanity, medical and otherwise. Foucault, supra note # --, esp. Chs. V-VII.}\]

\[\text{167 See Andrew Oldenquist, An Explanation of Retribution, 85 J. PHILOS. 464, 473 (1988) (advancing a form of retribution he describes as “sanitized revenge,” and notes that “personal accountability makes no sense unless it implies that transgressors deserve punishment—that is, they are owed retribution; and I shall add now that there is no doubt that retribution is revenge, both historically and conceptually”).}\]
penalty across the board.”\textsuperscript{168} At the heart of this justification is the notion that “punishment should expiate the crime and restore the moral balance in the universe.”\textsuperscript{169} Synthesized competency \textit{is} synthetic, it is \textit{not} analytic, a necessary condition for expiation. Punishment lies at the heart of a thick retributive outlook, one that focuses on a stable moral justification for punishment, not on its rational (or irrational) distribution. The very idea of executing an individual who is obviously no longer the person he was when he committed or was convicted for committing the crime that sent him to death row is not the act a morally stable community. And so sometimes there is no one to execute.

\textsuperscript{168}Furman v. Georgia, 408 U.S. 238, 245 (1972).

\textsuperscript{169}George Fletcher, \textsc{Basic Concepts of Criminal Law} 32 (Oxford, 1998).