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Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement

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I. INTRODUCTION

Contemporary American criminal law prohibits the execution of those who are not competent to face execution. The state cannot execute convicted offenders, including those who have been sentenced to death for capital crimes under valid law and through acceptable procedures, unless those offenders are competent at the time of execution. Although this requirement applies in all states that practice the death penalty and traces its heritage deep into the common law, its exact formulation remains controversial as does the appropriate rationale and the corresponding procedure.[1]

Five identifiable questions have troubled courts and commentators. First, what rationale justifies this requirement? Second, what is the appropriate standard of competency to face execution? Third, does the eighth amendment of the United States Constitution preclude execution of the incompetent as cruel and unusual punishment? Fourth, what procedural protection is necessary to implement this requirement? Fifth, what ethical dilemmas does this requirement raise for health care professionals who participate in the criminal justice system, and how should these clinicians resolve these issues?

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1. S. Brakel, J. Parry & B. Weiner, The Mentally Disabled and the Law 706-07 (3d ed. 1985); W. LaFave & A. Scott, Jr., Substantive Criminal Law § 4.4(c) (1986); Hazard & Louisell, Death, the State, and the Insane: Stay of Execution, 9 UCLA L. Rev. 381 (1962); Ward, Competency for Execution: Problems in Law and Psychiatry, 14 Fla. St. U.L. Rev. 35 (1986); Note, Eighth Amendment—The Constitutional Rights of the Insane on Death Row, 77 J. Crim. L. & Criminology 844 (1986) [hereinafter Note, Eighth Amendment]; Note, Ford v. Wainwright: The Eighth Amendment, Due Process, and Insanity on Death Row, 7 N. Ill. L. Rev. 89 (1987) [hereinafter Note, Ford]; Note, The Eighth Amendment and the Execution of the Presently Incompetent, 32 Stan. L. Rev. 765 (1980) [hereinafter Note, Presently Incompetent]; Note, Insanity of the Condemned, 88 Yale L.J. 533 (1979) [hereinafter Note, Condemned].

The United States Supreme Court addressed some of these issues in *Ford v. Wainwright* in which the Court held that the eighth amendment prohibits execution of the "insane."[2] The court in *Wainwright* discussed the rationale and standard for this requirement, but it did not resolve these issues.[3] The Court also explained its reasons for rejecting the Florida procedure for implementing the competency to face execution (CFE) provision of Florida law, but it did not specify appropriate procedures.[4] In short, the Court granted eighth amendment status to the CFE requirement, and it identified shortcomings in the Florida procedures, but the appropriate rationale, standard, and procedures remain unclear.

Although the CFE requirement has not produced voluminous literature, several commentators from the legal profession and other concerned disciplines have discussed the identified issues. Legal commentators have most frequently concentrated on the procedural protection due, although they have also discussed the rationale, standard and constitutional implications.[5] Mental health professionals have more often concentrated on the resulting ethical dilemmas encountered by members of their professions.[6]

While courts and commentators have discussed the rationale thought to justify the CFE requirement, these analyses have not provided satisfactory rationales or corresponding standards. This paper examines the justifications that have been suggested and argues that none of the

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2. Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986); see generally, Ward, supra note 1; Note, Eighth Amendment, supra note 1; Note, Ford, supra note 1; Note, Presently Incompetent, supra note 1. Various courts and commentators have described offenders who become severely disturbed between sentencing and execution as either "insane" or "incompetent." Both of these terms engender confusion because they seem to suggest that the issue and appropriate standard are analogous to the insanity defense or competence to stand trial. In order to avoid conflating various issues, this paper will use the term "disturbed offender" to refer to those condemned offenders who become sufficiently psychopathological to render them inappropriate for execution by the as yet unspecified standard of competency to face execution. The term will not refer to all offenders who suffer any psychological disturbance. Rather, it identifies only those whose pathology is so severe as to preclude execution according to the applicable standard.

3. Justice Powell did advance both a rationale and a standard in his concurring opinion. *Wainwright*, 477 U.S. at 418-23, 106 S. Ct. at 2606-08.

4. *Wainwright*, 399 U.S. at 413-16, 106 S. Ct. 2603-05.

5. See generally, Hazard & Louisell, supra note 1; Ward, supra note 1; Note, Ford, supra note 1; Note, Presently Incompetent, supra note 1; Note, Condemned, supra note 1.

6. See, e.g., Miller, Evaluation of and Treatment to Competency to be Executed: A National Survey and an Analysis, 16 J. of Psychiatry & L. 67 (1988); Radelet & Barnard, Ethics and the Psychiatric Determination of Competency to Be Executed, 14 The Bull. of the Am. Acad. of Psychiatry and the L. 37 (1986); Comment, Performing "Competency to be Executed" Evaluations: A Psycholegal Analysis for Preventing the Execution of the Insane, 67 Neb. L. Rev. 718 (1988).

familiar candidates withstand scrutiny. It then advances two alternatives and contends that these rationales provide a more satisfactory foundation for the CFE requirement and, further, that this analysis demonstrates that the CFE requirement addresses a fundamentally different type of issue than it is usually presented as raising. Finally, this analysis illuminates broader jurisprudential issues regarding the nature and justification of legal punishment, including the role of retributive principles in the social institution of punishment and the nature of the moral condemnation expressed by legal conviction and punishment.

The CFE issue does not arise unless three conditions are met.[7] First, one must assume that the state may justifiably execute some defendants under some conditions.[8] Second, in order to avoid conflating the question with several other issues involving psychological dysfunction, one must assume that the offenders in question were competent to proceed when they were tried and sentenced, that they did not meet the requirements of the insanity defense, and that they suffered no mental disorder that rendered the death sentence inappropriate by mitigating their culpability. Finally, these defendants must suffer some serious mental dysfunction at the time of scheduled execution, although the nature of that disorder must remain unspecified until the appropriate CFE standard is formulated later in the paper.

The argument will proceed in the following manner. Section II reviews and rejects the usual rationales for the CFE requirement. Section III advances a positive consequentialist justification for the CFE provision.[9] Section IV articulates an interpretation of the retributive theory of punishment that differs from those which are usually discussed in the CFE literature, while explicating the nature of the moral condemnation inherently expressed by legal punishment.[10] Section V interprets

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7. These conditions are logically prior in that the CFE question could not arise, in principle, unless these conditions obtained. In practice, a defense attorney might raise the CFE issue despite his belief that one or more of them had been decided wrongly.

8. Many people would dispute this claim, arguing that capital punishment is never justified. If one holds that the state can never legitimately execute anyone, then it follows that the state cannot justifiably execute an offender who suffers severe mental disorder. Hence, one must assume for the sake of argument that the state can justifiably execute some offenders in order to render the CFE dispute substantive.

9. A consequentialist justification is one that purports to justify an action or rule by appealing only to the consequences it is expected to produce. In moral theory generally, such theories may also be categorized as teleological theories, and Utilitarianism is one well-known theory of this type. W. Frankena, Ethics 14-17 (2d ed. 1973). The central debate regarding the justification of punishment is often framed as one comparing teleological or utilitarian accounts to retributive ones. See, e.g., G. Ezorsky, Philosophical Perspectives on Punishment 37-181 (1972); H. Hart, Punishment and Responsibility 1-27 (1968).

10. For an account of retributive approaches to punishment, see H. Hart, supra note 9 or G. Ezorsky, supra note 9.

the CFE requirement in light of sections III and IV and proposes a revised standard. Finally, section VI summarizes the argument.

II. The Standard Rationales

Courts and commentators have identified a series of putative rationales for the CFE requirement, although few of these writers have concluded that any of these proposals provide fully satisfactory foundations. At least one source has suggested each of the following justifications. Some have argued that it offends Christian charity to execute offenders who cannot prepare to meet their maker. Others portray the CFE provision as an extension of the more general requirement that courts try only defendants who are competent to participate in their own defense. According to this view, the CFE provision prevents execution of offenders who lack the capacity to raise facts or arguments that might legitimately preclude their execution. Some contend that execution of disturbed offenders would not serve the deterrent or retributive purposes of capital punishment, while others argue that severe mental disorder itself constitutes sufficient punishment, thus rendering execution excessive. Others have argued that executing disturbed offenders constitutes an unnecessary taking of human life, or that the CFE provision actually represents a subtle method of limiting the generally questionable practice of capital punishment.

A. The Opportunity to Prepare for Death

Consider first the claim that it would offend Christian charity to execute prisoners who lacked the capacity to prepare to meet their maker.[11] This rationale is difficult to reconcile with the principle of neutrality toward religion that the first amendment of the Constitution is usually understood to mandate.[12] Some have argued that it also misconstrues the nature of the Christian conception of judgment in that the traditional christian view would lead one to expect God to evaluate the individual's moral status on the basis of an entire life, rather than only on the point of execution.[13] In addition, the contention that human executioners must restrict executions to those who are "capable of preparing to meet their maker" is based on an internally inconsistent premise. This argument elevates religious faith to a status of such high regard that deference to that faith justifies overriding a legal execution pursuant to valid law, while it also suggests that humanity must exercise

11. Ford v. Wainwright, 477 U.S. 399, 407, 106 S. Ct. 2595, 2600 (1986); Solesbee v. Balkcom, 339 U.S. 9, 18, 70 S. Ct. 457, 460 (1950) (Frankfurter, J., dissenting); Hazard & Louisell, supra note 1, at 387; Ward, supra note 1, at 50-51.

12. L. Tribe, American Constitutional Law 1188-1201 (2d ed. 1988). Tribe provides an analysis of neutrality in the context of the first amendment and religion.

13. Hazard & Louisell, supra note 1, at 388; Ward, supra note 1, at 51.

mercy because God cannot be trusted to do so. This view elevates one particular religious tradition to a privileged status, while it implicitly questions the omnibenevolence traditionally attributed to the God on which that religious tradition is based.

Justice Powell presented a secular variation of this rationale in his concurring opinion in *Wainwright*. He argued that most men and women value the opportunity to prepare for their deaths and that it would be cruel to execute a person who lacked the understanding needed to do so.[14] This interpretation of the argument has the virtue of removing the controversial appeal to certain religious beliefs and recasting it in terms of humane consideration and charity. The weakness of this rationale is, however, that some people fear death sufficiently to hope fervently that they die in their sleep with no warning or opportunity to prepare at all. These individuals might welcome the opportunity to face execution through clouded comprehension rather than with full understanding of their plight.

More fundamentally, why would the legal system grant such special weight to this particular set of the condemned person's values and preferences? Presumably, many of these condemned offenders also value their lives and freedom, but the law does not cater to these preferences by commuting their death sentences or releasing them from prison. It remains a mystery why it would be more cruel to frustrate their preferences for an opportunity to prepare to face their deaths than it is to frustrate their preferences for continued life.

Another secular variation of the "prepare to meet your maker" argument insists that the possibility of repentance is a morally good state of affairs. According to this rationale, the state should not execute disturbed offenders because they lack the capacity to repent. Their execution would preclude the possibility of their repenting at the time of their executions. Even if one accepts the contention that a world where criminals have repented is morally superior to one where they have not, this argument does not support a general CFE requirement. Rather, this contention would merely support a stay of execution for disturbed offenders who had not already repented. This rationale provides no reason to refrain from executing disturbed offenders who have repented during the period between their crimes and their scheduled executions.

B. CFE as an Extension of Competency to Stand Trial

This rationale, like the previous one, has roots deep in the common law.[15] Unlike the previous argument, however, it does not cast the CFE

14. *Wainwright*, 477 U.S. at 421, 106 S. Ct. at 2607 (Powell, J., concurring).
15. *Wainwright*, 477 U.S. at 407, 106 S. Ct. at 2600; Solesbee v. Balkcom, 399 U.S.

provision as one that postpones justified executions out of charity. Rather, it endorses the requirement as a final attempt to avoid unjustified executions. On this interpretation, the CFE requirement serves as a final filter in the procedure of capital punishment by assuring that convicted persons will not die only because they lack the ability to raise exculpatory or mitigating arguments.

While this rationale may have carried considerable weight during earlier periods, contemporary procedures render it obsolete. Factual issues are contested primarily at the trial court level where the defendant's opportunity to participate and advise the defense attorney is protected by the requirement that trials proceed only when the defendant is competent to understand and assist. In addition, an extensive state and federal review process and the right to counsel at mandatory appeals assures effective review of death sentences.[16] Finally, appeals that occur late in the sequence of events leading to execution tend to address legal rather than factual issues, emphasizing the competence of the attorney rather than that of the condemned prisoner.[17]

C. Execution and the Deterrent Purpose of Punishment

This argument can take either strong or moderate forms. The moderate form contends that executing incompetent offenders is not necessary to the deterrent function of punishment: others will perceive the difference between "disturbed offenders" and themselves, and competent individuals will realize that they would be executed although the disturbed offender was not. Furthermore, because no one can plan to become mentally disabled if they are sentenced to death, they cannot plan on taking advantage of this CFE exception if it is maintained.[18] Thus, sparing disturbed offenders from execution will not undermine the deterrent function of capital punishment.

9, 18, 70 S. Ct. 457, 460 (1950) (Frankfurter, J., dissenting). Hazard & Louisell, supra note 1, at 383-84; Ward, supra note 1, at 50.

16. *Wainwright*, 477 U.S. at 420, 106 S. Ct. at 2607 (Powell, J., concurring). Douglas v. People of State of California, 372 U.S. 353, 83 S. Ct. 814 (1963) (extending the right to counsel to an appeal the defendant has of right).

17. See e.g., Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (holding that the eighth amendment does not categorically preclude the death penalty for mentally retarded offenders); Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676 (1987) (finding that the eighth amendment does not prohibit the death penalty for defendants who did not personally inflict the fatal wound to the victim but who participated in a felony with reckless indifference to human life); *Wainwright*, 477 U.S. 399, 106 S. Ct. 2595 (holding that the eighth amendment precludes execution of disturbed offenders); Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972) (striking down death penalty statute that is discretionary on its face but discriminatory in practice).

18. Hazard & Louisell, supra note 1, at 384-85.

The strong version of the argument contends not only that execution of the disturbed offender is unnecessary to the deterrent function but also that these executions *cannot* serve the deterrent purpose. Under this interpretation, execution of incompetent offenders would be so cruel and inhumane that it would not serve as an example to others.[19]

Others argue that if the purpose of punishment is to frighten others into complying with the law, then a demonstration that no offender will escape punishment will likely further that purpose.[20] Although some question the deterrent value of legal punishment in general and of capital punishment in particular, punishment deters more effectively when it is certain; eliminating exceptions increases certainty.[21] It is at least reasonable to expect, therefore, that capital punishment would deter more effectively without, rather than with, the CFE provision.

In addition, the moderate form of this rationale contemplates an unrealistically refined pattern of reflection by those who might be affected by the deterrent function of the death penalty. If anyone refrains from homicide to avoid execution, it seems improbable that they carefully peruse legal journals to determine the exact conditions under which offenders are executed. Presumably, anyone who is deterred from committing homicide by fear of the death penalty responds with a relatively gross impression such as "they hang you for that." While fine distinctions regarding the appropriate scope of capital punishment may be very important to the moral foundations of the criminal law, it is unlikely that potential offenders who might be deterred from committing crimes as serious as homicide respond with such a refined analysis.

D. Unnecessary Taking of Human Life

In its early form this position consisted of the claim that madness constitutes sufficient punishment in itself, thus rendering execution un-

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19. *Wainwright*, 477 U.S. at 407, 106 S. Ct. at 2600; Solesbee v. Balkcom, 399 U.S. 9, 17, 170 S. Ct. 457, 461 (1950) (Frankfurter, J., dissenting); Ward, supra note 1, at 51. It is not entirely clear whether this view contends that executing the disturbed offender would actively undermine the deterrent function, or only that it cannot advance that purpose.

20. Ward, supra note 1, at 51-52.

21. A. Bandura, Social Foundations of Thought and Action 268, 278 (1986); G. Walters & J. Grusec, Punishment 71-74 (1977). Experimental research consistently demonstrates that punishment suppresses behavior more effectively when every incident of the behavior elicits punishment. Conditions in the criminal justice system differ from those in experimental research, and thus, one must extrapolate from this research to criminal punishment. To the extent that this research supports the contention that punishment deters more effectively when it is perceived as likely to follow every incident of the forbidden conduct, however, it suggests that any exception to the death penalty will dilute any preventive effect that capital punishment might have.

necessary and excessive.[22] Commentators have rejected this argument because incompetence only postpones execution until the offender recovers. These commentators reason that if madness constitutes sufficient punishment, incompetent offenders would have their sentences commuted and would be released upon recovering their mental capabilities.[23] On the other hand one could argue that madness constitutes punishment comparable to the death penalty only when it, like death, is permanent. Thus, only permanent mental disorder is an adequate substitute for execution. Temporary madness would not preclude the defendant's execution upon recovery.

Three additional reasons exist that undermine this rationale. First, the claim that madness is comparable to death is simply false. While it may be true that some severely disordered people suffer great distress, such suffering cannot be tantamount to death. Whatever form it may take, mental disorder constitutes a mode of experience, not a complete lack of experience, and most people who suffer from psychopathology retain at least the possibility of future improvement, while those who are executed do not. Second, severe mental disorder does not necessarily entail extreme distress nor is it necessarily limited to such distress without any positive experiences. The description in *Wainright* of Ford's condition on death row, for example, includes agitation regarding delusional events that concerned him, but it also suggests a measure of comfort and confidence in his delusional court victories and status.[24]

Finally, madness cannot constitute punishment comparable to execution simply because it is not punishment at all. Punishment consists of some form of harsh treatment by an authority toward an offender for an offense.[25] Although mental disorder may involve great distress, it is not punishment because it is not imposed by an authority on an offender for an offense. *A fortiori*, a condition that does not constitute punishment cannot constitute punishment comparable to death.

The contemporary claim that incompetency should preclude execution because executing incompetent offenders involves taking human life unnecessarily does not depend on this misguided equivalence of suffering and punishment. It does, however, employ as a premise the proposition that such executions are not needed to maintain the deterrent function of punishment.[26] For the reasons stated above, however, it is plausible that if the death penalty deters at all, then it will do so more effectively

22. Hazard & Louisell, supra note 1, at 384; Ward, supra note 1, at 50.

23. Id.

24. Ford v. Wainwright, 447 U.S. 399, 402-03, 106 S. Ct. 2595, 2597-98 (1986).

25. Flemming v. Nestor, 363 U.S. 603, 612-16, 80 S. Ct. 1367, 1373-76 (1960) (punishment occurs only when the legislature directs sanctions at the person or persons affected); J. Feinberg, Doing and Deserving 95 (1970); H. Hart, supra note 9, at 4-5.

26. Hazard & Louisell, supra note 1, at 386.

without the exception for those who are incompetent to face execution.[27] If this contention is accurate, then exempting disturbed offenders from execution would impair the deterrent effect of capital punishment.

One might, however, respond that a plausible argument favoring removing the CFE requirement is not sufficient to support doing so. In order to support the taking of human lives, advocates must prove that these additional executions are necessary to effectuate the deterrent purpose of capital punishment. A merely plausible argument leaves too much room for error to justify rescinding a historical provision that protects people from death.

As an argument in support of the CFE requirement, however, this reasoning proves too much. Recall the three initial assumptions made in the introduction. CFE becomes a substantive issue only if one accepts for the sake of argument the proposition that the state can justifiably maintain an institution of capital punishment and apply it to some offenders. If the justified taking of human life requires proof that it is necessary for deterrence, however, then this initial assumption fails. The claim that justified taking of human life requires something near certainty that it will serve an overriding purpose may well constitute a powerful argument regarding capital punishment, but it addresses the general institution, not the CFE requirement specifically.

In addition to proving too much, this argument from the unnecessary taking of human life fails to prove enough. Assuming that one could establish that executing the severely disturbed is actually unnecessary to the deterrent effect of capital punishment, this argument fails to provide sufficient foundation for the moral intuitions and mandate involved. Courts and commentators have denounced the execution of the insane as "cruel" and "brutal."[28] Indeed, the *Wainright* Court concluded that the eighth amendment prohibition of cruel and unusual punishment bars execution of the insane as "the barbarity of exacting mindless vengeance."[29] These judgments and the moral intuitions they reveal extend well beyond the claim that these executions are not necessary. The claim, rather, is that execution of the insane is morally repugnant and, thus, unjustifiable even if the practice promotes legitimate social purposes. An adequate rationale for such a conclusion must support the contention that executing the insane is morally condemned regardless of how useful it might be, not merely that it is unnecessary for social purposes.

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27. See supra text accompanying notes 19-20.

28. See e.g., *Wainwright*, 477 U.S. at 421, 106 S. Ct. at 2607 (Powell, J., concurring); Solesbee v. Balkcom, 339 U.S. 9, 20, 70 S. Ct. 457, 462 (1950) (Frankfurter, J., dissenting).

29. *Wainwright*, 477 U.S. at 410, 106 S. Ct. at 2602.

It is important here to remember the distinction between the purpose of legal punishment and its justification.[30] Society maintains an institution of criminal punishment at least partially for the purpose of guiding conduct in such a manner as to prevent crimes, and a legitimate social goal provides some justification for a practice that will promote it. A legitimate social purpose, however, does not justify every act that serves to promote the purpose.

Punishing the innocent might promote deterrence in some cases, for example, but this benefit does not justify punishing the innocent. Although some might argue that extreme circumstances could justify some instances of punishing the innocent, a mere incremental improvement in some legitimate social goal would not justify such a practice. Many other social purposes and moral principles limit the extent and manner in which society can justifiably promote any particular legitimate social goal.[31] Constitutional procedural protection, for example, limits the methods that the government can employ in pursuing the legitimate preventive and prosecutorial purposes of the criminal justice system.[32]

Commentators have argued persuasively that individual guilt and desert are necessary to justify the use of punishment as a method of pursuing the legitimate social goal of crime prevention.[33] If the long-standing CFE requirement represents moral repugnance at the prospect of executing disturbed offenders, then executing these prisoners, like punishing the innocent, violates the moral foundations of the criminal law, at least insofar as these moral principles have traditionally been understood. An adequate justification of the CFE requirement must demonstrate not merely that executing these people would not serve social purposes, but that such executions would be unjustifiable even if they would promote social goals.

E. Tacit Clemency

One commentator has advanced a rationale for the CFE requirement that construes this provision as a method of addressing societal ambivalence toward the death penalty by providing "tacit clemency." This interpretation suggests that although society endorses capital punishment, it remains ambivalent about the justification of it and attempts to ameliorate its impact by reducing the frequency of application through a variety of limiting and qualifying provisions including the CFE requirement.[34]

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30. H. Hart, supra note 9, at 3-13; A. Ross, On Guilt, Responsibility, and Punishment 43-66 (1975).

31. H. Hart, supra note 9, at 10.

32. W. LaFave & J. Israel, Criminal Procedure § 1.6 (1984).

33. H. Hart, supra note 9; A. Ross, supra note 30, at 1-98.

34. Ward, supra note 1, at 56.

This account provides an explanation for the CFE requirement. It fails, however, to justify it. Reasons can justify a human act or decision by grounding it in moral principles, or they can explain those acts or decisions by appeal to desires, beliefs, expectations or psychological and sociological theories. Thus, justifying reasons justify and explanatory reasons explain, but neither can substitute for the other because they appeal to different types of underlying principles. To support an acceptable standard for the CFE requirement, a rationale must justify the CFE provision as part of the larger social institution of legal punishment. That is, it must explain why society *ought* not execute certain disturbed offenders, not why it *does* not, because the standard must separate those who society can justifiably execute from those whose society cannot justifiably execute. Thus, the explication of the CFE requirement as tacit clemency produced by social ambivalence may explain the practice, but it is simply the wrong type of rationale to provide justification.

F. Execution and the Retributive Purpose of Punishment

The Supreme Court has identified deterrence and retribution as the two primary social purposes of capital punishment.[35] One rationale for the CFE requirement relies on the contention that executing the insane cannot serve the retributive purpose. Justice Powell, for example, contends that execution of the disturbed offender fails to promote the retributive purpose of capital punishment because retribution requires awareness.[36] Evaluating this position requires clarifying the concept of retribution because sources employ different interpretations of retribution in discussing capital punishment. Some sources advance retribution as a moral balance in which each crime elicits punishment that is in some sense equal to the offense, thus balancing the moral scales. Those who justify the CFE requirement by appeal to this form of retribution argue that executing insane offenders will not restore the moral balance because the harm or suffering produced in the severely disturbed offender will not be comparable to that which the offender caused in the presumably intact victim.[37]

Moral theorists who have studied the theory of punishment have rejected the moral balance version of retribution as the "fiercest form of retributivism"[38] and as "incoherent."[39] The conceptual quagmire in-

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35. Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2929-30 (1976).

36. Ford v. Wainwright, 477 U.S. 399, 421, 1106 S. Ct. 2595, 2607-08 (1986) (Powell, J., concurring).

37. Hazard & Louisell, supra note 1, at 386-87; Ward, supra note 1, at 54-56; Note, Condemned, supra note 1, at 536.

38. H. Hart, supra note 9, at 236.

39. J. Feinberg, supra note 25, at 116-17.

herent in this interpretation of the retributive principle as requiring a "moral balance" becomes apparent when one attempts to specify the nature of the variables to be balanced and the method of comparing them. If the punishment must qualitatively and quantitatively match the crime, then this theory becomes impossible to apply because the official performing the punishment lacks any method for comparing incommensurate evils. Does the principle require, for example, that the state torture torturers? Must the state execute multiple killers several times? This theory would preclude punishment of those who committed crimes for which no comparable punishment was possible. How, for example, could the state punish the vandal who destroys a work of art but has never created one that could be destroyed in return? Would incarceration never be a justified punishment except for crimes of false imprisonment?

Would this principle forbid the execution not only of insane killers, but also of killers like Gilmore who reject appeal of their executions because they have decided that they would rather die than continue life on death row?[40] Arguably, execution of such killers would fail to establish the proper moral balance because these offenders have decided that they prefer death to continued life, while their victims probably had not made a comparable decision. This rationale suggests a legal "catch 22" in that a condemned offender can waive the right to challenge the death sentence only if that decision is made "knowingly and intelligently,"[41] but if the decision met those criteria, death would apparently be a relief rather than a terrifying prospect so it would not meet the moral balance test. Thus, if an offender competently waived her right to challenge her execution, death would not be an appropriate punishment for her.

These and other problems with the moral balance concept of punishment have led some writers to interpret retribution as calling for the satisfaction of the society's thirst for vengeance. Using this interpretation, retributive punishment does not seek a moral balance; rather, it prescribes punishment sufficient to satisfy the public anger and demand for revenge.[42]

This interpretation of the retributive function of punishment, like the moral balance one, encounters serious conceptual difficulties. First,

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40. Gilmore v. Utah, 429 U.S. 1012, 97 S. Ct. 436 (1976).

41. Id. at 1013, 97 S. Ct. at 437 (concluding that Gilmore validly waived his right to challenge the death penalty).

42. Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976); J. Stephen, Liberty, Equality, Fraternity 149 (1873); Ward, supra note 1, at 54-57. In many cases, it is impossible to determine with great confidence what the courts or commentators mean by "retributive" because they do not clarify the concept as they use it. The works cited for each variation are those which at least arguably contemplate the interpretation discussed.

it is not clear that this interpretation is retributive in any traditional sense of the word. Immanuel Kant, who is most often regarded as the classic proponent of the retributive theory of punishment, required death for homicide but specifically rejected punishment involving "any maltreatment that would make an abomination of the humanity residing in the person suffering it."[43] Kant portrayed punishment as necessary to vindicate rights, but he rejected as revengeful and vicious punishment beyond what is required to defend rights.[44] Kant contended that society has a moral obligation to punish in proportion to the wrong done, but he specifically forbade cruelty and indulgence in vengeful motives. The correct explication of Kantian retributivism remains controversial, but it does not license indulgence of a social thirst for vengeance.

Putting aside its claim to the retributive heritage, this rationale is both too narrow and too wide to provide a satisfactory rationale for the CFE requirement. It is too wide in that it seems that it should apply also to the Gilmore-type cases in which the defendant has decided that he would rather die than continue on death row and, therefore, that he would find death a relief rather than a curse. Presumably, bringing relief to a condemned offender is not a technique likely to quench the thirst for vengeance. It is too narrow in that it would cover only a subset of disturbed offenders. There is no reason to think that all severely disturbed persons would suffer less from execution than psychologically intact ones would. Suppose, for example, that a psychotic offender with religious delusions believed that he was being killed by the devil in a special ritual to insure that he would burn in hell forever. Such a psychotic defendant might actually experience greater distress than an intact defendant who believed he had made peace with God and his death. Thus, executing this particular disturbed defendant should adequately quench the social thirst for vengeance.

Ironically, this rationale appears to conflict with another theory sometimes advanced in support of the CFE requirement. Under this theory, a legal system that refuses to execute disturbed offenders because they are unable to come to terms with their execution but allows the execution of intact offenders who have come to terms with their fate will allow the execution of those whose reconciliation with their situation minimizes their distress. Thus, such a system prevents full exercise of society's need for vengeance.

Finally, and most importantly, the public vengeance variation of "retribution" creates a perversion of the exception. Traditionally, courts and commentators have condemned execution of disturbed offenders as barbaric, cruel, or brutal, but on this interpretation, such executions

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43. I. Kant, The Metaphysical Elements of Justice 333 (1797) (J. Ladd trans. 102 (1965)).

44. I. Kant, Lectures on Ethics 214 (L. Infield trans. 1930).

are rejected as insufficiently brutal to satisfy the thirst for vengeance. This account rejects execution of the insane not as unjustified but rather as inadequate satisfaction of the public preference for revenge. Thus, this rationale arguably serves to prescribe torture rather than to proscribe execution.[45]

The most plausible interpretation of the retributive rationale advanced by courts and commentators is the requirement of proportionate punishment. This principle requires punishment in relative proportion to the offender's guilt. For example, murder must be punished more severely than assault, intentional homicide more severely than negligent homicide, and unprovoked assault more severely than provoked assault.[46]

Although plausible and amenable to practical application, this retributive principle does not directly address CFE. This principle is a backward-looking one in the sense that it prescribes the appropriate degree of punishment by looking back to the offender's guilt at the time of the offense. If the offender performed the offense under conditions appropriate to support the death sentence, psychopathology at the time of execution does not alter the degree of guilt attributed to the actions performed while sane. Thus, capital punishment remains proportionate to the defendant's guilt at the time the crime was committed.

G. Summary

The prohibition against executing those who lack competency to face execution arises from roots deep in the common law and retains broad consensus in contemporary American criminal law. This virtually universal agreement among authorities and the emphatic support found in the most recent Supreme Court opinion[47] suggest that this legal provision reflects widely and deeply held moral convictions. While some of the proffered rationales seem to carry some weight under certain conditions,

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45. A defender of this vengeance-based interpretation might respond to these criticisms by claiming that this position only advocates the degree of vengeance that this particular offense justifies, not any degree that society happens to feel toward the offender. In this case, however, vengeance serves as a measure of just punishment only insofar as it corresponds to desert, and the vengeance theory collapses into the form of retributivism that calls for punishment in proportion to guilt and desert. This interpretation is addressed next.

46. Tison v. Arizona, 481 U.S. 137, 149, 107 S. Ct. 1676, 1683 (1987); Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976); J. Feinberg, supra note 25, at 70, 118; H. Hart, supra note 9, at 24-25. *Tison* and *Gregg* arguably endorse this variation of retributivism, although neither clarifies the concept well enough to allow certainty.

47. Ford v. Wainwright, 477 U.S. 399, 106 S. Ct. 2595 (1986) (both the majority and the concurring opinion by Justice Powell emphatically endorsed the requirement).

none provide a fully satisfactory and coherent principled foundation for this well-established legal rule that categorically prohibits execution of disturbed offenders.

This lack of a satisfactory justification for the rule is troubling from both a theoretical and practical perspectives. Theoretically, the lack of a clear justification obscures the relationship between this provision and the larger body of criminal law, making it difficult to evaluate the consistency between this rule and any other aspect of the broader system or to draw inferences about the significance of the CFE provision for other issues. Practically, the lack of a clear justification has resulted in a corresponding failure to develop a satisfactory standard of competence and ongoing questions about the appropriate procedures. The next two sections of this paper advance principled foundations for the CFE requirement and examine the significance of these for broader issues in the jurisprudence of punishment.

III. Positive Justification: Consequentialist

A. Clarification of Deterrence

The Supreme Court has identified deterrence and retribution as the two primary social purposes of capital punishment.[48] Society maintains a criminal justice system, at least partially, to guide behavior within socially acceptable limits. In doing so, the system employs legal punishment to deter the offender and others from committing crimes. Although some may debate its effectiveness, deterrence remains one of the system's primary strategies for guiding behavior.

The term "deter" carries both strict and extended interpretations in the debate regarding legal punishment, and establishing the appropriate role of deterrence in the CFE issue requires clarification of the term as applied to this dispute. In the strict sense, to deter is "[t]o discourage or stop by fear."[49] In this strict sense, punishment deters when it dissuades a person from committing an offense through fear of the consequences. It does so specifically when it reduces the propensity to repeat the crime of the person punished by instilling fear of further punishment in that person. It deters generally when it discourages others from committing crimes by serving as an example of unpleasant consequences that they can expect to encounter if they violate the law.[50]

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48. *Gregg*, 428 U.S. at 183, 96 S. Ct. at 2929-30.

49. Black's Law Dictionary 405 (5th ed. 1979). The Oxford English Dictionary (compact ed. 1977) provides a similar central sense of the term.

50. H. Hart, supra note 9, at 128; W. LaFave & A. Scott, supra note 1, at § 1.5(a). Terms vary somewhat across writers. For example, specific deterrence may be called individual or particular deterrence.

In the extended sense, deterrence may alter a potential actor's motivation to act through some mechanism other than fear. In this sense, to deter is "[t]o stop or prevent from acting or proceeding by danger, difficulty, or other consideration which disheartens or counterveils the motive to act."[51] Deterrence in this sense includes any source or type of motivation that dissuades the actor from performing some particular act or type of act. Rational or moral persuasion, for example, might counterveil a person's motivation to act by providing reason to believe that the act would be counterproductive or immoral. Such persuasion would qualify as deterrence in this extended sense although not in the strict sense which emphasizes the central role of fear.

When used in this extended sense "deterrence" can encompass punishments designed to decrease the probability of offenses through means other than fear of consequences. Some theories of punishment, for example, contend that punishment can prevent crimes through reform, rehabilitation or incapacitation.[52] Punishment reforms insofar as it leads the person punished to appreciate the wrongfulness of the punished conduct, repent for having done wrong, and, thus, to become a better person and to resolve to avoid wrongful behavior in the future. It rehabilitates by providing offenders with social or occupational skills that enable them to function more effectively in society without committing crimes. Finally, punishment reduces crime through incapacitation when it deprives the offender of the ability or opportunity to commit offenses. Incarceration, for example, deprives the offender of most opportunities to commit crimes during the actual period of confinement. If one restricts the term "deter" to the strict sense, and uses "prevention" for the extended sense, then deterrence is one of several preventive strategies, and reform, rehabilitation, and incapacitation are preventive but not deterrent functions of punishment.[53]

Certain forms of prevention, if effective, including reform and rehabilitation, provide two types of social benefits. First, they would decrease the frequency of crime, and second, they would improve the moral quality or social adaptivity of the person punished. While many

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51. Black's Law Dictionary 405 (5th ed. 1979). The Oxford English Dictionary, Id., does not provide any comparable definition of "deter" in this broad sense that does not require motivation through fear.

52. See generally, G. Ezorsky, supra note 9; T. Honderich, Punishment, The Supposed Justifications (1969); W. LaFave & A. Scott, supra note 1, at § 1.5; E. Pincoffs, The Rationale of Legal Punishment (1966). Each of these sources reviews various proposed justifications for legal punishment. The precise use of terms varies across writers.

53. This paper will use these two terms in this way. Notice that on this convention, "prevent" actually takes a wider scope than the broad sense of "deter" because it includes certain modes of prevention, including incapacitation, that do not act through the motivational system, but by restricting opportunity.

might doubt the ability of the criminal justice system to produce reform or rehabilitation, presumably, most people would agree that improved moral or social functioning would constitute positive effects if the system could produce them.

Other forms of prevention, in contrast, provide no positive social benefit independent of their preventive effect. Incapacitation and deterrence, for example, fall into this category. If punishment deters effectively, it prevents crime through fear of consequences. Fear of consequences, unlike reform or rehabilitation, carries no apparent social value independent of the preventive effect. The social value of deterrence, therefore, rests entirely on its role as a method of prevention.[54] That is, if deterrence is a primary social purpose of punishment, and the value of deterrence rests entirely in prevention, then prevention must constitute a primary social purpose of punishment.

If the social value of the deterrent effect of punishment lies in its preventive function, however, then the deterrent effect of punishment serves its purpose only if two conditions are met. First, the punishment must effectively deter some offenses through either the specific or the general deterrent effect. It may do so independently or in combination with other factors. Second, the punishment must not promote crime or impair other preventive functions to a degree that outweighs the deterrent effect. Since the underlying social purpose is prevention, deterrent punishment that fails to meet the first condition serves no positive preventive purpose at all, while punishment that fails to satisfy the second condition produces a negative net effect in the underlying program of crime prevention.[55]

B. Two Modes of Offense Prevention by the Criminal Law

Discussions of the preventive functions of the criminal law most often involve concepts such as deterrence and incapacitation that address the immediate relationship between a specific instance of punishment and repetitions of similar offenses by the same offender or by others in similar conditions. Historically, however, theories addressing the preventive effect of the criminal law have contemplated two different categories of preventive effects.[56] Direct preventive effects include deterrence,

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54. Section IV will qualify this claim by discussing an additional social value promoted by deterrence. That argument does not affect this one, however, because this section addresses only consequentialist justifications for the CFE requirement, while section IV examines nonconsequentialist concerns.

55. For the sake of simplicity, this paper will not address other possible social costs of punishment such as financial costs, limitation of legitimate liberty, etc.

56. See e.g., J. Stephen, supra note 42, at 151-52. H. Hart discusses Stephen's claims in H. Hart, Law, Liberty, and Morality 60-69 (1963).

incapacitation, and others that address the relationship described above between identifiable actors and particular offenses or types of offenses. When it functions effectively, however, the criminal law also serves to prevent crime indirectly by articulating and promoting the conventional social morality.[57] To the extent that the criminal law reflects widely accepted moral principles within society, it is expected to institutionalize those widely accepted mores, promoting attitudes and values that are consistent with both the criminal law and the conventional social morality. Ideally, this correspondence enhances the morally persuasive force of the criminal law and promotes the majority's voluntary compliance with the behavioral guidelines that are common to the criminal law and the conventional social morality.

While modern criminal codes in large complex societies may prohibit or require some conduct for reasons of efficiency or administrative convenience, the core rules of the criminal law usually address offenses such as murder, theft, or assault. These crimes violate not only the law, but also conventional moral standards that most members of the society endorse.[58]

H.L.A. Hart identifies legal rules which create duties and obligations, including those which define criminal offenses, as primary rules of obligation. He contends that in most settled societies the majority of the people will accept these primary rules from the internal point of view; that is, they will accept these rules, including the core rules of the criminal law, as providing reasons for acting in compliance with those directives.[59] Under these conditions, most people will comply with the criminal law voluntarily. The criminal law in such a society will serve primarily as a source of guidelines for self-regulation by the majority and only secondarily as a coercive enforcement mechanism. Hart contends that voluntary acceptance by the majority makes coercive enforcement of the minority possible.[60]

In summary, this view contends that the core rules of the criminal law represent standards of the society's conventional morality. Most

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57. The conventional social morality consists of the moral rules and principles regarding social life that are widely accepted in a particular society. Critical morality, in contrast, consists of that set of moral rules and principles that are best supported by reasoned argument. In a corrupt society, the conventional morality might be abhorrent from the viewpoint of critical morality. See, J. Feinberg, Harmless Wrongdoing 124-25 (1988).

58. H. Morris, On Guilt and Innocence 33 (1976).

59. H. Hart, The Concept of Law 86-88, 165 (1961).

60. Id. at 38-39, 193-98. It is not obvious that Hart is correct when he contends that voluntary compliance by the majority is necessary to make law effective in any society. Totalitarian societies that are prepared to exercise rapid and unconstrained force may well be able to coerce most of the population. His claim is at least plausible, however, if it is limited to liberal societies that place significant restraints on government action.

members of the society accept these rules as providing good reasons for compliance with them, and this broad voluntary support enables the criminal justice system to enforce them against violation by the minority. On this view, the criminal justice system prevents offenses by a minority directly through deterrence or incapacitation, while it prevents offenses by the majority indirectly by articulating and reinforcing the conventional social morality that this majority uses for voluntary self-direction.

Some empirical research supports this contention that law directs behavior more effectively through voluntary allegiance and endorsement than through coercive enforcement. Albert Bandura identifies three major sources of deterrents for criminal conduct. First, the formal legal conviction and punishment deters some potential offenders. Second, informal social sanctions, involving the social criticism, stigma, and loss of status that the offender can experience in communities that endorse the criminal law as representative of acceptable social behavior, discourage those who are sensitive to these forms of rejection from committing offenses. Finally, self-sanctions consist of self-criticism and self-condemnation by the individual who accepts the moral standards represented by the criminal law, and these self-generated motivators prevent offenses by those who endorse these standards. Most often, self-sanctions occur as the potential offender considers performing the illegal conduct and, ideally, such self-generated anticipatory condemnation prevents the offense.[61] Bandura contends that self-sanctions and social sanctions may prevent crime more effectively than formal legal punishment and that strict enforcement of the law through legal punishment may serve to prevent crime more effectively by confirming the conventional social morality than by direct deterrent effect.[62]

James Stephen contended not only that the criminal law represents the public morality, but also that legal punishment expresses the hatred and resentment that ordinary citizens feel for the criminal.[63] According to one interpretation of Stephen, he understood this expression of hatred and contempt accompanying punishment as an aspect of its preventive role; legal punishment not only expresses the hatred and resentment of the populace, it also ratifies these sentiments. In this way, legal punishment denounces crime and reinforces both the criminal law and the accepted social morality that corresponds to the core rules of the criminal law.[64]

Joel Feinberg advanced a later and more refined account of this expressive function of legal punishment.[65] Feinberg argues that the ex-

61. A. Bandura, supra note 21, at 273-74.
62. Id. at 278-82.
63. J. Stephen, supra note 42, at 148-52.
64. H. Hart, supra note 56, at 60-65.
65. Feinberg, supra note 25, at 95.

pression of social condemnation is inherent in the concept of legal punishment. Certain forms of harsh treatment, including those which a society employs as its primary response to violations of the core rules of its criminal law, serve as conventional expressions of condemnation. Imprisonment and execution, for example, are conventional symbols of condemnation in modern societies. Thus, by sentencing offenders to these forms of punishment, society articulates and reinforces the social prohibition of their conduct as contrary to accepted social morality. By "condemnation," Feinberg means both reprobation—the stern judgment of disapproval—and resentment—angry or vengeful attitudes.[66]

If Hart is correct in his contention that the criminal law serves primarily to provide guidelines for self-regulation and only secondarily as a means of coercive control, then one should expect this expressive function of the criminal law to enhance the law's preventive effect in two different ways. First, it should augment the direct preventive effects of legal punishment, by making actual punishment more aversive by subjecting the offender to expressions of social reprobation and resentment and by supporting the general deterrent effect through the threat of social contempt. One might reasonably suspect, however, that those who are not dissuaded by the threat of incarceration or execution will not vest great significance in expressions of social contempt. Perhaps, therefore, the more significant preventive effect of the expressive function of punishment lies in the second and indirect mode. To the extent that criminal punishment expresses the moral judgment and resentment that represents the shared social morality, it reinforces the social odium attached to such behavior and promotes the general tendency of the population to consider such conduct reprehensible. Thus, it encourages popular endorsement of and allegiance to the social morality represented by the criminal law and promotes voluntary compliance by the majority who incorporate this social morality into their personal criteria of acceptable conduct for themselves.

If the expressive function of legal punishment promotes the preventive purpose of the criminal law primarily through this indirect mode, the magnitude of this effect should correlate closely with the correspondence between the criminal law and conventional morality. Close

66. Id. at 95-101. Feinberg recognizes a broader sense of the term "punishment" that could include sanctions such as fines or license revocations. He employs the term "penalty" for this broader category of social sanctions in order to distinguish it from the narrower and more emphatic "punishment." The central contention of Feinberg's conceptual claim is that the paradigmatic forms of criminal punishment in a particular society take on a symbolic significance such that punishment through the application of one of these methods inherently expresses condemnation. In contemporary society, this set of inherently condemnatory modes of punishment would include execution, corporeal punishment, and imprisonment.

correspondence between the popular social morality and the conditions that support legal punishment should promote identification of criminal prohibition with immorality and encourage repudiation of crimes and criminals by the general public. Conversely, loss of this correspondence weakens the identification of criminal offenses with immorality, undermining the personal and informal social sanctions associated with crimes.

If, however, as Feinberg contends, expressed condemnation constitutes part of the concept of legal punishment, then punishment under the criminal law that fails to correspond with conventional morality creates an impression of hypocrisy in the criminal justice system because the courts' actions will express social condemnation in situations that do not, by the criteria of the widely accepted social morality, deserve condemnation. Legal punishment under conditions that do not elicit condemnation in the conventional social morality weakens the popular association between the criminal law and the accepted social morality. To the extent that the criminal law and conventional social morality diverge, members of the society are less likely to attach personal sanctions on the basis of illegality.

Given the evidence suggesting that personal and informal social sanctions support the law more effectively than formal legal ones, this pattern is likely to decrease moral consensus supporting the criminal law, weakening allegiance to it and decreasing voluntary compliance.[67] If this argument is correct, it suggests that criminal punishment under conditions that do not elicit support from the conventional social morality might prevent crime through the direct mode of deterrence at the expense of diluting the correspondence between law and conventional morality, thus weakening the moral condemnatory force of legal punishment and decreasing popular identification with the standards represented by the criminal law. Such a pattern might reduce allegiance to the law and voluntary compliance with it, producing a net loss in crime prevention by undermining the indirect preventive effect. Criminalization of alcohol during prohibition and of marijuana during the 1960-70's arguably demonstrate this pattern of alienation between law and conventional morality leading to a net loss in compliance with the law.

C. CFE and Indirect Prevention

Execution of disturbed offenders has been condemned as cruel, brutal, and barbaric throughout history of the Anglo-American criminal law, and it continues to hold the same status today.[68] Courts have interpreted this legal consensus as "objective" evidence of contemporary

67. See supra text accompanying notes 60-61.
68. See supra text accompanying notes 27-28.

standards of decency.[69] If this deeply and broadly established legal repudiation reflects the moral intuitions of many members of society, then the CFE requirement may promote the preventive function of legal punishment by protecting the correspondence between law and conventional morality and, thus, by facilitating the indirect mode of prevention.

Assume for the sake of argument that executing disturbed offenders would promote, or at least not impair the general deterrent effect of punishment. Supreme Court cases identify deterrence and retribution as the legitimate social purposes of capital punishment.[70] Although these opinions identify deterrence as a legitimate purpose, the analysis presented above suggests that these courts should be understood as using "deterrence" in the extended sense and, therefore, as recognizing prevention as a legitimate social purpose of punishment.[71] Even given the assumption that executing the disturbed offenders would deter, the practice may not serve a net preventive effect if it dilutes the persuasive moral force of the criminal law by creating significant divergence between legal practice and the conventional social morality, thus weakening the popular tendency to view violations of the criminal law as morally unacceptable.

If the general population shares the opinion that execution of disturbed offenders constitutes cruel, brutal, and barbaric behavior, then the practice could cause the law to diverge from conventional morality so drastically that some would consider certain illegal conduct to be not only morally acceptable but morally mandatory. Thus, the CFE requirement might undermine the deterrent effect of capital punishment to some unspecified degree yet serve the preventive function of the criminal law by avoiding a practice that would promote alienation between the law and conventional morality.

D. Summary and Conclusions of Part III

When one clarifies the distinction between deterrence and prevention, understands that prevention, rather than deterrence only, is a legitimate purpose of capital punishment, recognizes the persuasive moral force of the criminal law as one indirect source of prevention, and considers the possible effect on this persuasive moral force of executing disturbed

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69. Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989) (statutes and court practice provide objective evidence of evolving standards of decency). The majority of the Court apparently think that such legal evidence is in some sense more objective and more indicative of contemporary moral consensus than alternative sources such as surveys of the populace. While the Court has put forward no persuasive reason to believe this, it seems reasonable to accept virtually universal legal practice as one source of evidence regarding conventional social morality.

70. Id. at 2956; Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2929-30 (1976).

71. See supra text accompanying notes 47-54.

offenders, it is at least plausible that the CFE requirement serves the preventive purpose of legal punishment. This argument provides one purely consequentialist rationale for maintaining the CFE provision, but two problematic questions remain.

First, this rationale arises from the fact that the criminal justice system has historically recognized and continues to endorse the CFE provisions, and from the inference that this pattern of legal practice reflects the conventional morality. What principled foundation, however, can one advance for this practice? Why should the conventional social morality object to the execution of disturbed offenders as immoral in light of the assumptions made in part I regarding the justification of the sentences in these cases? If these institutions reflect moral confusion, should the law conform to the confusion or attempt to correct it? This argument provides no moral foundation in deeper principle for the CFE requirement; rather, it accepts the apparent social consensus and argues from that empirical claim to the likely practical effects of executing disturbed offenders despite the apparent consensus. If the social consensus were to change, this argument would no longer support the CFE requirement. This argument would also lose its force if some further evidence suggested that the "objective" legal evidence did not accurately represent conventional morality because, for example, popular opinion had changed but the law remained behind due to inertia.

Second, this argument is a conditional one in that it rests on the plausible but not proven premise that the alienating effects of executing disturbed offenders would outweigh any deterrent effects, producing a net loss of prevention. This assumption might fail in either of two ways. The legal prohibition may not accurately reflect the conventional morality, in which case eliminating the CFE requirement might actually improve correspondence between the legal system and the accepted social morality. Alternately, the current law regarding the CFE requirement might actually reveal the social consensus, but the alienating effects might not outweigh the direct deterrent effects of executing the disturbed offenders. If future evidence suggests that either of these conditions obtains, should the criminal justice system then abolish the CFE requirement, or is there some nonconsequentialist moral reason why the law ought to retain it regardless of its preventive productivity? Parts IV and V pursue these issues.

IV. Positive Justification: Retributive

Section II identified three variations of the retributive theory of punishment that have apparently been contemplated in the literature regarding the CFE requirement. These interpretations portrayed retribution as primarily concerned with restoring the moral balance, satisfying the public thirst for vengeance, or assuring punishment in proportion

to guilt. Section II rejected all three, either as insupportable or as irrelevant to the CFE requirement. Consider, however, the following alternative interpretation of the retributive theory.

A. Punishment and Expressed Condemnation

Feinberg defines moral condemnation as the collective social judgment of reprobation combined with an expression of resentful attitude. The expression of condemnation, according to Feinberg, is part of the concept of legal punishment.[72] It is difficult, however, to specify the exact object of these judgments and attitudes.

Consider the possibility that legal punishment expresses condemnation only of the specific conduct that constitutes this offense. For example, suppose that A is convicted of assault and sentenced to six months in jail for punching B.[73] Perhaps the condemnation is directed in a very narrow way at the conduct defined as "this punching of B." In this form it would not imply condemnation of A as an actor or as a person.

Unfortunately, this interpretation seems to include within the institution of punishment certain social processes that are usually distinguished from punishment precisely because they do not express moral condemnation in the same manner as punishment. For example, severely disturbed people who perform dangerous acts may be confined through civil commitment procedures or through criminal commitment after acquittal pursuant to the insanity defense.[74] These people, like those subject to criminal punishment suffer a major deprivation of liberty and social disapproval of the conduct that served as the predicate for their confinement. These commitments are not usually included in the category of punishment, however, at least partially because they do not carry the condemnatory significance of criminal conviction.[75]

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72. See supra text accompanying notes 64-65.

73. American Law Institute, Model Penal Code § 211.1 (Official Draft and Explanatory Notes 1985) [hereinafter Model Penal Code]. The code defines assault as purposely, knowingly, or recklessly causing bodily "injury to another".

74. S. Brakel, J. Parry & B. Weiner, supra note 1, at 21-75 (regarding civil commitment) and 725-34 (regarding commitment after insanity defense acquittal).

75. Jones v. United States, 463 U.S. 354, 368-69, 103 S. Ct. 3043, 3051-52 (1983). The Court reasoned that the purpose of commitment following an insanity defense acquittal is treatment and protection, not punishment. Considerations relevant to punishment, including retribution, are not relevant to length of confinement. Addington v. Texas, 441 U.S. 418, 427-28, 99 S. Ct. 1804, 1810 (1979). The Court distinguished civil commitment from criminal punishment and required only the clear and convincing standard of proof for civil commitment partially because the criminal standard of beyond a reasonable doubt constitutes part of the moral force of the criminal law and should not be extended to other aspects of law that do not carry the same stigma.

Consider, for example, a variation of the hypothetical described above in which A is civilly committed as mentally ill and dangerous to others after he punches B. A is confined in the state mental hospital pursuant to a statute which allows the civil commitment of a person who is mentally ill and dangerous to others as manifested by some recent violent conduct.[76] Clearly the commitment communicates disapproval of the conduct that precipitated it (reprobation) and it may well represent resentful attitudes despite the judgment that A does not qualify for legal punishment. In cases such as this second variation of "A punching B," the legal response to the conduct expresses condemnation of that behavior, but does not constitute legal punishment precisely because it does not express condemnation of the type expressed by legal punishment.

Perhaps, then, legal punishment communicates condemnation not only of the act, but also of the actor as a morally reprehensible person of defective character.[77] This interpretation would distinguish legal punishment from other processes such as civil commitment which might direct repudiation and resentment toward the harmful actions of a severely disturbed person, yet recognize that the actor does not deserve condemnation. Unfortunately, this interpretation cannot accommodate other cases. Some offenders live generally meritorious lives until they succumb to temptation or provocation and commit one relatively minor offense. Suppose, for example, that A punches B in the nose in response to insults that mitigate, but do not excuse or justify, A's hitting B. The court might convict A but give a minimal sentence because this conduct was an aberration by one who is not vicious or malicious. The court would select only a minimal sentence because it would conclude that A is not a reprehensible person, although his act was worthy of condemnation. Yet, it would be plainly false to claim that his conviction and minimal sentence was not "really" punishment.

In short, if the condemnation is understood as directed only at the conduct, then certain social processes such as civil commitment seem to become erroneously included in the concept of punishment. Similarly, if the condemnation is understood as directed at the actor's character, then the concept of punishment does not accommodate some clear cases of punishment in which a person of generally moral character commits one offense.

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76. See e.g., Wis. Stat. Ann. § 51.20(1)(a)(2)(b) (West 1987).

77. Admittedly, it is difficult to specify exactly what we mean when we say that an actor is a morally reprehensible person. We do speak of persons, however, as "bad," "wicked," or "evil." We also say of a person that he *is* a criminal or a felon. In some sense, therefore, we predicate immorality and criminality as properties of persons as well as of acts.

Consider the possibility that the condemnation applies to the action. That is, the condemnation is directed not at merely "this punching of B," nor is it directed at A as a person generally deserving denunciation. Rather, it is directed at "A's punching of B." On this interpretation, the punishment condemns A for punching B, expressing disapproval of A's deciding to punch B. One might think of it as a limited scope variation of the prior person-centered interpretation. According to this understanding, punishment expresses the message that society disapproves of A's punching B and attributes this objectionable action to some fault in A's character, but it does not necessarily condemn A as a person of generally reprehensible character.

Unfortunately, this account is conceptually deficient when applied to the conscientious civil disobeyer who intentionally violates the law for what she takes to be an overriding moral purpose. A jury might conclude that she acted with moral but not legal justification, or it might deny that her act was morally justified while having no doubt that she was genuinely convinced that her act was not only morally justified, but morally required. When the court concludes that this offender clearly violated the law with no legal defense, it might convict her but administer the minimum sentence. By doing so, the court would acknowledge the legal offense but it might also be expressing moral admiration for the actor's fortitude in disregarding her self-interest and performing the act that she understood was morally required. Particularly in the former variation, in which the jury concludes that the defendant acted with moral but not legal justification, it might also be expressing admiration of her doing the act. Yet, it seems clear that this is a case of legal punishment.

In summary, Feinberg contends that the concept of legal punishment includes the expression of moral condemnation, but it is extremely difficult to specify the precise nature or object of this condemnation. The examples described above rule out the conduct, the actor, and the actor's performing the act as inadequate descriptions of the object of the condemnation. While these factors would appear to be the most promising candidates, the following interpretation of retribution and its significance for the expressive function of punishment provides an alternative explication.

B. Persons and the Right to be Punished

Morris defines the "core rules" of the criminal law as those which prohibit violence and deception, and he argues that general compliance with these rules benefits all persons. He contends that this core of the criminal law promotes a fair balance of social benefits and burdens and that criminals take an unfair advantage by refusing to carry the burden of restraint regarding some socially unacceptable act. Morris justifies

the institution of punishment, therefore, as the social mechanism designed to rectify this unfair situation created by the crime. By punishing criminals, society deprives them of the unfair advantage they took, discourages others from doing so in the future, and reassures most members of society that they can conform to the criminal law without placing themselves at an unfair advantage.[78]

Morris also contrasts institutions that encourage compliance through punishment with those that guide behavior through involuntarily administered therapy. He argues that institutions of punishment, unlike therapeutic ones, are rule-based systems that respect the individual's ability to choose behavior through a process of reasoned decision-making. Morris contends that respect for persons requires this respect for the ability to choose for reasons, and further, that persons have a right to be treated as persons. He concludes, therefore, that persons who commit crimes have a right to be punished rather than subjected to involuntary therapy because punishment respects their status as persons who chose for reasons.[79]

Two difficulties with Morris's account are apparent. First, Morris justifies institutions of criminal law and punishment as maintaining fair distributions of benefits and burdens. Most societies maintain institutions of punishment, however, and some of these appear to be justifiable. Yet, it is not clear that the social distribution of benefits and burdens is fair, even when one limits the analysis to the benefits and burdens of the criminal law. For example, all citizens accept the burden of foregoing resort to force in order to receive the benefit of being safe from assault. The 250 pound uneducated person with below average intelligence who carries this burden foregoes a major part of his potential capacity to influence others, however, while the 120 pound educated person with above average intelligence foregoes very little of his potential capacity to influence. Similarly, the individual born into a wealthy family receives considerable protection and gives up little by the mutual repudiation of theft, while the individual born into the poor family gets little protection and is deprived of one potential source of wealth and capital with which she could improve her position.

Second, this "right" to be punished is an unusual type of right. Most commonly, legal rights identify areas of personal control within which the right-holder has some authority to exercise some degree of sovereignty.[80] The right to be punished, however, does not provide the

78. H. Morris, supra note 58, at 33-36.

79. Id. at 36-50.

80. Black's Law Dictionary 1189-90 (5th ed. 1979). The concept of a right is a highly controversial one that has drawn voluminous attention from legal scholars and philosophers. The point of this objection is not that one could not have a right to be punished; it is,

holder a license to do anything, to choose, or to exercise sovereignty in any area of life; it is a right to have something done to the holder by others. When the right attaches, the holders have no authority to waive it or to decide how, where, or when they will exercise it. Others administer the holders' rights according to some legal procedures controlled by those other parties.

Theories of punishment address issues about punishment as a social institution and as an individual event. As a social institution, punishment consists of a set of rules, practices, and roles such as a modern criminal justice system. An individual event of punishment is an application of that social institution to a particular person on a particular occasion. Questions about the concept, efficacy, or justification of punishment can involve either level of organization.[81] Regarding the justification of punishment, for example, one can ask whether the current criminal justice system constitutes a justified system of punishment, whether the practice of capital punishment is justified, or whether a particular offender ought to be punished.

Although Morris presents his argument regarding the fair distribution of burdens and benefits and his argument for the right to be punished as parts of an integrated theory of punishment, one can understand these two arguments as addressing two related but separate issues. The first is society's justification for maintaining an institution of punishment, while the second concerns the limits within which society may coercively guide behavior in any particular case. The first difficulty, regarding the imbalance of social benefits and burdens, questions the claim that social institutions of punishment can be justified by the fair distribution of benefits and burdens that they supposedly create.

One might consistently reject this justification for the institution of punishment, however, while maintaining that persons have a right to be punished rather than subjected to therapy. The negative aspect of this right merits special emphasis. While the right to be punished appears at first glance to be a right that few would fight for, Morris articulates this right as "the right to be punished rather than treated if he is guilty of some offense."[82] When articulated in this manner, the right is primarily a negative right to be free of coercive therapy or treatment, and it is grounded in the individual's right to be respected as a person who makes choices for reasons. The claim, then, is that if the state is to

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rather, that the unusual nature and role of this alleged right should lead one to examine closely the broader theory of which it is a part in order to understand the justification for the contention that punishment is most accurately interpreted in terms of the punished offenders' rights.

81. Baier, Is Punishment Retributive?, 16 Analysis 25-32 (1955); H. Hart, supra note 9, at 1-13.

82. H. Morris, supra note 58, at 45.

exercise coercive power over the individual as a result of that individual's having committed an offense, it must do so according to a system of rules that respects that persons capacity to act on reasoned choice.

To fully understand Morris's position, one must understand him as claiming that institutions of punishment are justified when they can reasonably be expected to promote a fair balance of benefits and burdens or, perhaps, when they appear to be more likely than alternative institutions to promote such a balance. On either of these interpretations, however, Morris does not contend that promoting the fair balance adequately justifies specific applications of the institution to individual offenders. Rather, individual instances of punishment are justified by the fact that the offender committed an offense under conditions that render him guilty and, therefore, vulnerable to behavior-guiding procedures that respect the person's capacity to act for reasons. Punishment justified in this manner pursues the preventive purpose of punishment while maintaining respect for persons and protecting and promoting Hart's choosing system.[83]

Regardless of the fairness of the social structure, that structure may be designed with a system of punishment that respects the person's capacity to act for reasons: a patently unfair system in terms of the distribution of substantive benefits and burdens could employ a system of punishment that directs the behavior of persons in a manner that respects their ability to choose for reasons. Such a system would constitute a system of punishment although it may not be justifiable as an institution or in application.

On this interpretation of Morris, respect for persons as agents who are capable of reasoned choice grounds the right to be punished rather than treated when guilt for an offense justifies the state in exercising some coercive force over the individual. This emphasis on respect for persons as being capable of acting on reason reveals the Kantian foundation of Morris's theory. Kant argued that only rational beings have the ability to direct their behavior through the idea of law; that is, on rational principle.[84] Kant contended that only the rational being acting on the good will—on principles of impartial reason—constitutes the preeminent good known as the moral good.[85] He argued that only morality, and humanity insofar as it is capable of morality, has dignity.[86]

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83. H. Hart, supra note 9, at 48-49, 182-83.

84. I. Kant, Groundwork of the Metaphysics of Morals 80, 95 (H.J. Patton trans. 1964).

85. Id. at 69.

86. Id. at 102. Kantian theory is controversial, both in its interpretation and in its application. This paper does not purport to present an authoritative interpretation or defense of Kant's moral theory. The point is only to illustrate the Kantian roots of Morris's theory of punishment.

In short, Kant contended that only the rational person exercising the capacity to choose actions on the basis of reasoned principle qualifies as good in itself and as a source of dignity. He concluded that this conception of a person and of the moral good in itself grounds a duty of respect for persons.[87]

Morris advances a theory of punishment that emphasizes the state's duty to respect persons as beings capable of directing their behavior through the exercise of rational choice. This theory reflects Kantian roots, and Kant is often identified as the classic retributivist. The variations of retributivism discussed in conjunction with the CFE requirement were all inadequate for the task of justifying that provision. Perhaps, however, a retributive theory that emphasizes the central role of respect for persons would provide a more satisfactory rationale.

C. Retributive Punishment and Respect for Persons

Morris advanced a theory of punishment in which societies maintain institutions of punishment to guide behavior in a manner consistent with a fair distribution of benefits and burdens, but he advocated a system of excuses for those who do not violate the rules voluntarily because they do not take unfair advantage.[88] He provided no reason, however, to assume that the individual who violates the law due to ignorance, mental disorder, or duress does not create an unfair distribution of benefits and burdens. If A punches B in the nose due to reasonable mistake or insanity, for example, A may still gain some unfair advantage from that act. Certainly, B's broken nose is neither less a burden nor more fair by reason of A's mental disorder. Morris has apparently conflated the fairness of the distribution of the benefits and burdens with the issue of A's blameworthiness for causing that distribution.

Morris' argument from a fair distribution of burdens and benefits advances a justification for the social institution of punishment, but concerns regarding voluntariness and blameworthiness address the separate question regarding the justification for applying that social institution of punishment to this particular offender. Hart limits the justified application of punishment to particular individuals by requiring that the person has knowingly and voluntarily committed an offense. He argues that distribution of punishment to individuals on the basis of the retributive principles of guilt and desert restricts justified punishment to those who have violated the law despite a fair opportunity to conform and protects the nature of society as a choosing system for persons who direct their lives through the exercise of rational choice.[89]

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87. Id. at 95-96.
88. H. Morris, supra note 58, at 35.
89. H. Hart, supra note 9, at 22-24, 44-49.

By limiting punishment to knowing and voluntary offenders, Hart, like Morris, recognizes respect for persons as beings who direct their lives through the exercise of rational choice as a consideration that limits how society can legitimately direct the conduct of its members. Hart and Morris both identify the rule-based system of punishment as a method of behavior guidance uniquely appropriate to rational choosers, and for this reason, Hart contends that only rational agents who voluntarily violate the law can be justifiably punished, while Morris argues that punishment is the only legitimate form of coercive state behavior guidance for rational agents. Hart explains his theory as one that applies the retributive principles of guilt and desert in order to maintain a choosing system for those with the ability to direct their actions through the exercise of rational choice. Similarly, Morris presents his theory as grounded in respect for persons with the capacity for rational choice and advocates excuses for those who do not deserve punishment because they did not violate the law voluntarily.[90]

Both Hart and Morris advance retributive theories insofar as they emphasize the backward looking principles of guilt and desert as justification for punishing voluntary violations by persons with the capacity to direct their lives through rational choice. Neither, however, presents his retributive theory as intended to pursue a moral balance or to satisfy the public thirst for revenge. Rather, both identify respect for persons as agents who are capable of directing their lives through rational choice as the core of their retributive theories. Retributivism, on this view, displays its Kantian roots in that it rests on a foundation of respect for persons as beings capable of directing their actions through the exercise of reason.[91]

Both Hart and Morris acknowledge the preventive purpose of legal punishment. Hart contends that society classifies certain kinds of be-

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90. H. Morris, supra note 58, at 35.

91. Hart has advanced an analysis of the concept of responsibility in which he has clarified four different senses of the term "responsibility." Capacity-responsibility and liability-responsibility are central to this discussion. People are legally responsible for their actions when they perform that conduct under conditions that render them liable to legal consequences. Hart terms responsibility in this sense "liability-responsibility." Foremost among the conditions that render people responsible in this sense for their behavior are certain psychological capacities including understanding, reasoning, and the ability to control conduct. Hart identifies this set of capacities as "capacity-responsibility," he contends that capacity-responsibility is usually a necessary condition for liability-responsibility. That is, actors must be responsible agents (capacity-responsibility) in order to be held responsible (liability-responsibility). H. Hart, supra note 9, at 215-22, 227-30.

The term "responsible" will be used throughout this paper in the sense in which it means capacity-responsibility unless a different sense is specified. The terms "responsible person (or agent)," "rational person (or agent)," and "rational chooser" will all be used interchangeably to refer to people who possess the capacities that constitute capacity-responsibility.

havior as criminal offenses to prevent their occurrence, while Morris recognizes the role of punishment in enforcing the core rules of the criminal law in order to maintain the fair balance of burdens and benefits.[92] Their systems also pursue a retributive purpose, however, in that they recognize the importance of maintaining a choosing system that maximizes respect for persons as rational agents as an additional aim of the criminal justice system. This second purpose requires the application of the backward looking retributive principles in the distribution of punishment. Thus, this purpose limits the manner in which the state can justifiably pursue the preventive goal. On the conception of retribution advanced here, retributive theories of punishment vest fundamental value in the person as a responsible agent acting on reason. Retributive institutions of punishment, therefore, express respect for responsible agents and constitute part of a social structure that enables people to function as rational agents.

This view of the criminal justice system as a social behavior guiding mechanism designed to prevent offenses but also intended to maintain a choosing system that respects persons through the application of retributive principles is consistent with contemporary American law. Current penal codes define offenses according to a structure of offense elements including the requirement of a voluntary act and a culpability element.[93] Additional defenses exculpate defendants who satisfy the offense definitions under conditions that prevented them from voluntarily directing their conduct as agents capable of rational choice.[94] Finally, civil commitment statutes limit confinement for protection and involuntary therapy to those who suffer some major mental illness that prevents them from directing their lives through rational choice.[95] These statutes serve both to exclude responsible agents from coercive therapy

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92. H. Hart, supra note 9, at 6; H. Morris, supra note 58, at 33-36.

93. Model Penal Code, supra note 73, at § 2.01, 2.02. The code provides for a limited set of strict liability violations which do not include culpability elements in their definitions. These violations are not crimes as defined by the code, however, and defendants convicted of these violations cannot receive sentences of imprisonment or probation. The code construes these violations as regulatory and it limits penalties to fines. The code allows strict liability offenses under these conditions because "the condemnatory aspect of the criminal conviction or of a correctional sentence is explicitly precluded." Id. at § 2.05 and comments at 281-83. Thus, the strict liability offenses contemplated by the code fall well outside the scope of the core rules of criminal law addressed by Morris. See supra text accompanying note 77. In addition, the penalties involved are not those which inherently express condemnation. See supra text accompanying note 64.

94. Id. at § 4.01 (insanity), 2.09 (duress); P. Robinson, Criminal Law Defenses §§ 25(a), 161(a) (2) (1984). These excuses exculpate defendants who performed offenses under conditions such that they were not responsible (liability-responsibility) for their conduct.

95. S. Brakel, J. Parry & B. Weiner, supra note 1, at 24-25. The claim here is that the legal institutions are designed in this manner, not that they always function according to design.

and to provide an alternative method of behavior control for those who are not rational agents, thus preserving the criminal justice system as uniquely applicable to those who qualify as responsible persons.

In summary, Morris, Hart, and contemporary American law suggest a theory of punishment that is preventive insofar as one of the primary purposes of the criminal justice system is the prevention of crime. A criminal justice system based on this theory is also retributive in that it limits punishment to those who fulfill the retributive requirements of guilt and desert. Furthermore, such a criminal justice system constitutes a "choosing system" designed to promote respect for responsible persons by providing a behavior guiding institution that is uniquely appropriate to individuals with the abilities to comprehend rules, to apply those rules prospectively to their circumstances and their potential courses of action, and to decide through the exercise of reason either to conform to those rules or to violate them. Criminal justice systems based on this theory provide social institutions of legal punishment that pursue both preventive and retributive purposes. The next section reexamines the nature and scope of the moral condemnation inherent in legal punishment within such a retributive institution.

D. Condemnation in a Retributive Institution of Punishment

Feinberg argued that moral condemnation constitutes part of the concept of legal punishment in that expressions of condemnation are inherent in the primary methods of legal punishment such as execution and imprisonment. The precise nature and scope of this moral condemnation, however, are difficult to specify. Condemnation of the act, of the actor, and of the actor's performing the act, all fail to provide fully adequate accounts.[96]

The criminal justice system consists of a complex set of rules and practices that constitutes the legal institution of punishment. Within that system, the substantive criminal law defines offenses and the appropriate punishments.[97] The nature of law requires that offense definitions take the form of relatively broad act-types as opposed to specific act-tokens.[98]

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96. See supra text accompanying notes 71-76.

97. See, e.g, Model Penal Code, supra note 73, at § 210-51 (offenses), art. 6 (sentences).

98. A. Goldman, A Theory of Human Action 10-15 (1970). Act-types are general descriptions of certain act-properties that humans can exemplify at a particular time and place. For example, raising one's hand, standing up, and asking a question are all act-types. Act-tokens are specific instantiations of those types by a particular actor at a particular time. For example, Smith's raising his hand at a particular time is a token of the act-type defined as "raising one's hand." Similarly, Smith's punching Jones in the nose at a particular time is a token of the act-type defined by the Model Penal Code's definition of assault as "purposely, knowingly, or recklessly causes bodily injury to another." Model Penal Code, supra note 73, at § 211.1(1)(a).

The principle of legality mandates that "conduct is not criminal unless forbidden by law which gives advance warning that such conduct is criminal."[99] Fuller describes a set of requirements that he contends are necessary to establish a system as a system of law. He advances a list of characteristics including generality, constancy of the law through time, and congruence between official action and declared rule, and he argues that these principles of legality constitute a formal "inner morality of law" that must be satisfied in order to qualify a system as a system of law.[100] Hart denies that these properties constitute a morality of law, but agrees that such characteristics are necessary for an effective legal system.[101]

All of these sources support the contention that a legal system must define offenses as general act-types that identify proscribed conduct before offensive behavior occurs and allow relatively consistent application across time and circumstances. These properties enable the law to serve its purpose as a set of rules that people can use prospectively to direct their behavior so as to avoid violating the law and subjecting themselves to punishment. In addition, these properties of law partially justify the institution of punishment because law with these properties provides those who are subject to its sanctions with notice and an opportunity to conform. Indeed, a statute defining a particular act-token that had already occurred as a crime would usually be invalid in the United States as an ex post facto law or a bill of attainder.[102]

While it is reasonable to expect the majority of act-tokens that fall within the scope of offenses defined as act-types to take a form anticipated by law-makers, a few will probably occur in unforeseen circumstances that alter the social desirability of the conduct or the culpability of the actor. A legal system can provide some fine-tuning with principles of justification, mitigation, and aggravation that enable the judicial system to adjust verdicts or sentences in some of these unusual cases. Any system that remains general enough to be considered a system of law, however, will have to deal with relatively coarse categories of act-types.

For these reasons, the criminal law must define offense elements in terms of relatively broad act-types that will encompass a wide range of particular circumstances. This requirement that the law define criminal offenses as relatively broad act-types contributes to the difficulties encountered in clarifying the nature and scope of the condemnation inherent

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99. W. LaFave & A. Scott, supra note 1, at § 3.1

100. L.L. Fuller, The Morality of Law 33-94 (revised ed. 1969).

101. H. Hart, supra note 59, at 61, 202.

102. W. LaFave & A. Scott, supra note 1, at § 2.4(a) (ex post facto laws), 2.4(d) (bills of attainder).

in legal punishment. A person commits criminal mischief, for example, when she "damages tangible property of another purposely, recklessly, or by negligence."[103] If the offender purposely destroys property worth more than five thousand dollars, her criminal mischief constitutes a felony punishable by imprisonment.[104] By defining criminal mischief as an offense punishable by incarceration, a mode of punishment that expresses condemnation,[105] the criminal justice system expresses condemnation of conduct of this type.

The criminal justice system, however, does not define offenses that warrant condemnation purely in terms of overt conduct. By defining offenses in terms of culpability elements and voluntarily acts in addition to overt conduct or results, the institution of punishment directs condemnation only toward proscribed act-types performed with certain mental states. Suppose, for example, that a driver destroys a ten thousand dollar car belonging to another when he swerves to avoid a child who darts in front of his car. The driver was driving carefully, but the child appeared from between two parked cars, requiring the driver to swerve without any opportunity to realize that doing so would result in his colliding with a parked car across the street. The criminal mischief statute does not apply to this act-token because it is not a token of the proscribed type which includes the requirement of certain mental states. Thus, the statute does not direct condemnation toward this driver, his act, or acts of this type because it limits its scope to damage caused purposely, recklessly, or negligently.[106] In addition, certain excuses, such as insanity or duress exclude additional actors from the proscribed punishment and condemnation.[107]

Although the precise purpose of the culpability and voluntary act requirements and of the insanity and duress defenses may continue to engender substantial debate, they serve roughly to limit criminal liability to conduct that can be attributed to the defendant as a product of his rational choice. By including these provisions in the criminal code, the institution of punishment directs condemnation only toward defendants who perform proscribed act-types as agents who direct their actions through rational choice. Thus, it promotes the retributive purpose of the system as one uniquely appropriate to rational agents, and it meets the retributive justificatory requirement by punishing only those who voluntarily and knowingly violate the law. In short, social institutions of punishment similar to the contemporary American system define

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103. Model Penal Code, supra note 73, at § 220.3(1)(a).

104. Id. at § 220.3(2), 6.06(3).

105. See supra text accompanying notes 64-65 regarding modes of punishment that inherently express condemnation.

106. Model Penal Code, supra note 73, at § 2.02.

107. Id. at § 4.01 (insanity), 2.09 (duress).

offenses and defenses to express condemnation at the systemic level toward proscribed act-types performed by agents with the capacities to direct their conduct through rational choice.[108]

While the institution of punishment expresses condemnation at this systemic level by virtue of the manner in which it defines offenses, individual applications of this institution occur at the level of specific events. At this level, particular instances of punishment express condemnation toward specific act-tokens and possibly toward the identified individuals who have been convicted of these offenses. The troublesome examples encountered in section IV(A) involved specific act-tokens. As long as the legal system retains a degree of generality sufficient to preclude its adjusting to the unique circumstances of every conceivable act-token, the moral quality of some possible act-tokens will differ from the moral quality of the act-types that constitute the offense definitions of which they are a token. When these discrepancies occur, the particular act-token may not merit the condemnation that the institution expresses on the systemic level toward the act-type. These discrepancies will occur when the moral quality of the act-token in question is significantly affected by some property of that act-token which the relatively coarse-grained act-types and justificatory, mitigating, and aggravating principles of the legal system fail to recognize.

Suppose that a conscientious civil disobeyer unsuccessfully attempts to legally prevent a local movie theater from showing sadistic forms of child-pornography. Assume that many people, including this defendant, believed that these films promote violence toward children, but that the films are technically within the legal limits. When the defendant found herself without legal alternatives, she broke into the theater and destroyed the screen and projectors to prevent further screenings. She made no effort to escape arrest and at trial she raised a defense of justification in the form of the lesser evils or necessity defense.[109] She was unable, however, to show that her act was necessary to prevent a greater harm. Although she believed that her action was necessary to prevent increased violence to children, she realized that she had no actual evidence to

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108. This analysis applies to a criminal justice system that conforms roughly to the Model Penal Code which incorporates certain retributive elements. It is at least logically possible that a criminal justice system could exclude such elements and adopt a system of strict liability for physical movement that caused certain results. Such a system would express condemnation in a different manner that will be described infra at note 112 and accompanying text.

109. Model Penal Code, supra note 73, at § 3.02; P. Robinson, supra note 94, at § 124. Defendants raise the necessity or lesser evils defense when they contend that they performed conduct that would ordinarily violate the law under conditions such that it was necessary to perform that conduct in order to prevent some greater harm to a legally protected interest.

support this belief. Although some jurisdictions provide the necessity defense to those who believe or reasonably believe that their act is necessary to avoid greater harm, other jurisdictions, including this one, allow the defense only when the act is in fact necessary.[110]

Those who agree with her belief regarding the harmful effects of the films might think that her action was morally justified or even obligatory. Those who do not share her beliefs about these effects but acknowledge that she honestly held them might hold that she was morally blameless, although mistaken. Suppose that the judge and jury fall into these two categories of people, but that, given the lack of any legal defense, the jury feels compelled to convict the defendant. The judge sentences her to one year in prison but suspends the sentence on the condition that she make restitution for the damage. At first glance, this case appears to create a contradiction because the court both morally condemns the defendant for her action (because criminal conviction and punishment are inherently condemnatory) and it does not (because the judge and jury think that her behavior was morally justified or at least that she was blameless for it). Some might suggest that this action by the court expresses legal but not moral condemnation. This option is not available, however, to one who accepts Feinberg's contention that legal punishment inherently expresses moral condemnation.

This apparent contradiction is illusory, however, and one can understand why it is illusory when one disentangles the analysis of the event at the systemic level from the analysis at the level of application. At the systemic level, the substantive criminal law identifies acts of this type as offenses that merit punishment including the inherent condemnation. By convicting the defendant, the jury ratifies the law's general condemnation of acts of this category at the abstract level of the institution of punishment. In effect, the jury endorses the proposition that the criminal law ought to condemn the act-type defined roughly as legally unjustified destruction of another's property by a person with the capacity to direct her action through rational choice.

While the judge and the jury agreed that this defendant's action exemplified this proscribed act-type, they believed either that this particular token of the act-type was one that did not merit condemnation due to morally relevant features that do not carry justificatory force within the legal system, or that the defendant was not blameworthy due to her honest belief that the conduct was morally required. Hence, the

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110. Compare Model Penal Code, supra note 73, at § 3.02 with P. Robinson, supra note 94, at § 124. On this hypothetical, she would have the defense available in jurisdictions that require only that the defendant believe the act is necessary, but she would not have it available in jurisdictions that require a reasonable belief because she realized that she had no actual evidence to support her belief.

jury's guilty verdict expressed condemnation of the act-type at the systemic level, although the jurors did not consider the defendant, her act, or both appropriate for condemnation at the level of the individual act-token. The legal system provides no official mechanism through which the jury can express differential evaluations at the systemic and applied levels. In this case, however, the judge expressed the systemic condemnation by handing down the jail sentence and communicated the lack of condemnation at the applied level by suspending the sentence.

In cases such as this one, the jurors condemn the act-type that this act-token exemplifies, but either they do not condemn this particular act-token if they think it was morally justified or they do not condemn this actor for performing this act-token if they think that the defendant was blameless, although the act was not morally justified. The standard legal procedure, however, does not allow the jury to express these differential evaluations, and one cannot even articulate them clearly unless one separates the analysis into the systemic and applied levels.

The usual system of justifications and excuses does not address these cases. The defendant can escape punishment and condemnation for this particular act-token by raising a defense of justification if the conduct was morally justifiable for reasons that the legal system recognizes as legal justifications. Alternately, the court can exculpate the defendant through an excuse such as insanity if she performed the proscribed conduct under conditions such that she was not capable of directing her conduct through rational choice. Finally, the court can reduce the sentence through mitigation when the defendant committed the offense under circumstances that reduce but do not eliminate culpability.

The criminal law makes no provision, however, for cases in which a fully responsible individual performs conduct that exemplifies a proscribed act-type under circumstances that render it morally meritorious, or at least inappropriate for moral condemnation, by virtue of properties that do not carry justificatory force within the legal system. These cases occur, however, because any action constituting an offense will token more than one act-type. Thus, a single act might token both a type that instantiates an offense definition and a different type that carries moral but not legal significance. The act of civil disobedience described above, for example, constitutes a token of the type defined by the definition of criminal mischief, but it also tokens the types defined as "actions intended to protect children" or "actions motivated by conscience." Cases such as this one reflect the fact that people often attribute substantial moral weight to subtle issues of motivation, but motive affects legal guilt only insofar as it addresses some specific offense element or recognized legal defense.[111]

111. W. LaFave & A. Scott, supra note 1, at § 3.6.

Judges and juries who encounter circumstances of this type are likely to experience a tension between their moral evaluation of this particular situation and their endorsement of the systemic condemnation of this general category of acts. They may address this tension by convicting the defendant but minimizing the sentence in order to express only symbolic condemnation of the act-type, or they may sacrifice the systemic condemnation to their specific evaluations of this case through a response such as a jury nullification.[112]

On this interpretation, the condemnation that Feinberg contends is inherent in the concept of legal punishment occurs at the relatively abstract systemic level. The criminal justice system expresses condemnation of certain act-types when it proscribes them as offenses and prescribes punishments such as imprisonment or death. It is theoretically possible to create a criminal justice system that defines offenses purely in terms of conduct or results without regard to culpability elements or voluntary act requirements. The penal code in this system might define criminal mischief, for example, as "damaging tangible property belonging to another" without mention of culpability elements included in the contemporary American version of the offense.[113] Presumably, this code would pursue only preventive purposes and it would express condemnation toward proscribed act-types on the systemic level as well as any tokens of those types on the applied level.

The contemporary American criminal justice system, in contrast, pursues both preventive and retributive purposes.[114] A retributive system promotes respect for persons as beings who can direct their action through rational choice by defining offense elements and excuses in a manner that limits punishment, and thus condemnation, to offenses performed under conditions that warrant attribution of these offenses to responsible agents. That is, a retributive system proscribes certain act-types and subjects them to moral condemnation by prescribing inherently condemnatory punishment, but it defines the offense elements and defenses in such a way as to limit condemnation for act-tokens of those types to those performed by persons who are capable of directing their action through rational choice.[115] By doing so, it establishes the

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112. The phrase "jury nullification" refer's to the jury's power to find the defendant not guilty regardless of the legal instructions they receive from the judge and the evidence presented. In this manner, the jury can address the discrepancy they perceive between legal rules and their own moral standards by refusing to apply the law as they are instructed. For a brief account of jury nullification and a list of further sources, see R.C. Singer & M.R. Gardner, Crimes and Punishment 41-44 (1989).

113. Compare this hypothetical statute with the Model Penal Code's definition of criminal mischief, supra text accompanying notes 102-04.

114. See supra text accompanying notes 92-94.

115. See supra text accompanying notes 87-94 for an account of a retributive system in the sense discussed here.

criminal justice system as a behavior-guiding institution uniquely appropriate to responsible agents and it grounds the foundation of that institution in respect for persons as the only type of agents appropriately subject to the requirements and condemnation of such an institution.

A retributive institution of punishment condemns act-types at the systemic level by catagorizing them as offenses and prescribing inherently condemnatory punishement. Individual applications of punishment to particular offenders for specific act-tokens express condemnation of three different types. First, they confirm the systemic condemnation of the act-type of which this particular offense is a token. Presumably, condemnation at the systemic level would have little significance if courts routinely refused to confirm it by convicting defendants who had performed tokens of that type. Second, they condemn the particular act-tokens committed by the defendant at trial in each case. Third, they express condemnation of the defendants as persons with the capacities for rational choice who elected to violate the law under conditions that render them accountable.

Ideally, all four aspects of condemnation will converge in most cases. Consider, for example, an ordinary case of unjustified assault on B by an angry but responsible A. At the systemic level, the institution condemned assault as a general category of conduct by identifying it as a punishable offense. In this specific case, most jurors would presumably endorse that general condemnation of assault as an unacceptable type of behavior, and they would also condemn this act-token as an instance of that type. Finally, they would express condemnation toward A as a responsible agent who violated this prohibition without justification.

Problematic cases arise, however, when one or more of several potential types of divergence occur. First, the system may prohibit certain categories of behavior as offenses when jurors in general do not condemn that type of behavior. When the conventional morality embodied by the criminal law diverges substantially from the conventional morality of the general population, the law may lose its morally persuasive force and, thus, poorly serve its primary function of guiding the voluntary behavior of the majority. Arguably, this pattern of divergence occurred during the prohibition period in the United States.

The second pattern of divergence occurs when jurors endorse the general categories of offenses defined by the criminal law but encounter specific cases that they do not consider deserving of condemnation because they think that the act was morally justified in that case. If for example, A punched B in response to constant insults by B, many jurors might think that B deserved what he got and that A's punching B was morally justified, although the provocation would legally constitute mitigation rather than justification.[116] The civil disobeyer described above

116. Black's Law Dictionary 903-04 (5th ed. 1979); Model Penal Code, supra note

would fall into this category for those jurors who thought that her particular act of destruction was morally justified. This pattern of divergence occurs because certain circumstances may have moral justificatory force in the eyes of jurors, although the legal system does not recognize that force. As suggested previously, the requirement of generality in the legal system may render some divergence of this sort practically, if not logically, unavoidable.[117]

The third pattern of divergence strikes to the heart of a retributive system of law; it occurs when the defendant meets the legal criteria of accountability but the jurors do not consider this defendant blameworthy. In the ordinary case, such as the unprovoked assault of B by A, the guilty verdict and the application of punishment express condemnation of A both as a responsible agent who has violated the law and as morally blameworthy for the offense. Under certain conditions, however, the jury may believe that the defendant violated a law as a responsible agent but that this offender is not morally blameworthy.

Certain cases of civil disobedience fall into this category. Assume, for example, that the jurors in the civil disobedience case described above endorse the law against criminal mischief and agree with the prosecution that this particular act was both morally and legally unjustified. In addition, they believe that the defendant acted as a fully responsible person with unimpaired capacity for rational choice but also that she acted out of the honest conviction that her act was morally required. In cases like this one, the jurors might want to condemn the defendant as one who violated the law while accountable by legal criteria, while refusing to condemn her as morally blameworthy.

The ordinary case actually involves condemnation of the actor in two senses; conviction condemns the defendant both as a responsible agent who is accountable by the criteria of the system and as morally blameworthy. In certain cases, however, such as some instances of civil disobedience, the defendant may warrant condemnation in the first sense, but not in the second. These cases arise when the jurors conclude that the defendant is not morally blameworthy for reasons that do not carry exculpatory force in the criminal justice system. A retributive institution of punishment promotes respect for persons by limiting application of the institution to those who are responsible agents, and therefore, it limits punishment to those who merit condemnation in the first sense. Jurors may hold, however, that some of these defendants do not deserve condemnation in the second sense because they are not blameworthy for reasons that lack legal recognition.

Ordinarily, of course, neither jurors or officials distinguish these various types of condemnation expressed by punishment, and the system

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73, at § 7.01, 7.03, 7.04. The code provides a list of factors for judges to consider when selecting the appropriate sentence from a statutory sentence range.

117. See supra notes 98-101 regarding the principle of legality.

does not provide formal procedures for expressing condemnation in one sense while withholding it in another. Consequently, officials and jurors struggle with the moral tension in the difficult cases in which the various senses do not converge. Given the demands for generality and relative simplicity in the legal system, it may not be possible to fully rectify this tension.

In a retributive system of punishment, then, the condemnation identified by Feinberg as inherent in the concept of legal punishment must occur at two levels. First, the criminal justice system necessarily expresses condemnation at the systemic level when it identifies an act-type as an offense punishable by one of the core methods of criminal punishment such as imprisonment. Second, by convicting the defendant, the court necessarily condemns the actor as a responsible agent who violated the law under the criteria of the legal system. The first level of condemnation condemns some particular type of conduct as contrary to the social morality embodied in the criminal justice system, while the second level condemns the actor for violating the criminal law under conditions of accountability as a person with the capacity to select actions through rational choice.

At first glance, this account appears to assert a logically necessary connection between law and morality that challenges the separation thesis regarding the relationship between law and morality defended by legal positivists such as Hart.[118] This account of the condemnation inherent in legal punishment does assert a conceptual connection between legal punishment and the social morality embodied in the criminal law. At the systemic level, any institution of legal punishment necessarily condemns the act-types it identifies as punishable offenses. A retributive system of punishment also necessarily condemns each convicted offender as a responsible agent who has violated the law under conditions that meet the institution's criteria of accountability. On the most plausible reading of Hart, however, this conceptual connection does not undermine the separation thesis.

Hart's separation thesis rejects the necessary connection between law and morality that he attributes to natural law theory. Natural law theory, as Hart understands it, asserts a relationship between law and morality such that a legal rule constitutes valid law only if it conforms to correct moral principles.[119] The positivist separation thesis denies this alleged connection.[120]

While the separation thesis denies that there is a logically necessary connection between legal validity and correct moral principles, this paper

118. H. Hart, supra note 59, at 181-207.
119. Id. at 151-53, 181-82.
120. Id. at 181-82.

advances an account of the moral condemnation inherent in legal punishment that asserts a conceptual connection between legal punishment and the conventional morality embodied in the criminal law. That is, Hart denies any logically necessary connection between law and critical morality, while this account asserts a logically necessary connection between legal punishment and conventional morality.[121]

Feinberg argued that moral condemnation is inherent in the concept of legal punishment.[122] This paper explicates this conceptual connection as one that binds legal punishment to the conventional morality embodied in the criminal law. One could reject any particular criminal justice system as inconsistent with critical morality, while acknowledging that the necessary connection between legal punishment and morality asserted in this paper obtains in that system.

Jurors or officials, therefore, can express moral condemnation of defendants and their acts in the sense required by this explication without believing that either the defendants or their actions deserve condemnation according to the moral criteria that these jurors or officials personally endorse.

Most effective criminal justice systems will probably achieve general correspondence between condemnation at the systemic level of act-types and the popular moral evaluation of act-tokens as well as between systemic standards of accountability and popular criteria of blameworthiness. If these judgments often diverge, than either the system must change to accommodate ordinary moral notions, or the criminal law will begin to lose its persuasive moral force because the majority of citizens will not endorse the standards embodied in the criminal law as guidelines for their voluntary compliance. Notice, however, that divergence will undermine the persuasive moral force of the criminal law regardless of the critical supportability of the system; the effectiveness of the system depends on convergence of conventional morality at the systemic and popular levels, not on the critical correctness of the system. A system of criminal law may retain substantial persuasive moral force if it accurately represents the popular conventional morality even if it is morally abhorrent from a critical perspective.

In summary, the retributive theory of punishment found in Morris, Hart, and contemporary American criminal law promotes respect for persons as agents capable of directing their behavior through rational choice. On this account, retributive institutions of punishment limit legal punishment to offenders who have violated the criminal law under conditions that support attribution of the offense to the offender as a responsible agent. These institutions express moral condemnation at the

121. See supra note 56 for the distinction between critical and conventional morality.
122. See supra text accompanying notes 64-65.

systemic level when they identify certain act-types as punishable offenses. Specific applications of these institutions condemn offenders as responsible agents who have committed offenses under conditions of accountability by the criteria of the system. When the conventional morality represented by the criminal justice system corresponds to that of the jurors, conviction also expresses their condemnation of the act-type proscribed by the offense definition, the act-token performed by the defendant in this case, and the offender as morally blameworthy for committing a wrongful act.

V. The CFE Requirement in a Retributive Institution of Punishment

A. Rationale

People are competent when they are "duly qualified," "having sufficient ability or authority"; they must be "able," "capable."[123] In the criminal law, competency to stand trial requires the abilities to understand the nature of the proceedings and to communicate with the defense attorney.[124] In the civil law, competency to contract requires the ability to understand the nature of the agreement and, in some jurisdictions, the ability to act reasonably with regard to the contract.[125] To make competent decisions regarding health care, the patient must have the ability to understand the health care procedure in question, its likely benefits and side-effects, and the available alternatives. In addition, one must be able to reason effectively enough to deliberate about the choice in light of one's values and to communicate the decision.[126]

For each of these legal purposes, competence is relative to the task at hand; people are competent for a particular purpose if they possess the capacities needed to perform the required task under the circumstances.[127] Competence to contract involves the ability to understand because a valid contract requires mutual assent by the parties to be bound by the contract.[128] Competence to stand trial involves the ability to understand and communicate because the defendant must make important decisions during the trial and assist the defense attorney in

123. Black's Law Dictionary 257 (5th ed. 1979); This legal definition is consistent with the meaning of the term in ordinary language. Oxford English Dictionary 719 (compact ed. 1977).

124. W. LaFave & A. Scott, supra note 1, at § 4.4(a).

125. J. Calamari & J. Perillo, Contracts § 8-10 (3d ed. 1987).

126. Buchanan & Brock, Deciding For Others, 64 The Milbank Quarterly 17, 24-26 (supp. 2, 1986).

127. Id. at 22-24.

128. J. Calamari & J. Perillo, supra note 125, at §§ 2-1 to 2-4.

presenting the defense.[129] In each case, the standard of competency reflects the task that the party must perform.

Proposed standards of competency to face execution sometimes reflect the task that the underlying rationale attributes to the condemned offender. If one thinks that the offender must assist the attorney in raising appeals or motions for clemency, then one might devise a standard similar to that applied to competency to stand trial. A standard designed to assure that the offender had the ability to make peace with God would probably require the ability to understand the nature of the forthcoming execution and its relationship to prior bad deeds.[130] These rationales, however, have been rejected in section II.

While the core of the concept of competency involves the person's ability to make the decision or perform the task required, the condemned prisoner, in contrast to the individual who enters into a contract or stands trial, does not have to decide or do anything. It seems natural to view the CFE requirement, along with competency to enter a plea, to stand trial, to waive rights, and to face sentencing, as one step in a series of determinations regarding competency to proceed.[131] The appropriate rationale, for competency to face execution remain elusive, however, because the CFE requirement simply has nothing to do with the offender's competence in this ordinary sense in which competence is relative to the task at hand. Competency involves the person's capacity to decide or act, yet execution does not require the offender to make any decision or perform any act. Hence, no issue regarding the offender's competence arises. The executioner, rather than the offender, must act.

The claim that the offender lacks competency to face execution challenges the justification of the executioner's action. To articulate the appropriate rationales and standard regarding the CFE requirement, therefore, one must look to the theory of punishment supporting the criminal justice system. In a retributive system of punishment such as the contemporary American criminal justice system, punishment must reflect the personal culpability of the offender.[132] Execution stands as society's extreme penalty, not only in the sense that it has the most severe practical effect on the offender, but also because it represents the most extreme expression of moral outrage at particularly offensive

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129. W. LaFave & A. Scott, supra note 1, at § 4.4(a).

130. Ward, supra note 1, at 101-07. Ward provides a list of the state standards. Many provide no clear standard at all, describing the offender who is not competent to face execution as "insane."

131. Solesbee v. Balkcom, 339 U.S. 9, 18-19, 70 S. Ct. 457, 461-62 (1950) (Frankfurter, J., dissenting) (quoting 1 Hale, The History of the Pleas of the Crown 34-35 (1736)); W. LaFave & A. Scott, supra note 1, at § 4.4.

132. Penry v. Lynaugh, 109 S. Ct. 2934, 2947-52 (1989); Tison v, Arizona, 481 U.S. 137, 149, 107 S. Ct. 1676, 1683 (1987); see supra text accompanying notes 92-94.

conduct.[133] A retributive institution of punishment must justify not only the general practice of capital punishment, but also the execution of this particular defendant with its inherent expression of extreme condemnation.[134]

Given the assumptions required to raise the CFE question as a viable issue, the offender must have performed the offense under conditions of full culpability, justifying the initial death sentence.[135] Although sentencing and execution are separate aspects of a complex social response to criminal conduct, each constitutes an application of the social institution of punishment to the defendant, and each carries the symbolic significance of an expression of condemnation of the defendant's offense and of the offender as a responsible agent who is fully accountable for violating the criminal law. By hypothesis, the offender qualified as a responsible person who was appropriately subject to the criminal justice system at the time of sentencing. When the time for execution arrives, however, the severely disturbed offender fails to qualify as the type of rational and accountable agent to whom the retributive institution of punishment uniquely applies. The actual execution constitutes an additional emphatic denunciation both of the offender's offense and of the offender as an accountable agent who is subject to the moral condemnation of the retributive institution of punishment.[136] To execute this offender *now* is to apply the retributive institution of punishment to this person *now* and, thus, to include this person in the community of rational agents to whom this institution is uniquely appropriate.

Some condemned offenders, however, are not accountable rational agents. To apply an institution uniquely applicable to responsible agents to one who is not responsible is to misapply that institution in a manner that distorts both the significance and the underlying justification of a retributive institution of punishment and undermines one aspect of its expressive function. Execution within a retributive system of punishment condemns the offender as a responsible rational agent who has committed a capital offense under conditions of full accountability and who qualifies as an appropriate subject of the retributive institution at the time of the execution. When the offender is not in fact a responsible person, the execution undermines the moral force that the retributive institution derives from its status as an institution exclusively applicable to rational agents. By executing such individuals, the criminal justice system abandons its role as the institution that expresses respect for human dignity

133. Gregg v. Georgia, 428 U.S. 153, 183, 96 S. Ct. 2909, 2930 (1976).

134. Feinberg, supra note 25, at 118.

135. See supra text accompanying note 7.

136. See supra text accompanying notes 111-17 regarding the two types of condemnation inherent in criminal punishment by a retributive institution.

by constituting a special social structure applicable only to those who possess the capacities of responsible persons.[137]

If the argument in section III is correct, the consequentialist and retributive theories of punishment converge on this issue, but they remain independent arguments that reflect their foundations in different types of moral theories. According to the consequentialist argument in section III, executing a severely disturbed offender would dilute the allegiance that many responsible agents might feel toward the criminal justice system as an institution uniquely applicable to them and particularly binding on them. This effect might reasonably be expected to decrease voluntary compliance with the system, leading to an increase in crime. This argument employs empirical premises regarding both the correspondence between the widespread legal recognition of the CFE requirement and conventional morality and the possible effects of executing disturbed offenders upon voluntary compliance with the criminal law. Evidence contrary to these premises would undermine the consequentialist argument.

The retributive argument, in contrast, does not appeal to any anticipated untoward social consequences of executing disturbed offenders. A retributive institution of punishment demands a stay of execution for one who does not qualify as a responsible agent because to execute such a person would distort the significance of retributive punishment and would undermine the moral foundations of the institution. While the moral theory underlying the consequentialist argument vests primary value in the positive social effects of any particular practice, the corresponding theory supporting the retributive argument values the dignity of the responsible person and of social structures that express respect for such persons, regardless of the consequences.

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137. This rationale would apply in principle to other forms of punishment in the narrow, emphatic sense. See supra note 65. Indeed, the Model Penal Code provides for removal of severely disturbed prisoners from prisons to mental health facilities. See supra note 73, at § 303.3(2)-(4). While the rationale applies in principle, the issue is not likely to arise often in practice because neither the disturbed offender nor the attorney has comparable motivation to raise it. Avoiding execution is a matter of major significance to most residents of death row, but many disturbed offenders may vest little importance in securing a transfer from one locked state institution to another. In addition, the continued imprisonment of a disturbed offender carries much less symbolic significance than an execution does because the former involves no change in the status quo while the latter constitutes an additional and emphatic exercise of state power over the offender.

For these reasons, in addition to the practical difficulties involved in finding secure treatment facilities, the issue of continued imprisonment of disturbed offenders carries less practical and symbolic impact. In principle, however, the rationale advanced here would apply to imprisonment as well as to execution because both constitute paradigmatic forms of criminal punishment that have taken on expressive significance as appropriate social responses to violations of the core rules of the criminal law. It would also apply to corporeal punishment for the same reasons.

Executing disturbed offenders would undermine this moral foundation and denigrate the unique stature of the community of responsible persons by designating the criminal justice system as an institution uniquely appropriate to such persons but then extending it to those who lack the capacity to participate fully in that system. Such executions would dilute both the unique status of rational agents and their special responsibility to direct their actions in a manner consistent with the capacities of responsible persons.

B. The Standard

According to the account described above, a retributive institution of punishment refuses to execute condemned prisoners who fail to qualify as rational agents because these offenders do not fall within the scope of the institution's authority as defined by its purpose and moral justification. The CFE provision actually addresses the justification of the execution and the offender's status as a responsible agent who is appropriately subject to the condemnation expressed by the execution rather than the offender's competence to make any decision or perform any action relevant to the execution.

To formulate an adequate standard for this purpose, consider two related provisions of the criminal law that also address the psychological condition of the individual who is subject to the legal process. Some courts and commentators have interpreted the CFE requirement and proposed standards of competency by analogy to the provision requiring competency to stand trial.[138] Competency to stand trial requires the ability to understand and communicate because the task at hand involves decision-making and assisting the attorney. CFE differs from competency in the strict sense of the word precisely because the condemned offender has no decisions to make and no task to perform.

Criminal liability attaches to an individual for past acts. It is backward-looking in the sense that it applies only to defendants who have committed crimes voluntarily, with the required mental state, and without excuse.[139] The CFE requirement differs from standards of criminal liability in that it addresses the offender's condition at the time of execution, and it arises as an issue only if the individual has already been identified as criminally liable regarding some past act.

While each of these provisions evaluates the defendant's capacities regarding some specified past act or future function, the CFE requirement addresses the offender's current status as an accountable agent who is a proper subject of the retributive institution of punishment. People are

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138. See supra section II B.

139. Model Penal Code, supra note 73, at § 2.01, comments at 216.

accountable if they are "liable to be called to account, or to answer for responsibilities and conduct."[140] To account for one's behavior is "to answer for discharge of duty or conduct; to give a satisfactory reason for."[141] Thus, in order to be accountable in a retributive system of punishment that is designed to apply exclusively to rational agents, the offenders must have the capacities required to answer for their conduct in the manner required by that institution; that is, as rational agents. A retributive institution of punishment that calls upon unqualified agents for an accounting within the system undermines its own purpose as a system that respects responsible persons.

Thus, in a retributive institution of punishment, criteria of accountability serves as eligibility requirements that qualify agents as proper subjects of the institution. People are eligible for a particular role or status if they are fit to be chosen for it, and they are fit if they possess the necessary qualifications.[142] Eligibility critera set the minimal qualifications necessary for inclusion in the identified population.[143] Adequate accountability criterion for a retributive institution, therefore, should specify the minimal qualifications necessary to render one admissible as a rational agent.

The standards applied to criminal liability and competency to stand trial each constitute accountability criteria for persons who are to be subject to some particular aspect of the retributive institution of punishment. The standard of competency to stand trial identifies those who are eligible to participate in the criminal trial in the role of defendant, and standards of liability identify those who are eligible to participate in the social system as one who is liable for offenses. To identify the eligibility criteria for inclusion in the class of people appropriately addressed by the retributive institution of punishment, consider the standards for competency to stand trial and criminal liability, and abstract the common core of these provisions from the specific features that address the separate purposes of each.

Consider first, standards of criminal liability. Hart contends that actors are legally responsible for their acts or harms when the connection between the actors and their actions, or the harm caused by those actions, is legally sufficient to render them subject to liability. Hart identifies responsibility in this sense as "legal liability-responsibility." He argues that there are several criteria for legal liability-responsibility, the most prominent of which are psychological capacities that the actor must possess.[144] Hart labels this set of psychological capacities "capacity-

140. Oxford English Dictionary 65 (compact ed. 1977).
141. Id. at 64.
142. Id. at 89, 265.
143. J. Feinberg, supra note 25, at 57.
144. H. Hart, supra note 9, at 215-22.

responsibility" and he includes in this set the abilities "to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made."[145]

Contemporary American criminal law includes a very similar set of requirements regarding mental elements in offenses. The culpability elements in offense definitions define the required degree of awareness with which the offender must act for his action to constitute that offense.[146] The voluntary act provision requires the necessary connection between the actor's physical motion and the decision to act.[147] Finally, the insanity defense precludes guilt when the actor fails to satisfy certain cognitive and perhaps volitional criteria.[148]

Competency to stand trial requires the capacity to understand the proceedings and communicate with one's attorney.[149] While the capacity to reason or to deliberate are not explicitly stated, the rationale implies that these are also necessary at least to some minimal degree. Competency is required of defendants because they must make important decisions during the trial and assist their attorneys in presenting their defense.[150] The ability to reason and to deliberate among alternatives is usually considered a necessary aspect of decision-making competence.[151] Hence, the foundation of the competency requirement implies some minimal capacity in these areas. A defendant could not be said to understand his options, such as those involved in entering a plea or raising a defense, if he could not reason from the decision made to the likely results.

Certain aspects of the criteria for criminal liability and competence reflect the specific purposes of each provision. The voluntary act requirement and the volitional clause in some insanity defenses address the actors' ability to direct their actions through unimpaired volitional processes because these provisions are concerned with the actors' liability for certain past actions. The precise meaning of these volitional requirements and the nature of the processes they contemplate remains controversial. The intuitive idea behind them, however, is relatively well accepted: people should be held liable for their actions only if they had the ability to direct their behavior. Cases in which this capacity is clearly absent, such as those involving seizure or convulsion, are widely accepted

145. Id. at 227.

146. Model Penal Code, supra note 73, at § 2.02.

147. Id. at § 2.01.

148. Id. at § 4.01. The code's provision for nonresponsibility due to mental disorder includes both cognitive and volitional clauses. Other insanity defense statutes, however, do not include volitional disorders.

149. W. LaFave & A. Scott, supra note 1, at § 4.4(a).

150. Id.

151. Buchanan & Brock, supra note 126, at 25-26.

as nonculpable.[152] The competency to stand trial standard, in contrast, does not include volitional components, but it does require the ability to communicate. This difference reflects the specific purpose of each provision—the competency to stand trial standard addresses the defendants' capacity to decide and communicate in the present rather than their liability for past acts.

Both standards require the ability to understand, however, and both require the capacity to reason. In addition, both standards imply a requirement of unimpaired consciousness. Consciousness involves the individual's state of alertness and awareness of himself, his environment, and the relation between the two.[153] Gross impairment of consciousness, such as that which occurs in a coma, deprives the person of any data regarding external or internal events or circumstances. People who suffer, for example, from seizures or head injuries sometimes experience clouded consciousness in which their awareness of their environment and of their place in it is limited or distorted.[154] Minimally adequate awareness constitutes a prerequisite for effective understanding and reasoning. Hence, any defendant who suffered a severe disturbance of consciousness would probably fail to meet the understanding or reasoning criteria at least in the sense that they would be unable to effectively employ those capacities.

Actors with adequate consciousness, understanding, and reasoning have the ability to comprehend rules, circumstances, behavioral alternatives, the likely results of those behaviors, and the various relationships among these factors. These basic cognitive capacities form the common content of the criminal liability and competence standards. These capabilities represent the minimal elements required to qualify a person as a rational agent and, thus, an appropriate subject of the retributive institution of punishment. Those who possess these capabilities qualify for inclusion in the population to whom such an institution applies.[155] Although precise thresholds are difficult or even impossible to specify, those who suffer severe disturbance of these cognitive processes fail to meet this criteria. Severely disorganized psychotics and the severely retarded, for example, would fall short of the threshold.

Recall that retributive institutions of punishment embody a moral theory that vests fundamental value in the person as a moral agent

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152. I add "generally" to this claim because there are cases such as those in which a person causes harm by driving when they are forewarned that they are vulnerable to seizures that constitute exceptions to this principle. The claim here is only that this is a widely accepted intuitive idea that permeates the law. This paper makes no attempt to develop a satisfactory formulation of the principle that supports this common intuition.

153. Blair, The Medicolegal Aspects of Automatism, 17 Med. Sci. & Law 167 (1977).

154. Id.; L.C. Kolb, Modern Clinical Psychiatry 115-16 (8th ed. 1973).

155. The minimally adequate degree of these capacities may vary with the social conditions, the specific purposes, the complexity of the legal requirements, the underlying moral theory, or other relevant variables.

acting on reason. Retributive institutions express respect for such persons by providing a social structure that is uniquely appropriate to them and within which they can exercise their capacities as self-directing rational agents.[156] Such an institution cannot extend its mandate and sanctions to those who fail to qualify as rational agents without undermining its own justification and purpose as a social structure designed to reinforce the unique status and responsibility of rational persons. To fulfill this role, a retributive institution of punishment would apply a standard of eligibility for execution similar to the following one.

> The state may not execute a condemned offender if at the time of the scheduled execution, that offender suffers severe disturbances of the cognitive capacities of consciousness, comprehension, or reasoning.

VI. SUMMARY

This paper examines the putative rationales for the CFE requirement and argues that all of the usual candidates fail to justify the provision. It then advances consequentialist and retributive alternatives to the usual rationales, and contends that these arguments successfully support the CFE requirement. On this account, however, the traditional formulations misconstrue the nature and purpose of the provision. In short, competence to face execution has nothing to do with the offender's competence as that term is usually interpreted. The requirement is best understood as reflecting minimal eligibility requirements for inclusion in the population of responsible persons who are appropriately held subject to a retributive criminal justice system.

In addition to addressing the CFE requirement, this analysis clarifies two broader underlying jurisprudential issues that permeate many areas of the criminal law. First, it advances an interpretation of the retributive principles that support the contemporary American criminal justice system. Second, it advances an analysis of the moral condemnation that some have contended constitutes an inherent aspect of legal punishment.

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156. See supra text accompanying notes 89-94.