3B2v8.07f
XML:ver:5.0.1
24/8/05 16:43
SARAT : 37006
Prod.Type:com
pp.129–146(col.fig.:NIL)
ED:NazneenKauser
PAGN: SCAN:

CRUELTY, COMPETENCY, AND CONTEMPORARY ABOLITIONISM

Michael Cholbi

ABSTRACT

After establishing that the requirement that those criminals who stand for execution be mentally competent can be given a recognizably retributivist rationale, I suggest that not only it is difficult to show that executing the incompetent is more cruel than executing the competent, but that opposing the execution of the incompetent fits ill with the recent abolitionist efforts on procedural concerns. I then propose two avenues by which abolitionists could incorporate such opposition into their efforts.

The 2003 execution of Charles Singleton, a diagnosed paranoid schizophrenic and convicted murderer, revived interest in a neglected aspect of death penalty jurisprudence, namely, the requirement that those who are slated to die for their crimes must be competent for execution. Subsequent to his 1979 conviction for capital felony murder, Singleton filed numerous appeals in the federal courts, arguing that his mental condition rendered him unfit to die. Prison psychologists reported that Singleton believed his cell was possessed by demons; that he was the victim of curses; that he had in fact already been freed by the courts; and that his pending death was in fact a pseudo-execution, because he would simply stop breathing and then "start

Crime and Punishment: Perspectives from the Humanities
Studies in Law, Politics and Society, Volume 37, 129–146

ISSN: 1059-4337/doi:10.1016/S1059-4337(05)37006-2

up again somewhere else.'' Singleton sometimes referred to himself as the ''Holy Ghost'' or ''God and the Supreme Court.'' In 1997, a medical review panel determined that Singleton was a threat to himself and others and ordered that he be given antipsychotic medication, which caused his delusions to dissipate. Singleton's execution was then rescheduled. Singleton's attorneys proceeded to file a habeas corpus petition, claiming that his involuntary medication was not in their client's medical interest (since his ''artificial competency'' would in fact lead to his death) and that the state could not coerce Singleton into receiving drugs for the sole purpose of restoring his competency for execution. The appeals court rejected these arguments, citing both the state's interest in expeditiously punishing offenders and the fact that Singleton had, at various points during his incarceration, willingly sought antipsychotic medication for his symptoms, (*Singleton v. Arkansas* 124 S. Ct. 74 (2003); see Stewart, 2004 for a full judicial timeline). The state of Arkansas executed Singleton by lethal injection on January 6, 2004. Singleton's reported last words: ''The blind think I'm playing a game. They deny me, refusing my existence. But everybody takes the place of another. As it is written, I will come forth as you go'' (quoted in Kimberley, 2004).

Singleton's case attracted extensive media attention, largely due to the array of moral issues it raises concerning the use of antipsychotics within the prison population. These include whether pharmaceutically induced competence counts as genuine competency from a legal perspective and whether prison physicians and psychiatrists have an obligation, in light of their duty to do no harm to their patients, to refuse to provide antipsychotic medications to those whose competency for execution would be restored thereby. That Singleton's case should garner such attention evokes our perennial fascination with questions about criminal mentality and responsibility, questions which are nearly impossible to avoid in the contemporary media environment. Television in particular encourages us to fear and condemn criminal behavior, while simultaneously permitting us the vicarious thrill involved when we seek to understand or even occupy the criminal mind. Twenty-four hour crime news coverage, with a special fixation on offenders' personal history and motives; the proliferation of crime psychodramas, some of which present the commission of crime from the first-personal perspective of the criminal; and crime documentary series that painstakingly recreate the details of criminal acts; all of these reflect and reinforce a willingness to entertain the possibility of our own criminality, a possibility the indulgence of which must of course be circumscribed by the condemnatory sentiments and judgments we direct at the criminal. Doubtless an interest in

the psychology of criminality is continuous with the near universal human preoccupation with comprehending evil, but this preoccupation is stoked by the contemporary media and manifests a larger cultural anxiety about questions about responsibility and agency in an advanced technological age. As Carl Elliott (2003) and others have pointed out, the increasing use and acceptance of various "enhancement technologies," including psychopharmaceuticals, cosmetic surgery, and other medical self-improvements, suggests a more porous understanding of the boundaries between the alleged sovereign self, a self thought somehow natural or authentic, and that self's social circumstances. Such anxieties are only the latest version of a question concerning criminals we seem unable to duck: Mad or bad? The very phrase "artificial competency" betokens these larger anxieties.

While issues of agency and responsibility will arise in the course of my discussion, I shall not explore the specific moral concerns raised by the use of such pharmacological interventions to establish competency, nor shall I be particularly concerned with the details of Singleton's case. Instead, I will pursue a logically prior question – why mental competence should be a requirement for execution at all – and, in particular, to juxtapose that inquiry with the aims and suppositions of the "neo-abolitionist" movement in the United States. Unsurprisingly, Singleton's execution garnered the opposition of death penalty opposition groups who claimed that executing Singleton under these circumstances would amount to a cruel punishment. Amnesty International organized a letter writing campaign on Singleton's behalf, and the European Union wrote to Arkansas Governor Mike Huckabee, asking that Singleton's life be spared (Vento et al., 2003). The National Association of Criminal Defense Lawyers, the National Coalition to Abolish the Death Penalty, the American Civil Liberties Union, and many other criminals' rights and anti-death penalty groups weighed in against Singleton's execution under "artificial competence." QA :1

After exploring the normative underpinnings of the competency requirement, with a special focus on the Constitutional prohibition on cruel punishments, I conclude that although the competency requirement has an identifiable retributivist pedigree, executing incompetent offenders cannot plausibly be condemned as uniformly cruel. That is, so long as cruelty is understood largely in terms of the intentional infliction of gratuitous or undeserved suffering on an offender, it cannot cogently maintained that executing the incompetent is more cruel than executing the competent. By insisting that executing the incompetent involves a greater degree of cruelty, capital punishment's opponents are thus put in the awkward position of defending, albeit indirectly, greater rather than lesser cruelty. I then diag-

nose the tension between the abolitionist efforts to halt the execution of the incompetent and the inability to justify the greater cruelty of executing the incompetent as symptomatic of the limitations of the neo-abolitionist project, one which has emphasized "conservative" legal values such as due process and equal protection (Sarat, 1999, pp. 7, 8). Finally, I argue that if condemning the execution of the incompetent is to be a central abolitionist tactic, abolitionists must, in light of political realities, go against the grain of contemporary opinion regarding criminality and criminal justice in two ways. First, abolitionists must reorient discussions of cruelty away from the suffering of the criminal and toward the attitudes implied by a society's insisting, even to the point of medicating Singleton, on the competency of the condemned. Second, abolitionists must raise hard questions about the assumptions concerning human agency and the intelligibility of our own behavior from a first-personal perspective that are incorporated into the competency requirement. In so doing, abolitionists would be directly confronting the sincerity, certainty, and moral authenticity of the retributivist outlook that underlies the competency requirement.

1. THE COMPETENCY STANDARD: ITS NATURE AND JUDICIAL HISTORY

The rule that those who are to be executed must be competent has deep roots in English common law. American law affirmed this rule in *Ford v. Wainwright* (477 U.S. 399, 1986), a case that bears striking resemblance to that of Charles Singleton. Alvin Ford was convicted of armed robbery resulting in the killing of a police officer. Ford was competent at the time of his crime and throughout his trial, but while on death row in Florida, Ford began to exhibit symptoms of what state psychiatrists deemed psychotic or paranoid schizophrenia. Ford claimed that prison guards were killing inmates and then hiding the corpses within the prison walls. He expressed great anguish at his belief that prison officials were torturing his female relatives, but had no fear of his own execution. "I know there is some sort of death penalty," Ford reportedly said, "but I'm free to go whenever I want because it would be illegal and the executioner would be executed." He also asserted that he was Pope John Paul III, that he owned the state prisons, and that he was controlling Florida's governor through mind waves (Miller & Radelet, 1993).

In delivering the Supreme Court's majority opinion, Justice Thurgood Marshall cited common law's condemnation of executing the incompetent as "savage and inhuman" to conclude that the Eighth Amendment's prohibition on cruel and unusual punishments bars the state from executing those who are insane at the appointed time of death. According to Marshall, the procedures the state of Florida used to determine competency did not meet the stringent evidentiary standards that capital punishment jurisprudence demands, and were in fact unfair to defendants because determinations of competency, being made entirely by officials within the state executive, carried obvious potential for bias. The state governor not only appointed all the experts and prosecutors responsible for initial determinations of defendant competency, but the governor was also personally responsible for making the final determination of competency. The Court remanded Ford's case back to a District Court for a new hearing on his competency. (Ford would die of natural causes before his case could be fully adjudicated.)

The more noteworthy feature of *Ford*, however, is the attempt by Justice Powell to articulate a more precise standard for competence for execution. In his concurring opinion, Powell wrote that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." This standard, that the condemned must at the time of his execution be aware of his forthcoming punishment and the reasons for it, is the *de facto* criterion for competency for execution within U.S. law. Here I wish to put forth both the most plausible interpretation of the standard and a normative framework within which this standard could be understood as identifying a feature that could render an instance of capital punishment a cruel act of punishment.

What exactly is required of a condemned person if we require that she be "aware" both of the punishment she is about to suffer and "why" it is being imposed? At a minimum, the standard demands that the condemned person appreciate that she is dying and the experiential ramifications of that fact, i.e., that in being executed her (embodied) existence is coming to an end and that the way of life she associates with her ordinary existence will cease. Such awareness therefore extends beyond simply knowing *that* one will die; the condemned must also be cognizant of the emotional or existential implications of dying (Slobogin, 2000, p. 32). As one court explained, an incompetency finding is warranted if the offender when "taken to the electric chair would not quail or take account of its significance."(*Musselwhite v. State*, 60 So. 2d 807; Miss, 1952) Moreover, the competency standard asserts that the condemned must understand that her death is an act of pun-

ishment (rather than, e.g., a merely pre-ordained death having no causal relationship to her criminal history), and she must thereby recognize the salient punitive features of her execution, i.e., those features that are commonly understood to constitute the punitive aspects of her death. A competent individual must therefore know that her death is intended as a punishment for crimes previously committed and that insofar as her execution is intended as punishment, it represents an intended loss or deprivation to her. This seems adequate to capture the demand that the condemned know "why" she is being punished. The competent need not know the *justification* for her punishment, be it retributive, deterrent, etc. Instead, a person is competent for execution, according to this standard, if she possesses a kind of causal or narrative knowledge , namely, the knowledge that she is (a) to die, (b) as punishment, and (c) for crimes for which she was found guilty.

2. CRUELTY AND THE RATIONALE FOR THE COMPETENCY REQUIREMENT

In what respect, then, might capital punishment imposed on the incompetent constitute a cruel form of capital punishment? Unfortunately, the American judicial system has rarely attempted to offer a substantive and non-procedural standard for what constitutes a cruel punishment, beyond appealing to high-minded moral ideals such as human dignity or to prevailing moral sensibilities (*In re Lynch* (1972) 8 Cal.3d 410, p. 424; *Furman v. Georgia* 408 U.S. 238 (1972); *People v. Almodovar* (1987) 190 Cal.App.3d 732, pp. 739,740; *In re DeBeque* (1989) 212 Cal.App.3d 241, p. 248). Nonetheless, as Justice Marshall noted in *Ford*, the thesis that executing the incompetent is cruel has "impressive historical credentials," but as with many common law rules, "the reasons for the rule are less sure and less uniform than the rule itself" and the requirement of competency lacks "unanimity of rationale." Ford mentions no less than six rationales for requiring competency (Slobogin, 2000, p. 30):

1. The incompetent are not able to participate fully in their defense, by, for example, providing last minute information that might serve to exonerate them.
2. Insanity is sufficient punishment in itself, making execution redundant.
3. An incompetent person is unable to make peace with her God and is thus more likely to suffer damnation in the hereafter.

4. Executing the incompetent is a "miserable spectacle," one for which civilized societies feel a "natural abhorrence."
5. Executing the incompetent has no general deterrent effect.
6. The retribution the community seeks by punishing the offender cannot be achieved because the incompetent defender cannot grasp the disapprobation or condemnation directed at her.

As several commentators have noted, most of these rationales are quite weak, and Marshall was simply incorrect to claim that the "various reasons put forth in support of the common law restriction have no less logical, moral, and practical force than they did when first voiced." (Hazard & Louisell, 1962; Ward, 1986, pp. 48–57; Slobogin, 2000, p. 32) (1) No longer seems as pressing in the post-*Furman* context where death sentences are automatically appealed. (2) Rests on the arguable assumption that madness is in fact a form of punishment. Indeed, given the conditions under which death-row prisoners live (Rhodes, 2004), insanity could be understood as a natural and not unhealthy response to various indignities or deprivations. Furthermore, even if madness were punishment enough, psychotropic drugs make it possible for this punishment to be of limited duration. (3) Rests on questionable assumptions about both offenders (i.e., that they are adherents of religion in the first place) and theology (that if there is a just God, this God allocates salvation based on one's mental state in the last days of life rather than on the moral quality of one's life as a whole, etc). (4) Is simply circular: Only if executing the incompetent were in fact cruel, would the shocked reactions of civilized society be sufficient to justify the competency requirement in the first place.

(5) Rests on the still-controversial assumption that capital punishment has a measurable deterrent effect. Yet even if capital punishment has such an effect, this rationale faces further challenges. It might be thought that executing the incompetent cannot "send a message" *to incompetent would-be murderers* that they will be punished for their crimes, both because the incompetent would be incapable of understanding that message and, being incompetent, they may not possess the self-control to refrain from killing. In this regard, executing the incompetent would fail to deter other incompetent persons. But this justification of the competency requirement is insufficient on two scores: First, the "audience" for the deterrent message of execution is not limited to the incompetent. Recall that the requirement is one of competency *for execution*, not sanity at the time of the crime's commission, competency to stand trial, etc. Indeed, the competency requirement only comes into play for offenders who were sane and competent at the time of

their crimes and their convictions, but whose competence degenerates between sentencing and the date of execution. Hence, it is at least possible that executing the incompetent would have some deterrent effect on those who are competent at the time they would commit their crimes. Second, a state's willingness to execute the incompetent might have a greater marginal deterrent effect than executing the competent. That is, by denying those convicted of criminal crimes an avenue by which to ultimately avoid execution, the state's execution of the incompetent might send a particularly emphatic message concerning its dedication to executing murderers.

Given the shortcomings of these other rationales, most commentators have suggested that only (6), that executing the incompetent fails to achieve capital punishment's retributive aims, holds promise as a justification for requiring competency for execution (Hazard & Louisell, 1962, p. 387; Radelet & Barnard, 1986, p. 39; Slobogin, 2000, p. 32). This conclusion strikes me as correct. As I suggested above, to require competence in the condemned is to require that they meet the cognitive conditions needed to understand not only that they will die, but also that their death is sanctioned as punishment for a crime previously committed. In this regard, competency is a presupposition for the punishment to have *communicative* force. As a number of recent retributive theories of punishment have emphasized, retribution is essentially a communicative act, aiming at the expression of a community's moral attitudes and values, including its condemnation of the criminal act, its symbolic distancing of the community from that act, or its concern to re-assert the rule of law and the equal standing of offender and victim (Feinberg, 1990, Vol. 4; Hampton, 1992; Duff, 2000, pp. 19–30). If retribution is to a large degree communicative, then the execution of the incompetent is cruel because competence is required in order for a punishment to adequately express respect for the offender as an autonomous agent capable of conforming her behavior to the law. The insistence that only the competent may be executed thus reflects a Kantian understanding of the moral status of the criminal and her actions. Respect for the offender suggests that in order for a punishment to be justified, it must be justifiable *to* the punished *as* punishment. The offender's punishment must therefore be understood by her as the state's morally legitimate response to her rational determination to transgress the law, a system of state-enforced norms established for the collective and individual benefit of the community (Morris, 1968). To execute the incompetent is therefore cruel because it would in some sense amount to a gratuitous imposition of suffering: To be subject to the deprivation of a punishment without being able to appreciate it *qua*

punishment is not to be punished but to be subject to that which, from the offender's perspective, is little better than state caprice.

3. THE GREATER CRUELTY?

For many opponents of capital punishment, executing anyone, competent or no, is cruel. But in arguing the specific injustice of executing Charles Singleton and other incompetent offenders, opponents of the death penalty are implicitly endorsing a comparative normative claim, to the effect that to be executed, while incompetent is at least as cruel to the offender as it would be to execute him while competent. Yet abolitionists face an uphill battle unequivocally vindicating this claim, for in order to demonstrate this, abolitionists would need to show that executions of the incompetent share some feature that executions of the competent necessarily do not, and that this feature makes said executions morally worse in some regard.

Regrettably, it is difficult to identify such a feature. As I argued earlier, the cruelty of executing the incompetent arises from its imposing on the offender a sanction whose rationale he fails to appreciate fully, and in so doing, imposing a sanction that fails to be a proper reaction to the criminal as a rational agent being held accountable for his criminal conduct. At the same time though, at least from an internal psychological standpoint, to be executed while incompetent is less cruel than being executed while competent. Consistent with my earlier interpretation of the competency requirement, to be executed, while competent is to be executed in such fashion as to recognize one's death as a punitive sanction imposed for one's criminal behavior. Yet it is precisely the communication of death's punitive message that suggests that to be executed while competent is, at least from offender's standpoint, worse than to be executed. Being executed while competent involves greater suffering of at least two kinds. First, the competent and condemned are able to hear the society's implicit message of ostracism, condemnation, and distancing. As their delusional behavior suggests, Alvin Ford and Charles Singleton, in contrast, were not able to receive the harsh message of denunciation that capital punishment inherently conveys. To be executed for one's crimes is, as many have noted, the most resounding affirmation possible of the criminal's badness and irredeemability (Camus, 1957). In being executed, one is not only exiled from one's own human community, but one is exiled from all possible human communities. In this respect, the incompetent are spared one of the principal forms of suffering

that capital punishment inflicts: They avoid the permanent stigmatization of execution, the transformation from citizen to notorious killer.

Second, being executed while competent subjects the offender to the exquisite pain of knowing the occasion and circumstances of one's death. The fear of death appears to be a near universal human instinct, and nearly every one of those sentenced exhaust their options of appeal, pardon, or commutation in order to avoid this fate. The overwhelming majority of human beings spend the overwhelming majority of their lives in a position in which they are able to ignore the specifics of their own death largely because of the temporal indeterminacy of death. Only the most morbid are fixated on the circumstances of their death, and most of us can rest content that our death will take place in a vague future whose duration shrinks constantly. Admittedly, the fact of death is what serves to give individual human lives, and the projects and commitments those lives contain, their practical urgency. Yet those very projects and commitments lose their allure when we move from an inchoate awareness of the fact of death to a concrete awareness of the facts that shall constitute our actual deaths. Presumably, the competent death row inmate must "come to terms" with the facts of his own death. Perhaps such coming to terms has salutary effects, as some who have argued for the rehabilitative potential of capital punishment might suggest. And we might hope that the immanence of death would spur death row inmates to embrace the finitude of life and enact positive change. All the same, death remains the separation from all that life is, and to know how that separation will take place cannot but make the remainder of life an anxious and addled affair. To know that one will die at 8:00 a.m. on the morning of July 10, say; that death will happen after a steak dinner; that certain individuals (one's attorney, spiritual counselors, a physician, witnesses, etc.) will be present at the time of death; that one will die in a certain room; that one will die wearing a blue workshirt and blue jeans; the only thing that knowledge of the "protocol" of one's death can contribute to the last days of life is a horrified fixation on these specifics. To remain ignorant of these specifics, as the incompetent are, is a blessing of no small significance.

With respect to the internal psychological cruelties of execution, the incompetent may well be immune to the most insidious of this suffering. The cognizance of one's future execution and its justification is, from the experiential standpoint of the condemned, more cruel than ignorance thereof. Hence, it is far from evident that the claim that executing the incompetent is more cruel than executing the competent withstands scrutiny. Admittedly, some particularly stalwart defendants may bask in the glow of the greater dignity afforded them if they are executed while competent, perhaps because

they themselves believe the punishment is in fact deserved and to be competent while executed more deeply respects their status as responsible Kantian agents. For such defendants, being executed while incompetent might well be crueler than being executed while competent. Still, given that only a handful of death row inmates "face up" to their executions by, e.g., failing to exhaust all available appeals, the number for whom execution while incompetent would be more cruel than execution while competent, because the former is a greater affront to one's dignity, appears small. And the main point I wish to argue remains: It is not plausible to say that as a class, incompetent offenders who are executed suffer greater cruelty than those who are competent.

As a result, abolitionists opposed to the execution of the incompetent on grounds of cruelty cannot, so long as the focus falls on the experience of the criminal, argue that it is a cruel form of punishment. Ironically, abolitionists must defend capital punishment's ability to stigmatize and denounce, and must defend the greater psychological anguish that knowing the occasion of one's death entails.

4. COMPETENCY AND CONTEMPORARY ABOLITIONISM

In emphasizing that executing the incompetent is a cruel *form* of capital punishment, abolitionist groups are continuing the "neo-abolitionist" strategy they have followed in the last decade or so. Perhaps inspired by Justice Harry Blackmun's exasperation with judicial efforts to identify a fair procedure for allocating and assigning death to criminals (*Callins v. Collins* 510 U.S. 1141 (1994)), abolitionists have adopted a strategy that involves not directly engaging with the morality of capital punishment as such, but instead highlighting systemic flaws and injustices in capital sentencing and administration in order to stimulate death penalty reform that will curtail or eliminate executions. The underlying logic of the neo-abolitionist strategy is to grant that capital punishment is in principle morally justified for certain crimes, but to point to a variety of shortcomings within the American criminal justice system, or perhaps within any conceivable system of criminal justice, that taken together suggest that capital punishment is not (or cannot be) justly administered. These shortcomings include, among others, racial discrimination, prosecutorial suppression of exonerating evidence, the use of plea bargaining to induce informants to testify in capital cases, in-

adequate defense counsel, and lack of access to potentially exonerating evidence such as DNA testing. The neo-abolitionist critique is therefore essentially systemic: In "the clash between the operational needs of an execution system," in particular the need for efficient and swift killing, and "the principles and procedures of American legal culture" (Zimring, 1999, p. 137), neo-abolitionists claim that the former must yield to the latter. In this respect, neo-abolitionism embraces the "conservative" values of due process and equal protection and turns the death penalty against these values (Sarat, 1999, pp. 7, 8), in effect suggesting that capital punishment undermines mainstream commitments of democratic justice. QA :2 QA :3

The neo-abolitionist strategy clearly involves a compromise for those committed to inherent injustice of the death penalty, but it has not been without its successes. A number of states have considered or implemented moratoria on death sentences after concerns about racial disparity or the execution of the innocent have been spotlighted. Furthermore, the pragmatism of neo-abolitionism meets its opponents on the very procedural turf that has, perhaps disingenuously, been invoked by those opponents in recent capital punishment jurisprudence (Zimring, 1999, pp. 142, 143). The neo-abolitionist strategy can also be justified as a sensible response to American social and political realities. The first of these realities is that American capital punishment jurisprudence has come to accept that capital punishment can be cruel only adverbially – that capital punishment is not itself cruel, but it can be cruelly implemented. Indeed, no U.S. court has ever endorsed the position that death is in and of itself a cruel punishment. The issues raised by *Furman, McCleskey*, and the other landmark death penalty cases are exclusively procedural or comparative, addressing whether capital defendants have been fairly tried or sentenced. The thesis that capital punishment is intrinsically immoral has rarely been taken seriously by U.S. courts, and it appears unlikely that this will change in the foreseeable future. The second reality is the principled moral support for capital punishment in American popular opinion. Although support for capital punishment in public opinion polls has dropped somewhat from 1990s, Americans continue to believe that death is a suitable penalty, at least in principle, for certain particularly vicious crimes. Many of these same polls indicate that this support is wide but shallower than one might expect, as public support weakens when concerns about racial discrimination, police or prosecutor misconduct, and the execution of the innocent are raised. Still, the great majority of Americans hold that the death penalty is within the range of morally acceptable punishments, and this is a political reality that is unlikely to alter. The neo-abolitionist strategy, by not quibbling with the legal or

moral legitimacy of capital punishment as such, can be seen as a pragmatic effort to limit or *de facto* end executions without aspiring to a *de jure* abolition of capital punishment.

However, I would suggest that the competency of the executed is an area where the philosophical and practical limitations of this neo-abolitionist strategy become apparent. Abolitionist groups have latched onto the issue of incompetent offenders for good reason. The image of a mentally incompetent individual being put to death tugs at the consciences of many, and might thereby spark broader reflection on the morality of capital punishment. Moreover, from the abolitionist point of view, stopping executions is itself a moral imperative, making the invocation of incompetency a useful legal and rhetorical tool to forestall injustice.

Nevertheless, these considerations make abolitionists concern with the execution of the incompetent anomalous in the present context, for there is no obvious way in which those who are incompetent have any *procedural* grievance. It is worth reminding ourselves that the question under consideration is not that of insanity, a sort of incompetence at the time of a crime's commission, nor is the question the competence of the accused to stand trial. American law has mechanisms to identify individuals incompetent in these respects, and in theory, offenders incompetent in these ways will not be convicted or sentenced to death in the first place. The central question raised about the execution of the incompetent is not legalistic or procedural but straightforwardly moral: Is it cruel to execute an incompetent person for her crimes? As I argued earlier, if a case can be made for the (greater) cruelty of executing the incompetent, it will have to be done by referring to features of the violence involved in such execution, and it is not obvious that so long as it is the experience of death that it can be taken as paramount, such violence is worse than the violence ultimately directed at competent offenders. Opposition to executing the incompetent is therefore an outlier within contemporary abolitionist activism, as executing the incompetent is a decidedly paleo- rather than neo-abolitionist cause.

5. RETRIBUTIVISM, SELFHOOD, AND SATISFACTION

These difficulties indicate that for the abolitionist movement to enjoy anything more than piecemeal success, it will have to extend beyond procedural critique and focus on what capital punishment says about the moral

sensibilities – and moral blind spots – of the societies that implement it. I conclude, then, with a discussion of how opposition to execution of the incompetent could be successfully incorporated into contemporary abolitionist efforts. Doing so demands a more direct confrontation with the popular and appealing retributivist ideals that underlay the competency requirement but that often become distorted in contemporary thinking about criminal behavior and in the cultural politics of criminality.

Recall my earlier suggestion (Section 2) that the competency requirement is best understood as grounded in a retributive requirement that a punishment must have communicative force. If punishments are to express respect for an offender's autonomy, they must be addressed to the offender as punishment. To my mind, this picture of punishment holds great appeal, in that it treats the offender as a member of a larger community and addresses him as a full-fledged member of that community. Nevertheless, one wonders how fully this ideal is in fact translated into current American understandings of punishment, and to what extent it can be invoked to explain the Singleton decision. To medicate Singleton so as to render him competent for execution is, in keeping with my argument in Section 3, to subject him to the specific social and existential cruelties of execution while competent. We may then ask: What do we learn about a culture from its demand that the incompetent be made competent to die? What would have been lost, for instance, had Singleton been executed while incompetent?

Retributivists have long emphasized the detachment inherent in their moral ideal. The retributive impulse to dispense deserved suffering, they argue, is not the impulse toward revenge – toward the conscious delight in another's suffering – and must be carefully distinguished from it (Henberg, 1990). Criminals are to be punished, on the retributivist view, solely on account of, and in proportion to, the seriousness of their wrongdoing. Punishment is therefore a requirement of justice or desert, unrelated to the satisfaction we might take in its imposition. But I would propose that medicating a man in order to reestablish his competency brings retributive ideals uncomfortably close to the boundary between justice and vengeance. That is to say, it is at least a plausible explanation that the insistence on offender competency reflects not some demand that justice be directed at a subject capable of internalizing its punitive message, but that it reflects an unsavory yearning to take satisfaction in the offender's suffering. As in Hegel's master–slave dialectic, the offender whose incompetence makes him, strictly speaking, incapable of being punished unwittingly fails to acknowledge, and thereby thwarts, our punitive aims. Medicating Charles Singleton may

therefore reflect a not-so-retributive desire that murderers ratify our anger toward them, no matter if this requires pharmacological intervention.

I am not claiming that there is no conceptual or psychological difference between the retributive ideal of impartial justice and more morally suspect motives, nor that the sort of objectivity that retributive judgment asks cannot be achieved. I am only proposing that mental competency might serve the abolitionist movement as a kind of litmus test for the authenticity or sincerity of American society's commitment to retributivism as a punitive ideal. The abolitionist movement would be well-served, then, to introduce into public discussion the uncomfortable question of how genuinely retributive our allegiance to the competency requirement in fact is.

A second avenue by which concerns about competency could play a role in abolitionist efforts starts from the cultural anxieties I earlier identified about the growing threats to the ideal of the sovereign self. Again, the competency requirement enables the essentially condemnatory message of punishment to be received by the offender. But to what purpose? Insofar as the communicative act invites a response on the part of the offender, the desired response is that the offender identify the wrongdoing for which he is punished as his: Having responsibly violated the law, the offender is now invited, by way of the act of punishment, to *take* responsibility for his wrongdoing, embracing the act as a reflection at least of his will at the time of its performance. (This may or may not be understood as a prelude to repentance or reparation.) Yet in the case of the incompetent offender, efforts to weave his *earlier* criminal activity into his current self-understanding are likely to be futile. (Recall that Singleton lost his appeal on the grounds that he had earlier in his incarceration consented to medication, a consideration that amounts to an effort to impose a kind of narrative coherence on his agency so as to justify the imposed artificial competence that enabled his ultimate execution.) The trademark of the incompetent offender is that he fails to understand that his looming punishment bears a causal relationship to his earlier wrongdoing. Consequently, the incompetent murderer cannot achieve the narrative reintegration or cross-temporal self-understanding that constitutes the point of the competency requirement in the first place.

To execute the incompetent offender, or to medicate in order to make him death-eligible, is to impose a kind of superfluous suffering on him, since the good that is realizable by way of punishment cannot in these cases be actually realized. Such executions amount to the reassertion of an ideal, an ideal of the stable, sovereign, self-governing individual, an ideal which, as I discussed at the outset, is not only increasingly difficult to locate in societies

smitten with various modes of self-improvement and self-enhancement, but obviously not in evidence in incompetent offenders. It is only through what William Connolly has called "forgetting" (Connolly, 1999) that we could fail to recognize incompetent offenders as evidence of the often Augustinian character of the human will, a will that is often unstable, discontinuous, and opaque even to itself, in contrast to the unified, incorrigible will associated with Enlightenment thought. As Connolly points out, retribution is intelligible as a punitive goal only if certain contingent forms of rational self-understanding are realized (Connolly, 1999, pp. 190, 191), forms which are not realized in incompetent offenders, making them an inappropriate subject of retributive punishment. To execute persons who lack such self-understanding is therefore an excellent example of the "absence of fit between the clarity justice demands and the opacity of the actual cases before us." (Connolly, 1999, p. 192) To simply insist that such clarity is present when it is not amounts to a validation of the model of agency on which such clarity depends, and is thus symptomatic of the role that punishment may play in overcoming collective uncertainties about ideals of morality and agency. Executing the incompetent "sacrifices the lives of killers to reassure a culture that would otherwise be perplexed and troubled by the constitutive uncertainty haunting some of its most cherished categories of self-understanding." (Connolly, 1999, p. 197)

This does not entail rejecting the ideal of the integrated, stable self, nor does it suggest that the ideal cannot be reconciled with the contingency of its actualization (Herman, 1993, p. 233). But it does ask us to take conscious efforts to remember this contingency, and it is these efforts that abolitionists must lead if they are to make a compelling public case for the wrongfulness of executing the incompetent. Such efforts might begin by suggesting that incompetent offenders are not the only agents in whom the ideal of the sovereign, continuous self is incomplete. For who among us cannot point to past actions of ours that, the best efforts of self-investigation notwithstanding, remain anomalous or alien to our ordinary or better selves? The moral self is forever a work in progress, so we must therefore be careful that we do not apply models of moral selfhood and moral attributability too bluntly or in the face of countervailing evidence. Abolitionists must have the audacity to point that this is precisely what we do when we execute the incompetent.

5. CONCLUSION

Admittedly, the two lines of argument I outlined are riskier for the abolitionist cause than continuing to emphasize the conservative legal values that have nevertheless served that cause well in recent years. The risk arises because these strategies break out of the familiar circle of talking about criminals and crime victims, a circle which tends to dominate current discussion. For competency to be a cause worth taking up, abolitionists must turn a more direct light on the retributive moral sentiments and the ways in which our professed commitment to them does not align with our practices of punishment. Having used procedural issues as a wedge into popular and political consciousness, contemporary abolitionism must begin to confront more facially the unrecognized normative tensions that reside behind support for capital punishment.

UNCITED REFERENCES

Vento (2003).

REFERENCES

Camus, A. (1957). Reflections on the guillotine. In: *Resistance, rebellion, and death: Essays* (pp. 173–234). Vintage Press, 1995. QA :4

Connolly, W. E. (1999). The will, capital punishment, and cultural war. In: A. Sarat (Ed.), *The killing state: Capital punishment in law, politics, and culture*. New York: Oxford University Press.

Duff, R. A. (2000). *Punishment, communication, and community*. New York: Oxford University Press.

Elliott, C. (2003). *Better than well: American medicine meets the American dream*. New York: W.W.Norton.

Feinberg, J. (1990). *Harmless wrongdoing: The moral limits of the criminal law (Vol. 4)*. New York: Oxford University Press.

Hampton, J. (1992). Correcting harms vs. righting wrongs: The goal of retribution. *UCLA Law Review*, *39*(6), 1659–1701.

Hazard, G. C., & Louisell, D. W. (1962). Death, the state, and the insane: Stay of execution. *UCLA Law Review*, *9*, 381.

Henberg, M. (1990). *Retribution: Evil for evil in ethics, law, and literature*. Philadelphia: Temple University Press.

Herman, B. (1993). Leaving deontology behind. In: *The practice of moral judgment*. Cambridge: Harvard University Press.

Kimberley, M. (2004). The disturbing death of Charles Singleton. *AlterNet*. http://www.alternet.org/story/17590, 2/1/05.

Miller, K. S., & Radelet, M. L. (1993). *Executing the mentally ill: The criminal justice system and the case of Alvin Ford*. Newbury Park, CA: Sage Publications.

Morris, H. (1968). Persons and punishment. *The Monist*, *52*(4), 475–501.

Radelet, M., & Barnard, G. (1986). Ethics and the psychiatric determination of competency to be executed. *Bulletin of the American Academy of Psychiatry and Law*, *14*, 37.

Rhodes, L. A. (2004). *Total confinement: Madness and reason in the maximum security prison*. Berkeley: University of California Press.

Sarat, A. (1999). Capital punishment as a fact. In: A. Sarat (Ed.), *The killing state: Capital punishment in law, politics, and culture*. New York: Oxford University Press.

Slobogin, C. (2000). Mental illness and the death penalty. *California Criminal Law Review*, *1*, 3. http://www.boalt.org/CCLR/v1/v1sloboginfr.htm, 2/1/05.

Stewart, S. D. (2004). Clark County (Ark.) Prosecutor. Singleton case history. http://www.clarkprosecutor.org/html/death/US/singleton887.htm, 2/1/05.

Vento, S. (2003). Letter from European Union leaders to Arkansas Governor Mike Huackabee, December 10, 2003. http://www.eurunion.org/legislat/DeathPenalty/SingletonArkGovLett.htm, 2/1/05.

Ward, B. A. (1986). Competency for execution: Problems in law and psychiatry. *Florida State University Law Review*, *14*, 35.

Zimring, F. E. (1999). The executioner's dissonant song: On capital punishment and American legal values. In: A. Sarat (Ed.), *The killing state: Capital punishment in law, politics, and culture*. New York: Oxford University Press.

Cases Cited

Callins v. Collins 510 U.S. 1141 (1994).

Ford v. Wainwright (477 U.S. 399, 1986).

Furman v. Georgia 408 U.S. 238 (1972).

In re DeBeque (1989) 212 Cal.App.3d 241.

In re Lynch (1972) 8 Cal.3d 410.

Musselwhite v. State, 60 So. 2d 807 (Miss. 1952).

People v. Almodovar (1987) 190 Cal.App.3d 732.

Singleton v. Arkansas 124 S. Ct. 74 (2003).

AUTHOR QUERY FORM

ELSEVIER

Studies in Law, Politics

JOURNAL TITLE:	**SARAT**
ARTICLE NO:	**37006**

Queries and / or remarks

Query No	Details required	Author's response
AQ1	Vento et al. (2003) is not listed in the reference list.	
AQ2	Please check the insertion of the year of publication in Zimring (1999).	
AQ3	Please check the insertion of the year of publication in Sarat (1999).	
AQ4	Please provide the names of all the editors and place of publication in Camus (1957).	
UC. Ref.	If references appear under section "Uncited Refernces", then cite at relevant places in the text. In case of nonavailabilty of citation, the corresponding references will be deleted from the reference list.	