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Memory, Moral Reasoning, and Madison v. Alabama

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MEMORY, MORAL REASONING, AND *MADISON V. ALABAMA*

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I. INTRODUCTION

In 2019, the United States Supreme Court held in *Madison v. Alabama*[1] that the Eighth Amendment does not shield a death row inmate from execution when the inmate loses his episodic memory of committing the crime for which he is to be punished.[2] In so holding, the Court refused to extend precedent barring execution where an inmate's mental illness prevents him from "rational[ly] understanding" why the state seeks to impose the punishment of execution.[3] The Eighth Amendment bars execution in such cases because when a person loses his capacity to rationally understand his punishment, the punishment loses its "retributive value"[4] and "simply offends humanity"[5] if carried out. As these terms reflect, the boundaries of the Eighth Amendment are shaped by the "natural abhorrence civilized societies

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[1] 139 S. Ct. 718 (2019).

[2] This was the first of two holdings made by the Court in *Madison*; the second involved whether the Eighth Amendment prohibits the execution of a prisoner suffering from dementia. *Id.* at 722. With respect to this latter question, the Court extended *Panetti v. Quarterman*'s holding beyond psychotic delusions to protect prisoners with dementia from execution after finding that dementia may also impede the requisite comprehension of one's punishment. *Id.* The Supreme Court remanded the case back to the state court to determine whether Vernon Madison's dementia did, as a matter of fact, prevent him from comprehending his own punishment. *Id.* at 731. However, the case was not reheard before Madison died of natural causes in February 2020. *See Vernon Madison, Alabama Death Row Prisoner with Dementia, Has Died*, EQUAL JUST. INITIATIVE (Feb. 24, 2020), https://eji.org/news/vernon-madison-alabama-death-row-prisoner-with-dementia-has-died/.

[3] Panetti v. Quarterman, 551 U.S. 930, 959 (2007).

[4] Ford v. Wainwright, 477 U.S. 399, 409 (1986).

[5] *Madison*, 139 S. Ct. at 723 (citing *Ford*, 477 U.S. at 409).

feel" at imposing certain punishments.[6] But the Court concluded in *Madison* that the Eighth Amendment does not in fact compel a similar conclusion where episodic memory loss alone is at issue.[7]

Was this the correct decision? Since the Supreme Court decided *Madison*, there has been scant literature discussing the merits of this decision, and no scholars have criticized or defended *Madison* on its resolution of the "amnesia-only" question.[8] This question is not one of great practical importance. Indeed, it is doubtful that the Supreme Court needed to even entertain this question given the facts of the case,[9] and it is unlikely that a case of episodic amnesia, absent anything more, will ever receive Eighth Amendment review again. Nevertheless, in addressing the relationship between retributive justice and memory, the Supreme Court ventured into a subject-matter of philosophical interest. Since John Locke, philosophers have debated the question of whether a person can be punished for crimes they have no memory of committing.[10] This article reexamines through a philosophical lens the question analyzed by the Court: whether the goals of retribution are undermined to any extent when the object of retribution forgets her crime.

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[6] *Ford*, 477 U.S. at 409.

[7] *Madison*, 139 S. Ct. at 727.

[8] It should be noted, however, that other people have at least taken interest in this topic. Prior to *Madison*'s decision, a philosophy professor at the University of Manchester named Helen Beebee published a brief article in an online magazine discussing the issue that the Supreme Court would be considering and explaining how John Locke would consider Vernon Madison in 2018 to be a different person than the Vernon Madison who committed the crime in 1985 because the former lacks any recollection of doing so. *See* Helen Beebee, *Memory, Identity, and Responsibility: Need We Be Punished for Crimes We Can't Remember?*, 64 INST. ARTS & IDEAS (Mar. 20, 2018), https://iai.tv/articles/should-people-be-punished-for-crimes-they-cant-remember-committing-what-john-locke-would-say-about-vernon-madison-auid-1050.

[9] Vernon Madison's vascular dementia and multiple strokes left his mind in so diminished of a state that he was incapable of even reciting the alphabet past the letter "G." *See* Brief of Petitioner at 8, Madison v. Alabama, 139 S. Ct. 739 (2019) (No. 17-7505), 2018 WL 2383228 at *11. Notably, the case's procedural history may have required the opposite conclusion. Writing in dissent, Justice Alito argued that the Court should not have heard the question of whether executing a prisoner with dementia violates the Eight Amendment because it granted certiorari only for the memory loss question. *Madison*, 139 S. Ct. at 731–32. The petitioner introduced the dementia claim only after the Court had granted review. *Id.*

[10] *See infra* Part IV.

The approach this article takes in answering this question is neither entirely legal nor entirely philosophical. This is because the question this article seeks to answer is not whether the Supreme Court's decision was correct as a matter of law, but whether its resolution of the philosophical question withstands further examination in light of legal and philosophical literature which the Court may not have considered. At the same time, this article's philosophical analysis is not entirely divorced from the Supreme Court's legal analysis in *Madison* and its controlling precedents. Rather, its guiding standard follows the Supreme Court's conception of the philosophical concerns underlying the relevant legal standard. This may allow for a relatively fair judgment of the Supreme Court's philosophical conclusion, one made on the Court's own terms.

The purpose of Part II is to establish that the Supreme Court's analysis of *Madison*'s philosophical question was a moral analysis of the kind that can be fairly judged through philosophical analysis rather than strictly legal analysis. Eighth Amendment jurisprudence "necessarily embodies a moral judgment" by allowing justices to engage in independent moral reasoning when interpreting the Cruel and Unusual Punishment Clause.[11] This proportionality review allows justices to draw conclusions about morality grounded in philosophical principles and their own moral intuitions. Proportionality review doctrine is unsurprisingly controversial, and debates over the constitutional legitimacy of this review have gone hand-in-hand with a more philosophical debate between those who believe in the existence of objective moral facts and those who do not. Insofar as judgment requires a decision of right or wrong, correct or incorrect, or true or false, how one resolves the question of moral facts is crucial to the endeavor of judging moral judgments. This article does not engage with this debate and merely assumes that moral facts exist, and moral conclusions can either be correct or incorrect. What Part II establishes, then, is (1) philosophical conclusions about morality can be judged as either correct or incorrect through philosophical analysis, and (2) the Supreme Court's resolution of *Madison*'s philosophical question is a philosophical conclusion

[11] Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C. J., dissenting)). For further discussion of this statement, see Kurt M. Denk, *Jurisprudence that Necessarily Embodies Moral Judgment: The Eighth Amendment, Catholic Teaching, and Death Penalty Discourse*, 88 NOTRE DAME L. REV. 323 (2012).

about morality of the kind that can be judged through philosophical analysis.

Having established that it can judge the Supreme Court's resolution of *Madison*'s philosophical question through its own philosophical analysis, this article then identifies in Part III a standard by which it can fairly judge the Court's conclusion. In *Madison* and its precedents, the Supreme Court judges the moral correctness of a punishment by its consistency with (1) the dictates of moral intuition and (2) the retributive "goal"[12] or "purpose"[13] of criminal justice. Examining how retribution is understood both in Eighth Amendment jurisprudence and in philosophical literature, this article interprets the retributive goal of criminal justice as being composed of an *intuitive-appeal aim*, a *just-deserts aim*, and a *communicative aim*.[14] Of course, this article will define these terms and justify the apparent redundancy of including both a goal of consistency with moral intuition and an intuitive-appeal aim of criminal justice. Under the chosen standard, if execution of an episodic amnesiac either undermines the aims of retribution or runs afoul with the author's moral intuition for some other reason, this article will conclude that the Supreme Court's philosophical conclusion was incorrect. While this article's objectivity is unavoidably limited by its appeal to the author's intuition, its use of the Supreme Court's own basic criteria, subjective appraisal and all, will hopefully provide enough objectivity to fairly and meaningfully judge the Court's conclusion.

Working from this standard, Part IV surveys various arguments for why episodic memory loss may undermine the aims of retribution or otherwise offend one's moral intuitions. Of the existing explanations for the thesis that episodic memory loss undermines the aims of retribution, none convincingly withstand their critiques. And, of the other potential explanations that this article considers, none reveal anything intuitively meaningful about episodic memory loss itself. This article thus concludes that the Supreme Court's resolution of *Madison*'s philosophical question was correct.

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[12] *Kennedy,* 554 U.S. at 442.

[13] *Ford*, 477 U.S. at 408.

[14] The use of "aim" instead of "goal" is intended to distinguish between the general "retributive goal of justice" and the specific aims that compose this goal.

II. MORAL REASONING IN EIGHTH AMENDMENT JURISPRUDENCE

Before judging the Supreme Court's resolution of *Madison*'s philosophical question, this article must establish that the Court reached a moral conclusion that can be fairly judged by philosophical analysis rather than strictly legal analysis. To this end, this part establishes (1) that philosophical conclusions about morality can be judged as either correct or incorrect through philosophical analysis, and (2) that the Supreme Court's resolution of *Madison*'s philosophical question is a philosophical conclusion about morality of the kind that can be judged through philosophical analysis. As this article will explain, Eighth Amendment jurisprudence allows justices to engage in independent moral reasoning when interpreting the Cruel and Unusual Punishment Clause through proportionality review. The conclusions justices reach about morality are grounded in moral principles and intuitions, exposing them to philosophical critique in a way that purely legal conclusions are not. If moral conclusions can be judged as either correct or incorrect, then it is possible for this article to judge the Court's resolution of *Madison*'s philosophical question.

The Eighth Amendment mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[15] As the Court explained in *Trop v. Dulles*,[16] "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."[17] To this end, the Eighth Amendment prohibition against "cruel and unusual punishment" is not limited to the practices condemned by the common law in 1789 but instead embodies the "evolving standards of decency that mark the progress of a mature society."[18]

Madison is the latest in a line of Eighth Amendment cases dealing with the impending execution of prisoners who have undergone some neurological change since sentencing that casts doubt on their

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[15] U.S. CONST. amend. VIII.
[16] 356 U.S. 86 (1958).
[17] *Id.* at 100 (plurality opinion).
[18] Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989) (citing *Trop*, 356 U.S. at 101 (plurality opinion)).

enduring fitness for execution. This line of cases effectively began in 1986 with *Ford v. Wainwright*,[19] where the Supreme Court held that executing a person who has "lost his sanity"[20] lacks "retributive value"[21] and therefore "simply offends humanity" if carried out.[22] The Court appealed to what it perceived as people's general moral sensibilities, arguing that such a prohibition is required by the "natural abhorrence civilized societies feel" at executing the insane.[23] Although this principle was invariably recognized at English common law,[24] the Court acknowledges that "the reasons for the law are less sure and less uniform than the rule itself."[25] It lists four possible reasons why execution of the insane might violate the Eighth Amendment: first, executing the insane "simply offends humanity" and that intuition alone is sufficient to prohibit the practice.[26] Second, it is uncharitable to dispatch an offender "when he is not of a capacity to fit himself for it" in a religious sense.[27] Third, execution of the insane serves no purpose because "madness is its own punishment: *furiosus solo furore punitur*."[28] And fourth, given that the community's quest for retribution requires punishment of equivalent "moral quality," this quest is not served by an execution that has a "lesser value" than the crime for which the insane person is to be punished.[29] The Eighth Amendment

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[19] 477 U.S. 399 (1986).
[20] *Id.* at 406.
[21] *Id.* at 409.
[22] *Madison*, 139 S. Ct. at 723 (citing *Ford*, 477 U.S. at 407, 409).
[23] *Ford*, 477 U.S. at 409.
[24] The *Ford* Court points in particular to the sentiments of great common law figures like Blackstone and Coke. Blackstone once wrote that executing an insane prisoner is "savage and inhuman" because "idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself[.]" *Id.* at 406 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *24–*25). Similarly, Sir Edward Coke similarly wrote that executing the insane constitutes "a miserable spectacle, both against Law, and of extreme inhumanity and cruelty, and can be no example to others." *Id.* at 407 (citing 3 EDWARD COKE, INSTITUTES 6 (6th ed. 1680)).
[25] *Ford*, 477 U.S. at 407 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1881)).
[26] *Id.*
[27] *Ford*, 477 U.S. at 407 (citing John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 HOW. ST. TR. 474, 477 (1685)).
[28] *Id.* at 408.
[29] *Id.* at 408 (citing Geoffrey C. Hazard, Jr. & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962)).

prohibits execution of the insane because each of these possibilities undermines execution's "retributive purpose"[30] or "retributive value"[31] to an extent that renders execution inconsistent with the "retributive goal of the criminal law."[32]

Twenty years later, the Supreme Court extended *Ford*'s holding in *Panetti v. Quarterman*[33] to hold that a state may not execute a prisoner whose "mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution."[34] The *Panetti* Court reasoned that capital punishment is imposed because it has "the potential to make the offender recognize at last the gravity of his crime,"[35] but the potential to realize this aim is called into question "if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole."[36] Following *Panetti*'s standard, the Supreme Court considered in *Madison v. Alabama* whether the Eighth Amendment also forbids execution whenever a prisoner shows that a mental disorder has left him without any memory of committing his crime.[37] The Court determined that it did not, reasoning that the "offense to morality must be much less when a person's mental disorder causes nothing more than an episodic memory loss. Moral values do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall."[38] As the Court's wording suggests, moral values and the intuition that certain punishments "simply

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[30] *Id.*
[31] *Id.* at 409.
[32] *Id.* at 422.
[33] 551 U.S. 930 (2007).
[34] *Id.* at 958–59.
[35] *Id.* at 933 (explaining that the purpose of execution is also "to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.").
[36] *Id.* 958–59.
[37] *Madison*, 139 S. Ct. at 722.
[38] *Id.* at 727.

offend[] humanity"[39] are the animating forces behind *Panetti*'s standard. Indeed, the Supreme Court has made clear that the Cruel and Unusual Punishment Clause "necessarily embodies a moral judgment."[40]

Judges may personally engage in moral reasoning when resolving Eighth Amendment questions through what is known as proportionality review. As the name suggests, the judicial capacity to engage in moral reasoning stems from the Eighth Amendment's embodiment of a prohibition against disproportionate punishments, a matter which supporters of proportionality review argue is impossible to assess without moral reasoning.[41] Although the Cruel and Unusual Punishment Clause does not expressly prohibit excessive punishments, the Supreme Court has held that, given the Eighth Amendment's prohibitions against "excessive bail" and "excessive fines," the Cruel and Unusual Punishment Clause should also be ready to stand for a prohibition against excessive punishment.[42] The Court also found support for a proportionality requirement in English common law tradition dating back to the Magna Carta.[43] The English Bill of Rights of 1689 also embodied this requirement in its prohibition against "cruel and unusual punishments," and the Court reasoned that the framers intended to provide the same protection in the American Bill of Rights as was found in its English counterpart.[44] This historical interpretation drew attacks from originalist critics, first Justice White in *Weems v. United States*[45] and later Justice Scalia in *Harmelin v. Michigan*,[46] who both rejected a textual basis for a prohibition against disproportionate punishments.[47] Ceding the historical question to the originalist objectors, defenders of a proportionality requirement directed the Court away from its historical approach entirely and instead toward consideration of so-

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[39] *Ford*, 477 U.S. at 407 (citing COKE, *supra* note 24, at 6).
[40] *Kennedy*, 554 U.S. at 419 (quoting *Furman*, 408 U.S. at 382). For further discussion of this statement, see Denk, *supra* note 11.
[41] *See, e.g.*, Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL'Y 47, 52 (2008).
[42] John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 912 (2011) (citing Atkins v. Virginia, 536 U.S. 304, 311 (2002); Solem v. Helm, 436 U.S. 277, 285 (1983)).
[43] *Id.* at 908.
[44] *Id.* at 912 (citing *Helm*, 436 U.S. at 285).
[45] 217 U.S. 349 (1910).
[46] 501 U.S. 957 (1991).
[47] Stinneford, *supra* note 42, at 913.

ciety's "evolving standards of decency that mark the progress of a maturing society," as articulated in *Trop*. In so rejecting the originalist position, the Court committed itself to the proposition that the "standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment."[48]

As for *whose* moral judgment the Cruel and Unusual Punishment Clause embodies, "[a] glance at Eighth Amendment jurisprudence reveals that judges continually engage in moral reasoning."[49] In *Trop*, the Court resolved the proportionality question by looking only to "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions."[50] However, the Court established in *Gregg v. Georgia*[51] that, in addition to examining "objective indicia" of society's moral standards, judges must also exercise their own independent moral judgment when interpreting the scope of the Cruel and Unusual Punishment Clause.[52] Restating this two-pronged approach in *Coker v. Georgia*,[53] the Court emphasized that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[54] Despite the urgings of Justice Scalia that, within the framework of *Gregg*'s test, the Eighth Amendment "should be informed by objective factors to the maximum possible extent,"[55] the Court's reliance on *Gregg*'s objective analysis has steadily weakened relative to its subjective inquiry.[56] Indeed, proportionality review has undergone "a kind of renaissance"[57] in recent decades, with the Court increasingly emphasizing its right to exercise its "independent judgment"[58] to strike down particular punishments even where they enjoy strong public support," as in cases like *Atkins*

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[48] Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 416 (2011) (citing *Furman*, 408 U.S. at 382).
[49] Moore, *supra* note 41, at 52.
[50] Roper v. Simmons, 543 U.S. 551, 563 (2005).
[51] 28 U.S. 153 (1976).
[52] Sigler, *supra* note 48, at 409.
[53] 433 U.S. 584 (1977).
[54] *Id.* at 597.
[55] Stanford v. Kentucky, 492 U.S. 361, 369 (1989) (quoting *Coker*, 433 U.S. at 592).
[56] Nita A. Farahany, *Cruel and Unequal Punishments*, 86 WASH. U. L. REV. 859, 876 (2009) ("No vestige of [the Court's] once robust intrajurisdictional analysis could be found [in *Kennedy v. Louisiana*].").
[57] Stinneford, *supra* note 42, at 901.
[58] *Id.* at 906 (citing *Roper*, 543 U.S. at 574–75).

v. Virginia[59] and *Roper v. Simmons*.[60] The Supreme Court's analysis in *Madison* makes sense in the context of this jurisprudential evolution. The *Ford* Court discussed both objective and subjective considerations, citing to a moral intuition against executing the insane deeply embedded in the common law and explaining that "the intuition that such an execution simply offends humanity is evidently shared across this Nation."[61] But, in the more recent cases of *Panetti* and *Madison*, the Court considered whether a punishment "simply offend[ed] humanity"[62] without examining any objective indicia of contemporary society's standards.

Perhaps unsurprisingly, proportionality review has been and still is a hotly contested topic among legal scholars. Proponents of proportionality review have justified their position by pointing to practical shortcomings in the standards of decency test. Stinneford, for example, argues that traditional means of measuring "objective indicia" of societal moral consensus often yield ambiguous results that fail to provide the Court with helpful guidance.[63] Moore, on the other hand, has offered a variety of historical and theoretical justifications for allowing judges to resolve Eighth Amendment cases with their own independent moral reasoning.[64] On the other side of the debate are scholars like Ronald J. Allen, who lambast proportionality review as an

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[59] 536 U.S. 304 (2002).
[60] 543 U.S. 551 (2005).
[61] *Ford*, 477 U.S. at 409.
[62] *Id.* at 407 (citing COKE, *supra* note 24, at 6).
[63] Stinneford, *supra* note 42, at 918–19.
[64] Moore presents four reasons why he believes judges should make their own moral judgements in the first person in Eighth Amendment cases: (1) "even if a judge decides to defer to consensus opinion, he or she must at least make a first-person value judgment that such deference is appropriate. . . . [J]udges who defer in this way are making moral judgments about democracy and equality in order not to make other moral judgments on the merits." Moore, *supra* note 41, at 58; (2) the "Mark II originalism" argument that the meaning of the text of the Constitution is in part a function of the beliefs of the Framers of 1791 and 1868. The Framers had an ontological belief in natural rights, shared Locke's epistemological beliefs that one can know the truths of morality, and the belief that, when speakers of a natural language like English speak, and believed that their semantic intentions were referential. *Id.* at 58-62; (3) the "backdoor" argument: if there are only first-person judgements of judges or third-person sociological judgments of what other people believe, and if you eliminate the latter kind of determinations, that leaves first-person judgments as necessary (assuming that morality-free constitutional interpretation is simply not possible). *Id.* at 63; and (4) "judges do better in their constitutional adjudication if

undemocratic judicial encroachment on the legislative function. Allen has gone so far as to state that justices who render decisions on important questions based on their own moral beliefs "commit impeachable offenses no different from a President who subverts the constitutional order."[65] Other scholars like Mary Sigler reject both proportionality review and the evolving standards of decency test; she has argued that the touchstone of the Eighth Amendment should instead be the "political morality of our liberal democracy."[66]

The significance of this debate is more than just contextual. It relates to a deeper conflict between moral skepticism and moral realism that has consequences for whether this article can meaningfully judge the correctness of the Supreme Court's philosophical conclusion in *Madison*. To *objectively* claim that a moral proposition is true or false, rather than just *subjectively* seeming to be so, is to make a claim of moral fact. This sort of claim has two implications: first, it implies that there is some objective standard for assessing truth or falsity. Second, it implies that there is some fact about the world which makes the conclusion true or false (or perhaps neither but never both).[67] Although this is uncontroversial in most contexts, the possibility of *moral* conclusions is highly contested by those skeptical of the existence of moral facts. On one side of the debate are "moral skeptics" like Justice Oliver Wendell Holmes, who believe there are no moral facts and therefore no objective moral truth or natural law; all morality is relative and subjective.[68] On the other side of the debate are "moral realists," such as Madison, Hamilton, and Locke, who believe that there are moral truths about which there are moral facts, and therefore moral conclusions may be objectively correct or incorrect.[69] In the context

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they make committed, first person, emotion-laden judgments, rather than being guided by the dry recitation of moral shibboleths accepted by others." *Id.*

[65] Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL'Y 25, 34 (2008).

[66] Sigler, *supra* note 48, at 406. By "political morality," Sigler refers to those values that underlie America's constitutional system, including "the distinctive principles of liberal democracy." *Id.* at 422.

[67] P.F. Strawson famously argued that sentences with definite descriptions but that fail to refer are neither true nor false. *See* P.F. Strawson, *On Referring*, 59 MIND 320 (1950). Thus, because there is no present king of France, a statement like "the present king of France is bald" is neither true nor false; it is just meaningless. *Id.*

[68] *See* Moore, *supra* note 41, at 54–55 (citing Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918)).

[69] *Id.* at 55.

of Eighth Amendment jurisprudence, acceptance of proportionality review is split along lines of moral realists, who believe "[w]hether a particular punishment is cruel or unusual is true or false independent of what judges think about the matter,"[70] and moral skeptics, who regard conclusions reached through proportionality review as "nothing so much as the justices' personal policy preferences" and "largely devoid of meaningful standards for justifying—or even evaluating—the Court's controversial judgments."[71] This debate dominates Eighth Amendment discourse, as it did in the pages of the 2008 volume of the *Harvard Journal of Law & Public Policy*. Michael Moore, a realist and proponent of proportionality review, argued that:

> [w]e could not have a constitutional scheme like the one we have were judges to accept [Ronald Allen's] skepticism about their use of moral reasoning. Values must be real, and judges must use them in their reasoning, if we are to make sense of the constitutional scheme that we have.[72]

Allen, a skeptic and opponent of proportionality review, responded that "moral views are radically subjective reflections and do not correspond to mind-independent entities in the necessary sense—in short, that moral propositions do not possess truth value in that sense."[73] Other notable scholars have weighed in on both sides of this debate as well.[74]

This debate places an obstacle in this article's path to judging *Madison*'s philosophical conclusion because, to the extent the justices decided *Madison* according to their independent moral judgments rather than objective indicia of popular moral consensus, this article

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[70] *Id.*

[71] Sigler, *supra* note 48, at 405.

[72] Moore, *supra* note 41, at 49.

[73] Allen, *supra* note 65, at 31.

[74] On the moral realist side, Mary Sigler has argued that the Court should "shed its moral skepticism—the implausible view, implicit in much of its Eighth Amendment jurisprudence, that morality is inherently subjective, the pursuit of moral truth necessarily futile. For, despite the allure of the skeptical posture, it is out of place in our political morality." Sigler, *supra* note 48, at 406. On the moral skeptic side, Robert Bork has rejected the objectivity of value judgments and denied that judging necessarily involves moral reasoning. *See generally* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

would be judging the Court's resolution of what is, as Michael Moore writes, "surely a moral question."[75] But to say that this resolution is either correct or incorrect requires the assumption that moral facts exist. For the sake of argument, this article will assume that there are moral facts. However, it does so with full recognition that this is a highly contestable premise and makes no attempt at an argument in either direction. This article also assumes two more related premises which will become more relevant to this article's methodology in Part III: first, that that moral facts are epistemically inaccessible. And second, that moral facts may nonetheless be estimated through moral intuition and reasoning.[76]

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[75] Moore, *supra* note 41, at 52 ("Under Eighth Amendment proportionality review, for example, courts repeatedly face questions like the one in *Roper*: Does anybody deserve to die when that person lacks the mental maturity that marks moral agency? This is surely a moral question. . . . If judges are prohibited from engaging in moral reasoning, they will have no way of answering these difficult questions rooted in morality.").

[76] This is another debatable assumption. The notion of an objective natural law has long dominated Western philosophical thought and, "[i]n all its diverse forms, the theory of natural law represents a common affirmation about the possibility of arriving at objective standards[.]" PAUL E. SIGMUND, NATURAL LAW IN POLITICAL THOUGHT 8–9 (1971). Also common among natural law philosophers is the belief that "reason" or some similar concept is the mechanism by which humans access the dictates of natural law. *See* Christopher Wolfe, *Understanding Natural Law*, 12 GOOD SOC'Y 38, 39 (2003) ("I think virtually all of the thinkers [Sigmund] puts in the category of natural law place some emphasis on some understanding of reason."). Many philosophers understand moral intuition to perform a similar function. *See, e.g.*, C.M.A. McCauliff, *Cognition and Consensus in the Natural Law Tradition and in Neuroscience: Jacques Maritain and the Universal Declaration of Human Rights*, 54 VILL. L. REV. 435, 437 (2009) ("Intuition in the form of human inclination or connaturality played an important role in [Jacques] Maritain's philosophy of natural law . . . ."). However, other philosophers who recognize the existence of moral truths contend that these truths are epistemically inaccessible. *See, e.g.*, William Tolhurst, *The Argument from Moral Disagreement*, 97 ETHICS 610, 611 (1987) ("The version of the argument from disagreement which I will consider does not aim to show that there are no objective moral truths, only that these truths, if any there be, are epistemically inaccessible."). Because the epistemic accessibility of moral facts is beyond this article's scope, it will merely assume that moral facts are not epistemically accessible.

III. STANDARD OF JUDGEMENT

Having assumed that moral facts exist, there is one more thing this article must do before it can engage with *Madison*'s philosophical question in earnest: establish a standard for judging moral correctness. To do this, this article will look to what the Court itself offers as the moral reasons underlying the governing legal standard to judge the Court on its own terms, so to speak.

Aside from intuition, the possible reasons the Supreme Court offers in *Ford* are (1) that it is uncharitable to dispatch an offender "when he is not of a capacity to fit himself for it" in a religious sense;[77] (2) punishment of the insane serves no purpose because "madness is its own punishment: *furiosus solo furore punitur*;"[78] and lastly, (3) given that the community's quest for retribution requires punishment of equivalent "moral quality," this quest is not served by an execution that has a "lesser value" than the crime for which the insane person is to be punished.[79] Writing for the Court in *Ford*, Justice Marshall observes that each of these reasons "have no less logical, moral, and practical force than they did when first voiced."[80] As for the first reason, Marshall writes that "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today."[81] It is less clear which reason Justice Marshall is referring to when he states that "we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life."[82] He might be saying that a person who lacks the capacity to understand his execution is insane, and because insanity is its own punishment, any further punishment would lack retributive value. Alternatively, he might be saying that the prisoner's inability to comprehend the reason for his punishment gives the punishment lesser value than it would otherwise have, thereby rendering the original punishment excessive.

It is instructive to examine the Supreme Court's reasoning in *Panetti* and *Madison* as well. The Supreme Court in *Panetti* reasoned

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[77] *Ford*, 477 U.S. at 407 (citing Hawles, *supra* note 27, at 477).
[78] *Id.* at 407–08.
[79] *Id.* at 408 (citing Hazard & Louisell, *supra* note 29, at 387).
[80] *Id.* at 409.
[81] *Id.*
[82] *Id.*

that "execution has no retributive value when a prisoner cannot appreciate the meaning of a community's judgment."[83] The Court in *Madison*, in turn, cites *Panetti* for this proposition and focuses singularly on the prisoner's capacity to "recognize the retributive message society intends to convey with a death sentence."[84] In truth, much of the Court's reasoning can also be characterized as intuitive as well.[85] But neither in *Panetti* nor *Madison* does the Court cite to the coming-to-grips-with-one's-own-conscience reason or the *furiosus solo furore punitur* reason. This article, therefore, will not judge *Madison*'s philosophical conclusion by either of these criteria. This is especially for the best in the case of the former, given the complications it poses.[86] Instead, this article will focus on the Supreme Court's more general aim throughout *Ford*, *Panetti*, and *Madison* that punishment be consistent with the "retributive purpose"[87] or "retributive goal of the criminal law."[88]

Of *Ford*'s original four reasons, the aims of serving the "quest of retribution" and satisfying moral intuitions are the only two that clearly continue to guide the Court's reasoning in *Panetti* and *Madison*. These criteria will be the focus of this article's analysis. This article will further explain how it will use these criteria to judge *Madison*'s correctness: first, for the intuitive appeal reason in subpart A, and second, for the retributive reason in subpart B.

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[83] *Madison*, 139 S. Ct. at 727 (citing *Panetti*, 551 U.S. at 958–59).
[84] *Id.*
[85] Justice Kagan presents a series of hypothetical questions for which she provides intuitive, obvious answers meant to illustrate that lack of memory for the crime itself is not necessary for reaching a rational understanding of one's punishment. For example, she asks: "Do you recall your first day of school? Probably not. But if your mother told you years later that you were sent home for hitting a classmate, you would have no trouble grasping the story." *See Id.* at 723–24.
[86] This article stands on tricky footing by assuming the moral realist position because it begs the question of whether there are *religious* facts as well. Although this article is predicated on the assumption that moral facts can be estimated through moral intuition and reasoning, it does not have the corresponding tools to estimate the truth of spiritual facts. Determining whether there is a deity with which a prisoner can come to terms is not within the scope of this article.
[87] *Ford*, 477 U.S. at 408.
[88] *Id.* at 422.

A. Criterion 1: Intuitive Appeal

As stated above, the Supreme Court in *Ford* provides, as a first possible reason for the prohibition against executing the insane, an "intuition" that doing so "simply offends humanity," which is alone sufficient to prohibit the practice.[89] This reason—intuitive appeal—is an important and unique reason that requires close examination. Intuitions are the "impressions of the attributes of objects of perception and thought" which are "neither voluntary nor verbally explicit."[90] As Daniel Kahneman explains, a particularly important intuition is one that assesses stimuli as good or bad: "The evidence . . . is consistent with the idea that the assessment of whether objects are good (and should be approached) or bad (and should be avoided) is carried out quickly and efficiently by specialized neural circuitry."[91] These "moral" intuitions influence anyone and everyone, existing across cultures and demographics.[92] They also play a crucial role in legal reasoning. Oliver Wendell Holmes once observed that, "[t]he more we examine the mechanisms of thought, the more we see that the automatic unconscious action of the mind enters largely into all its processes."[93] Indeed, it is widely understood today that judgments about justice, especially for violations of serious crimes, are more the product of intuition than conscious reasoning.[94]

There are two further points to make about moral intuitions: first, it is important to distinguish evaluating the Court's conclusion by its intuitive appeal from doing so by its consistency with its stated aim of prohibiting any punishment that by intuition "simply offends humanity."[95] There is an epistemic barrier that exists between the justices on the Court and the rest of the world that prevents anyone but the

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[89] *Id.* at 407.
[90] Daniel Kahneman, *A Perspective on Judgment and Choice: Mapping Bounded Rationality*, 58 AM. PSYCH. 697, 699 (2003).
[91] *Id.* at 701.
[92] Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CA. L. REV. 1, 9–10 (2007).
[93] OLIVER WENDELL HOLMES, MECHANISMS IN THOUGHT AND MORALS: AN ADDRESS BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY, JUNE 29, 1870 48–49 (1871).
[94] Robinson & Darley, *supra* note 92, at 3.
[95] *Id.*

members of the Court from knowing what moral intuitions they were experiencing when they rendered their decision in *Madison*. Having assumed the existence of moral facts, this article can now judge the content of moral intuitions as either correct or incorrect. However, regardless of a moral intuition's objective correctness, one cannot say that it is false that, for example, Justice Kagan had moral intuition x and not y when rendering a decision. Although the content of the opinion may provide strong evidence that Justice Kagan did not have the moral intuition that executing episodic amnesiacs "simply offends humanity," this information is epistemically inaccessible to anybody but Justice Kagan. For all we know, she may well have flipped a coin instead. To put it succinctly: this article cannot say that the Supreme Court justices made a decision guided by moral intuition because such a fact is ultimately unknowable. All it can do is use the author's own intuitions to probe the issue. But, insofar as moral facts are themselves epistemically inaccessible as well, the author can only attempt to assess the consistency of a moral conclusion and a moral fact. Thus, any conclusion this article draws on the basis of intuition should not be construed as an assertion of objective moral truth but rather as only an estimate of it.

Second, an intuitive appeal is unique among reasons in that it is a reason unto itself and yet also underlies all other reasons. For example, as this article explains the following subpart, the Supreme Court's resolution of *Madison*'s philosophical question can be judged by assessing whether or not the execution of episodic amnesiacs undermines the Court's stated aim of fulfilling the retributive goal of criminal law. And, it can also be judged by assessing whether or not doing so undermines the Court's stated aim of making decisions consistent with moral intuitions that identify which punishments "simply offend humanity." But, at a more basic level, the retributive aim also reduces to a moral intuition: retribution is good because justice requires that morally culpable wrongdoers receive punishment of "equivalent moral quality,"[96] and doing what justice requires is good because moral intuition M tells us that it is, and X is good if moral intuition M says it is good. In formal terms:

G = Good M = Moral Intuition J = Doing what justice requires R = Retribution

P1. If M says $G_x \rightarrow G_x$

[96] *Ford*, 477 U.S. at 408 (citing Hazard & Louisell, *supra* note 29, at 387).

P2. M says G_J
P3. J = R
∴ C1. G_R

By defining goodness as what moral intuitions say is good, this illustration betrays the author's skeptical inclination. Nevertheless, the same explanation could be provided for a world where moral facts are real by replacing "If M says $G_x \rightarrow G_x$" with "If M says $G_x \rightarrow$ one has reason to believe in a moral fact G_x." The point is that one can reach a conclusion "punishment P is good" ("G_P")—or at least might be so––by establishing that "P = R" or by establishing that "M says G_P." All of this qualification is to acknowledge the "category mistake" awkwardness of distinguishing between satisfaction of the aims of retribution as one reason and satisfaction of moral intuition as a separate reason.[97] This article will make such a distinction despite this awkwardness.

B. Criterion 2: Retributive Goals of Criminal Law

The second criterion this article will use to assess the correctness of the Supreme Court's philosophical conclusion in *Madison* is this conclusion's success in fulfilling the retributive aims of criminal justice. Retribution is widely regarded by moral philosophers as integral to justice and morality,[98] and even its critics recognize that "[t]he desire for retribution runs deep, beyond recorded history, and even beyond human history."[99] Retributivists believe that the general justifying aim of punishment is to serve justice by giving criminals the hard

[97] *See generally* GILBERT RYLE, THE CONCEPT OF MIND (1949).
[98] *See, e.g.*, PETER A. FRENCH, THE VIRTUES OF VENGEANCE 97 (2001) ("Personal and vicarious moral anger can be and ought to be placated by hostile responsive action taken against its cause. Wrongful actions require hostile retribution. That . . . is actually one of the primary foundations of morality."); ROBERT C. SOLOMON, IN DEFENSE OF SENTIMENTALITY 37 (2004) ("[T]o seek vengeance for a grievous wrong, to revenge oneself against evil—that seems to lie at the very foundation of our sense of justice, indeed, of our very sense of ourselves, our dignity, and our sense of right and wrong.").
[99] FREE WILL SKEPTICISM IN LAW AND SOCIETY: CHALLENGING RETRIBUTIVE JUSTICE 73 (Elizabeth Shaw et al. eds., 2019).

treatment they deserve.[100] Because retributivism is a deontological theory of punishment, its ideological rivals are consequentialist theories that define morality by its consequences and generally equates welfare maximization with moral correctness.[101] There are also numerous "hybrid theories" that attempt to "bridge the retributive/consequentialist divide" by drawing from both kinds of theories.[102]

As previously discussed, retribution aims at its most basic level to satisfy the demands of moral intuitions. One can defend retributivism by appealing to those intuitions that allow people to conceive of a state of affairs where the punishment of culpable wrongdoers is good, independent of any consequentialist justification.[103] One might even conclude that satisfaction of people's intuitive craving for retribution is retribution's only aim.[104] However, according to Douglas Husak,

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[100] CHRISTOPHER HEATH WELLMAN, *The Rights Forfeiture Theory of Punishment*, *in* LIBERAL RIGHTS AND RESPONSIBILITIES: ESSAYS ON SOVEREIGNTY AND CITIZENSHIP 212 (1st ed. 2013).

[101] John Bronsteen, *Retribution's Role*, 84 IND. L.J. 1129, 1132 (2009).

[102] *Id.* at 1136.

[103] Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 968 (2000) (citing MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 153–54 (Clarendon Press ed. 1997)).

[104] One may fairly wonder how different retribution is from revenge. The answer may be that revenge can be justified or unjustified, proportionate or disproportionate, but retribution is the kind of justified and proportionate revenge that society allows. This is a possible implication of the "rights forfeiture" theories of punishment offered by Christopher Heath Wellman and other philosophers. These rights-based theories of punishment are based on the notion that criminals may be properly punished because they forfeit the general right humans have not be subjected to hard treatment when they break laws that validly bind them. *See* WELLMAN, *supra* note 100, at 213. The implication of these theories is that the jurisdictional entity authorized to punish *may* permissibly punish when the right not to be punished is forfeited, but it is not *obligated* to punish the lawbreaker even when rights forfeiture occurs. Many people think that it is ethical to be merciful and not carry out justified punishment, but the merits of mercy do not make it unjust to exact such retribution. To the extent jurisdictional entities choose to punish rather than forgive, they punish not out of a desire to comply with a moral obligation but out of a desire to punish for punishment's sake. Indeed, rights forfeiture theorists like Wellman maintain that the deontic status of an action is not a function of the agent's motivation. *See* WELLMAN, *supra* note 100, at 221. By this logic, a sadist who punishes someone liable for punishment out of a love for inflicting suffering does nothing wrong as long as the punishment is proportional.

satisfaction of our moral intuitions is necessary for a successful retributive theory.[105] The importance of intuitive satisfaction even serves as a standard for the success of hybrid retributivist-consequentialist accounts.[106] If every moral theory aims to align the outcomes it produces with our moral intuitions (and thus approximate moral truths), any retributive moral theory that might be guiding the Supreme Court will necessarily have this aim as well.

On a separate level, retribution's aim is the provision of justice for some wrong. This notion is invariably accepted by retributivists and explains the presence of certain characteristics in all retributivist accounts. First, any retribution must be no greater or less than what is deserved by retribution's object.[107] Second, one can inflict retribution only on those who have made themselves liable for retribution.[108] Retributivism, unlike consequentialism, therefore precludes the possibility of punishing the innocent in cases where doing so would maximize social welfare in the aggregate.[109] Where retributivist accounts differ among themselves is in *how* retribution achieves justice. For many philosophers, retribution aims to restore a moral balance,[110] though there is disagreement as to what this entails as well. For some, such as

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[105] Husak, *supra* note 103, at 972.

[106] *See, e.g.*, Bronsteen, *supra* note 101, at 1135 (Bronsteen argues that his hybrid argument succeeds because, "[m]ost important[ly], it tracks our intuitions and considered judgments regarding the roles that retribution and utilitarianism play in justifying criminal punishment.").

[107] Norval Morris, *Punishment, Desert and Rehabilitation*, *in* EQUAL JUSTICE UNDER LAW: U.S. DEP'T OF JUSTICE BICENTENNIAL LECTURE SERIES 140 (1977) ("No sanction should be imposed greater than that which is 'deserved' . . . . Nor should a sanction be imposed which is so lenient that it unduly depreciates the seriousness of the crime.").

[108] Bronsteen, *supra* note 101, at 1142 ("The retributive approach makes sense of our desire to punish only those who have committed crimes."). Wrongful actions that do not break laws can still, from a moral perspective, make a wrongdoer morally liable for retribution. But, to the extent states hold monopolies over the powers of rights adjudication and punishment, punishment is only permissible to the extent it is exacted in accordance with valid laws, which generally allow for punishment only for violation of the laws themselves.

[109] *Id.* ("Perhaps the most important point in favor of retribution . . . is that it is far more reliable than is utilitarianism at explaining why punishment should be confined to those who break the law.").

[110] Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 420 (1990).

Michael Moore, retribution requires that culpable wrongdoers be punished.[111] Others, such as Douglas Husak, argue that retribution does not necessarily require punishment but merely suffering.[112] Whatever the vehicle, justice requires that wrongdoers receive what they deserve.

Aside from these "just deserts" theories is a separate branch of retributive thought: "communicative" theories of retribution, under which legal punishment is justified because it "communicates the censure that offenders deserve for their crimes."[113] Communicative theories are retributive because they "seek to explain penal desert in terms of the censure that is deserved."[114] One type of communicative theory is "teleological," understanding punishment as a form of communication that tells the criminal how wrong his act was.[115]

Finally, there are theories of retributivism that are both desert-oriented and communicative in nature, such as the view that punishment aims to elicit remorse. On one hand, eliciting remorse is communicative because a remorseful agent, in the words of Raimond Gaita, "(re)acquires a belief about the moral worth of the agent she has harmed as she recognizes 'the reality of [that agent] through the shock of wronging her.'"[116] O. Carter Snead similarly understands retribution's aim as forcing wrongdoers "[t]o take on board the enormity of one's crimes and feel authentic shame and remorse."[117] This characteristic of remorse makes it sound more in "restorative justice" (a consequentialist theory),[118] and has led some philosophers to conclude that the infliction of remorse is not itself a form of punishment.[119] On the

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[111] *See* MOORE, *supra* note 103, at 153. More specifically, Moore's view is not just that criminals be punished but that a capable wrong itself ought to be punished. Husak, *supra* note 103, at 971 (citing MOORE, *supra* note 103, at 187).

[112] Husak, *supra* note 103, at 973.

[113] Ambrose YK Lee, *Defending a Communicative Theory of Punishment: The Relationship Between Hard Treatment and Amends*, 37 OXFORD J. LEGAL STUD. 217, 217–18 (2017).

[114] *Id.* at 218.

[115] Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464, 470 (1988).

[116] RAIMOND GAITA, A COMMON HUMANITY: THINKING ABOUT LOVE AND TRUTH AND JUSTICE 52 (2002).

[117] O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1263 (2011).

[118] *See, e.g.*, *id.* at 1262; *see also* Jenny Teichman, *Punishment and Remorse*, 48 PHIL. 335, 345 (1973) ("Where remorse is concerned, there is some evident overlap between retributive and restorative theories of justice.").

[119] Teichman, *supra* note 118, at 344 ("Remorse is not exactly a variety of punishment, but it has some resemblances to punishment."). Bagaric and Amareskara have an even stronger view of this kind, arguing that remorse has no justification under

other hand, many philosophers recognize that remorse—which Adam Smith famously described as "the most dreadful" of all sentiments[120]—can itself be a form of punishment, perhaps even a substitute for external punishment.[121] Remorse is also relevant to communicative retribution because of how it illustrates the offender's endorsement of society's message of censure.[122] Other philosophers such as Christopher Birch, Jenny Teichman, and Joel Feinberg understand eliciting remorse as a central aim of retribution.[123] Remorse-based theories also warrant particular consideration given the actual significance remorse has in the criminal law context.[124] In practice, defendants who express remorse are generally more likely to receive lenient punishments, whereas defendants who do not are more likely to receive harsher punishments.[125]

In summary, retributive theories can have at least three aims: the *intuitive appeal aim* (creating a state of affairs that conforms to the

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retributivist theory because the retributivist theory of punishment requires congruence between the severity of the punishment and the severity of the wrongfulness of the act; in contrast, the degree of remorse, they argue, is a characteristic of the offender. *See* Mirko Bagaric & Kumar Amarasekara, *Feeling Sorry?—Tell Someone Who Cares: the Irrelevance of Remorse in Sentencing*, 40 HOWARD J. CRIM. JUST. 364, 368 (2001).

[120] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 122 (1759) (Writing that, "of all the sentiments which can enter the human breast, [remorse is] the most dreadful.").

[121] Johnathan Pugh & Hannah Maslen, *'Drugs That Make You Feel Bad'? Remorse-Based Mitigation and Neurointerventions*, 11 CRIM. L. & PHIL. 499, 508 (2015) ("[I]f remorse is aversive enough to constitute suffering, then it may constitute or substitute for some of the deserved punishment.").

[122] *See generally* HANNAH MASLEN, REMORSE, PENAL THEORY AND SENTENCING (2015).

[123] Dresser, *supra* note 110, at 422 (citing JOEL FEINBERG, HARM TO SELF 85 (1986)) (Feinberg argues that "punishment is forgone at a later point because of belief that the (same) person has genuinely repented and feels remorse for former criminal conduct."). For Birch and Teichman, see *infra* Part IV. B.

[124] Rocksheng Zhong et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. AM. ACAD. PSYCHIATRY L. 39, 39 (2014) ("Legal scholars and courts appreciate the significance of remorse in criminal law.").

[125] *Id.* ("Legal research has demonstrated that remorseful defendants are generally more likely to receive relatively lenient punishments, whereas remorseless defendants are more likely to receive harsher punishments.") (citing Theodore Eisenberg et al., *But Was He Sorry?—The Role Of Remorse In Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998); Stephen P. Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1583 (1998)).

dictates of our moral intuitions), the *just-desert aims* (inflicting suffering proportional to a wrongdoer's just desert), and the *communicative aim* (conveying society's message of censure to the wrongdoer). A couple points to note here: first, these aims include all of their manifestations. For example, the just-desert aim can be satisfied both by the infliction of punishment or some non-punishment suffering. Second, these aims can operate in conjunction with each other. For example, one may say that the value of eliciting remorse is that it satisfies both the just-desert and communicative aims of retribution. And third, there may be other unidentified aims that also reduce to the intuitive appeal aim just as the just-desert and communicative aims do. The intuitive appeal aim is therefore a catch-all aim for any possible aim of retribution that is consistent with our moral intuitions.

The Supreme Court's understanding of retributive justice seems to reflect all three of retribution's aims. Most apparent is the intuitive appeal aim, given how Eighth Amendment analysis "necessarily embodies a moral judgment."[126] However, the Supreme Court is also quite clear in its recognition of the just-desert and communicative aims as well. In *Kennedy v. Louisiana*,[127] the Court identifies the just-desert aim as retribution's purpose: "[t]he goal of retribution . . . reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused."[128] Similarly, the *Ford* Court looked to the just-desert aim when it defined "retribution" as embodying "the need to offset a criminal act by a punishment of equivalent 'moral quality.'"[129] Yet, elsewhere in *Ford*, the Supreme Court emphasized the importance of providing the comfort of understanding,[130] which sounds more in retribution's communicative aim. The Court more clearly appealed to retribution's communicative aim in *Panetti*, where it observed that capital punishment is imposed because it has

> the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability

[126] *Kennedy*, 554 U.S. at 419 (quoting *Furman*, 408 U.S. at 382). For further discussion of this statement, see Denk, *supra* note 11.
[127] 554 U.S. 407 (2008).
[128] *Id.* at 442.
[129] *Ford*, 477 U.S. at 408.
[130] *Id.* at 410.

> of the prisoner is so serious that the ultimate penalty must be sought and imposed.[131]

And, following *Panetti*, the *Madison* Court recognized that "execution has no retributive value when a prisoner cannot appreciate the meaning of a community's judgment."[132] These more recent cases suggest that the Supreme Court has moved retribution's communicative aims front and center in Eighth Amendment analysis while moving the just-desert aim into the background. Nonetheless, all three aims are evidently present in the Supreme Court's reasoning throughout the line of cases running from *Ford* to *Madison*.

There is one final aspect of this article's standard that requires clarification: the extent to which episodic memory loss can undermine retribution's aims before the Supreme Court's conclusion becomes incorrect. At one extreme, this article could understand the Court to be asserting that episodic memory loss does not undermine the retributive aims of justice to any extent so that demonstrating *Madison*'s conclusion achieves this to *some* extent is sufficient to prove it incorrect. At the other extreme, this article could understand the Court to be asserting that episodic memory loss would have to strip punishment of any retributive purpose whatsoever to make execution of an episodic amnesiac constitute a cruel and unusual punishment. While the legal answer may be somewhere in the middle, this article will take the former extreme and ask whether episodic memory loss can undermine the aims of retribution to any degree at all.

IV. ANALYSIS

Having identified a proper standard of judgment, this article now applies the standard to the Supreme Court's resolution of *Madison*'s philosophical question.[133] There is, in the words of O. Carter

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[131] *Panetti*, 551 U.S. at 958.

[132] *Madison*, 139 S. Ct. at 727.

[133] It is worth briefly noting that this article is not primarily concerned with assessing the correctness of the Court's conclusion as a matter of constitutional law, and so is not concerned with practical considerations that might otherwise influence a Court. Episodic memory loss is more easily malingered than insanity, and between twenty-five to forty-five percent of those convicted of homicide claim amnesia for the killing. Michael D. Kopelman, *The Assessment of Psychogenic Amnesia*, *in* HANDBOOK

Snead, an "abiding truth . . . that there is a connection between retributive justice and memory."[134] There is also a long tradition in Western jurisprudence and philosophy recognizing some intuitive connection between memory and liability for punishment. Since John Locke famously asserted that "[n]o one shall be made to answer for what he knows nothing of"[135] the question of whether there is indeed a memory criterion of personal identity has been the subject of extensive debate. Other philosophers have argued that, insofar as retribution aims to make a perpetrator feel remorse for his crime, losing personal memory of the crime undermines this aim of retribution by making remorse impossible. Implicit in both theories is the existence of *some* moral intuition compelling their respective conclusions, even if the explanatory reasons they ascribe to this intuition differ. And, as Christopher Birch has suggested, execution of amnesiacs may undermine the aims of retribution for reasons beyond lack of personal continuity or impossibility of eliciting remorse, even if the reason is yet to be identified.[136]

In this Part, this article will assess how effectively these personal identity (which is relevant to desert) and remorse-based theories explain how episodic memory loss might undermine the retributive aims of justice. It will also accept Birch's invitation to theorize an alternative explanation for the relevant moral intuition by offering such an alternative: the *privileged phenomenal information explanation*. Despite the merits of these three potential explanations, this article will ultimately conclude that none successfully withstand scrutiny. Absent any compelling explanation for how episodic memory loss might undermine the aims of retribution, this article must conclude that the Supreme Court's resolution of *Madison*'s philosophical question was correct.

OF MEMORY DISORDERS 428–29 (Alan D. Baddeley et al., eds., 1995). This is undoubtedly a serious practical issue with recognizing episodic memory loss as sufficient to trigger the Eighth Amendment cruel and unusual punishment clause, but reasons of this type will not factor into this article's analysis of moral reasons.

[134] Snead, *supra* note 117, at 1254.

[135] JOHN LOCKE, *Of Identity and Diversity*, *in* AN ESSAY CONCERNING HUMAN UNDERSTANDING 464 (A. Fraser ed. 1959) (1689), *reprinted in* PERSONAL IDENTITY 48 (John Perry ed. 1975).

[136] Christopher Birch, *Memory and Punishment*, 19 CRIM. JUST. ETHICS 17, 29 (2000).

A. The Personal Identity-Based Explanation

Critiquing the Supreme Court's decision in *Madison*, Jennifer Leto writes, "[t]o kill a man, who does not remember his crime, his trial, the victim, and maybe even himself, is a merciless killing. . . . Madison's life is not the same after his experience in the prison system."[137] Whether intended or not, Leto's argument channels a notion dating back to John Locke that memory is integral to personal continuity. Under Locke's "memory criterion" of personal identity (as it is traditionally understood), "a person P_1 who exists at time t_1 is identical to a person P_2 who exists at a later time t_2 only if P_2 at t_2 is conscious of (remembers) any of the thoughts or actions of P_1 at t_1."[138] This discontinuity threatens to undermine retribution's aims because desert-based justifications for punishment are dependent on a person's persistence over time. This is because, as Rebecca Dresser explains, "[f]or punishment to be fair, the person punished must be the same person who previously disobeyed the law. If not, an innocent person unjustly pays the price for another's wrongdoing, an outcome which retributivists universally denounce."[139] This subpart will survey contemporary identity theories and consider the extent to which they support the conclusion that personal continuity requires episodic memory. Lockean identity theory has been subject to much scrutiny, and the consensus among contemporary philosophers is that episodic memory is not necessary for personal continuity. Deferring to the judgement of these philosophers and considering those reasons favoring the same conclusion, this article concludes that this explanation cannot defeat the Court's conclusion.

Locke believed that memory was integral to personal continuity, writing "[f]or as far as any intelligent being can repeat the idea of any past action with the same consciousness it had of it at first, and with the same consciousness it has of any present action; so far it is the

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[137] Jennifer Leto, *Extraordinary and Compelling:* Madison v. Alabama *and the Issue of Prison Reform for Elderly Prisoners*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 41, 59 (2019).
[138] Johan E. Gustafsson, *Did Locke Defend the Memory Continuity Criterion of Personal Identity?*, 10 LOCKE STUD. 113, 116 (2010).
[139] Dresser, *supra* note 110, at 421–22.

same personal self." [140] It should be noted that Locke was concerned with identity of consciousness, rather than identity of substance,[141] and that he took a rather strict view of personal continuity: "if Socrates and the present mayor of *Quinborough* agree, they are the same person: if the same Socrates waking and sleeping do not partake of the same consciousness, Socrates waking and sleeping is not the same person."[142] As Johan Gustafsson and others have noted, although these textual statements do not alone support the traditional memory criterion stated above, this is nonetheless how Locke has traditionally been interpreted.[143] This interpretation is further supported by Locke's oft-quoted statement that "no one shall be made to answer for what he knows nothing of . . . ."[144]

Numerous modern and contemporary philosophers have sought to reformulate and improve upon Locke's theory with their own accounts of personal identity. One example of a leading contemporary account is that of Derek Parfit, who claimed that a person's existence is reducible to his brain, body, and "the occurrence of a series of interrelated physical and mental events."[145] Central to Parfit's account is "Relation R," the relationship of psychological connectedness and continuity between a person and his self at some past point in time.[146] Relation R has a direct relationship to just deserts because "[w]hen some convict is now less closely connected to himself at the time of his crime, he deserves less punishment. If the connections are very weak, he may deserve none."[147] "Relevant considerations would include the presence of memories of the crime," the crime's surrounding events, and one's role in the crime's planning and execution.[148] Taken

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[140] JOHN LOCKE, *Of Identity and Diversity*, *in* AN ESSAY CONCERNING HUMAN UNDERSTANDING (Project Gutenberg 2d ed.) (1689), http://www.gutenberg.org/cache/epub/10615/pg10615.html.
[141] *Id.* ("This may show us wherein personal Identity consists: not in the identity of substance, but, as I have said, in the identity of consciousness. . . .").
[142] *Id.*
[143] *See* Gustafsson, *supra* note 138, at 113–16.
[144] LOCKE, *supra* note 140.
[145] DEREK PARFIT, REASONS AND PERSONS 211 (1984).
[146] *Id.* at 215.
[147] *Id.* at 326.
[148] Dresser, *supra* note 110, at 429 ("Other features of interest would be the psychological characteristics that led the offender to engage in criminal conduct, such as a desire for illegitimate personal gain, disrespect for others, lack of impulse control,

to its logical extremity (what some call "Parfit's Extreme Claim"), this thesis would entail that nobody can ever deserve punishment for past crimes because people always differ from their former selves to some extent.[149] Parfit understandably did not go this far but instead proposed that a person persists between two points in time if she has sufficient psychological connections to persist in a morally relevant way.[150]

A memory criterion theory grounded in meaningful connectedness has intuitive appeal, and most contemporary philosophers accept some psychological criterion of personal identity.[151] Aside from Parfit, other prominent modern philosophers who have offered Lockean accounts are H.P. Grice, John Perry, and Sydney Shoemaker.[152] There is substantial diversity among these and other psychological criterion theories. For example, in contrast to Parfit, who concentrated on the volume of psychological connections, Alexander and Ferzan have recently proposed that it is not the amount of psychological connection that is critical to persistence but instead the particular kinds of psychological connections that persist.[153] However, despite the widespread popularity of *psychological* criterion accounts among philosophers, few accept Locke's *memory* criterion of personal identity.[154]

This aversion to a Lockean memory criterion is a response to some famously potent objections that have been raised against it. One is the "circularity objection" that personal identity is conceptually prior

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and rejection of the numerous other values and concerns protected by the criminal law.").

[149] *Id.* at 422.

[150] *See* PARFIT, *supra* note 145, at 199–201. What is the "sufficient" amount of connection? Parfit explains that "there is enough connectedness if the number of direct connections, over any day, is at least half the number that hold, over every day, in the lives of nearly every actual person." Dressler, *supra* note 110, at 399.

[151] SVEN BERNECKER, *Personal Identity and Memory*, *in* MEMORY: A PHILOSOPHICAL STUDY 2 (2009).

[152] *See* H.P. Grice, *Personal Identity*, 50 MIND 330, 340–41 (1941); *see generally* JOHN PERRY, IDENTITY, PERSONAL IDENTITY, AND THE SELF (2002); *see* SYDNEY SHOEMAKER & RICHARD SWINBURNE, PERSONAL IDENTITY 3–66, 69–91 (1984).

[153] LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, REFLECTIONS ON CRIME AND CULPABILITY: PROBLEMS AND PUZZLES 155 (2018) ("We submit that the best approach is to sever the metaphysical question from the normative one. . . . [W]hat matters normatively for desert is not *how much* connectedness survives, but *which* psychological characteristics in particular survive.").

[154] *See id.* at 168 (stating that episodic memory is not the kind of psychological connection that is required for personal continuity).

to memory and therefore cannot be defined in terms of memory itself.[155] Marya Schechtman uses this argument to reject psychological continuity as a criterion for personal identity altogether, explaining that an "attempt to give a noncircular analysis of identity over time requires that the distinction between genuine and apparent continuity be made without presuppositions about the identity or existence of the person having the states which constitute such continuity," which she dismisses as impossible.[156] Other philosophers reject the circularity argument but deny a connection between memory and personal identity for other reasons. For example, Sven Bernecker argues that the circularity objection fails because "memory presupposes personal identity only as a matter of contingent fact, not as a matter of logical necessity," and thus, when I seem to remember an experience, "it is merely an assumption I make that I am identical with the person who had the experience."[157] Bernecker is clear, nonetheless, that memory does not imply personal identity.[158] Another classic objection against Locke's memory criterion with lasting influence is Thomas Reid's "Gallant Officer" argument, which seeks to show the Lockean memory criterion's failure to account for transitivity of identity.[159] Rejoinders to this argument are common, yet few philosophers assert that Locke's memory criterion, as traditionally understood, withstands Reid's argument.

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[155] Marya Schechtman, *Personhood and Personal Identity*, 87 J. PHIL. 71, 73–74 (1990). This objection goes as follows: "memory connectedness seems like a plausible criterion of personal identity because . . . we can only remember our own experiences. *Id.* at 73. To the extent we can imagine experiences which are not ours, these "memories" are no basis for claims of personal identity." *Id.* Although "we must have some way of distinguishing between these real and [imaginary] memories. . . . [r]eal memories are apparent memories in which the person remembering is the person who actually had the experience." *Id.* at 73–74. The issue, then, "is that one must already have a criterion of personal identity in order to define memory." *Id.* at 74. But, "since the fact of identity is prior to the distinction between real and apparent memory, personal identity cannot be defined in terms of memory connectedness." *Id.*

[156] *Id.* at 86.

[157] BERNECKER, *supra* note 151, at 60.

[158] *Id.* at 2.

[159] *See* THOMAS REID, ESSAYS ON THE INTELLECTUAL POWERS OF MAN 248–49 (James Walker 3d ed. 1852) (1785). The "Gallant Officer" argument goes as follows:

> Suppose a brave officer to have been flogged when a boy at school for robbing an orchard, to have taken a standard from the enemy in his first campaign, and to have been made a general in advanced life: suppose,

More to the point, many of these same philosophers also deny that psychological discontinuity caused by memory loss can alone undermine the just-desert aim of retributive justice. Schechtman argues that association of memory and moral desert stems from mistaking persons as objects of knowledge with persons as subjects with moral agency.[160] Our intuitions of persons as self-conscious agents capable of moral responsibility come from our view of persons as subjects, but identity theorists use an objective inquiry of personal identity that views persons as objects that mistakenly turns these intuitions into a criteria of identity.[161] The better way of understanding moral agency, she proposes, is by examining the coherence of one's self-conception as a moral agent.[162] Alexander and Ferzan, in contrast, recognize that changes in personal identity can have implications for moral desert, but they deny that episodic memory loss is the kind of change that has moral implications.[163] Even Parfit, who otherwise supports a memory criterion of identity, doubted that memory loss alone is sufficient to absolve a wrongdoer of responsibility.[164] Indeed, the author could find no contemporary accounts definitively endorsing this position. In deference to the overwhelming consensus among philosophers on this matter, this article rules out the memory criterion of personal identity as an explanation for how episodic memory loss undermines the retributive aims of justice.

Deference aside, it is understandable why philosophers shy away from the memory criterion. In addition to the threats of those abstract, logic-heavy objections described earlier, the memory crite-

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> also, which must be admitted to be possible, that when he took the standard, he was conscious of his having been flogged at school, and that, when [he was] made general, he was conscious of his taking the standard, but had absolutely lost the consciousness of his flogging.

Id.

[160] Schechtman, *supra* note 155, at 88.

[161] *Id.* at 88–89.

[162] *Id.* at 91.

[163] ALEXANDER & FERZAN, *supra* note 153, at 168 (explaining that their account "would fail to excuse a defendant who lacks memory of an event but is otherwise more or less the same person as the one who committed the offense. We believe that such cases are not instances of failure of personal identity.").

[164] Birch, *supra* note 136, at 27 ("Parfit directly poses the question whether we deserve to be punished for crimes we . . . have forgotten, but leaves the issue unresolved, commenting only that loss of memory seems insufficient.").

rion also struggles with intuitive shortcomings. One can easily conceive of circumstances where one's moral intuition is not particularly offended by punishment for a crime the wrongdoer has forgot committing. Justice Kagan offers a simple illustration of this in *Madison*, asking:

> Do you recall your first day of school? Probably not. But if your mother told you years later that you were sent home for hitting a classmate, you would have no trouble grasping the story. And similarly, if you somehow blacked out a crime you committed, but later learned what you had done, you could well appreciate the State's desire to impose a penalty.[165]

Justice Kagan's latter example is more on point than the former in defusing the personal continuity objection. Anyone who has been intoxicated will know that intoxication is a state of consciousness noticeably different from sobriety, and by Locke's logic, one is not the same person when intoxicated one evening that he is when he awakens sober the next day. But the common law does not immunize people from the consequences of their drunken antics, a reflection of the fact that most people conceive of personal identity as robust enough to withstand superficial changes in psychological states. Considering the intuitions at play, the idea of punishing someone for a crime he does not remember committing is more intuitively uncomfortable than merely identifying someone as the one who committed that forgotten crime. Whatever the explanation for this intuition may be, it does not seem to lie in personal identity.

B. The Remorse-Based Explanation

If there is an issue with punishing episodic amnesiacs, then, it is not about the identity of the prisoner; rather, "the concern here seems to be about the nature of punishment. If the defendant does not recall

[165] *Madison*, 139 S. Ct. at 727.

the event, then even if she deserves the punishment, she will not understand the punishment to be directed at something she did."[166] Alexander and Ferzan ultimately reject this theory but do so on the basis that, "before accepting the view that punishing those without memory of the relevant event would be a failure of punishment, one would need to adopt a communicative theory of punishment. We are skeptical of such theories . . . ."[167] This subpart will explain, however, that even those philosophers more receptive to communicative theories of retribution similarly deny that episodic memory loss itself can undermine retribution's aims.

Particularly common among communicative theories are those accounts emphasizing the role of memory in allowing criminals to feel remorse for harms they have caused. These theories point to both *factual* and *affective* knowledge as being necessary for remorse.[168] On one hand, feeling remorse requires recognition that you, of all people, are responsible for a wrong's occurrence as a matter of fact. As Jonathan Pugh and Hannah Maslen point out, "one cannot feel remorseful over the acts of other agents."[169] On the other hand, one also needs memory of the affective moral experience of committing the wrongful act. This is because, as Christopher Birch explains, "repentance involves a remaking of one's moral sensibility . . . [which] requires that a person perform a mental operation upon the moral attitudes and beliefs held at the time of the offense and that led to its commission."[170] Thus:

> A person who is unable to recollect the moral attitudes and beliefs she held at the time of the offense and the decisional process by which she came to commit it, and to modify her mind in the fashion just described, is not capable of contrition or repentance. She can condemn her past conduct or regret that it occurred. In doing that,

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[166] ALEXANDER & FERZAN, *supra* note 153, at 168.
[167] *Id.* at 169.
[168] *See* Snead, *supra* note 117, at 1263 ("To take on board the enormity of one's crimes and feel authentic shame and remorse requires an intact memory (factually and affectively) of the crime.").
[169] Pugh & Maslen, *supra* note 121, at 501.
[170] Birch, *supra* note 136, at 28.

> however, she will be doing no more than anybody can or should do with regard to a wrongful act. [171]

Birch's emphasis on the "remaking" of one's moral sensibilities has a distinctly consequentialist flavor to it, evoking Nozick's similar position that the function of retributive punishment is to "reconnect" a wrongdoer with the moral norms of the community.[172] Nevertheless, other theorists have made similar arguments through a retributivist lens. Jenny Taichman, for example, explains that remorse is a form of understanding "as is partly shown by the fact that you cannot feel it and at the same time ask: 'Why am I feeling this?'"[173] This understanding can fulfil the just-desert aim of retribution because "the having of painful thoughts like 'How I wish that that had never happened,'" understanding is one way for the wrongdoer to suffer for her wrongful conduct.[174] It can also fulfil the communicative aim of retribution by forcing a punished person to confront "society's understanding . . . of good and evil."[175]

On its face, the remorse explanation (which involves both the just-desert and communicative aims) seems to stand on sturdier ground than the personal identity explanation. In contrast to the numerous objections that have been raised against the memory criterion of personal identity, objections to the notion that episodic memory loss undermines a wrongdoer's capacity for remorse are scarce. But, like the personal identity-based explanation, the remorse-based explanation does not resonate with much intuitive strength either. Although remorse often serves as a mitigating factor, states routinely punish people who are not remorseful for their wrongs. One would not say that the retributive aims of punishment are undermined when an unrepentant prisoner is punished, and this reasoning applies even more strongly in cases where the state seeks to execute a prisoner because whether the prisoner's moral sensibilities are "remade" or not is of no consequence. The remorse-based explanation is even weaker than the personal identity explanation in this way, for if the prisoner is not the same person as the one who committed the crime, the prisoner is liable for

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[171] *Id.*
[172] ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 374 (1981).
[173] Teichman, *supra* note 118, at 345.
[174] *Id.*
[175] *Id.*

no retribution whatsoever. Thus, although the Supreme Court repeatedly speaks of retribution in terms of its communicative aims, a desire to elicit remorse does not seem to be what animates this sentiment. If there is a moral intuition against punishing episodic amnesiacs, neither the remorse explanation nor the personal identity explanation ultimately provides a satisfying explanation for it.

C. The "Privileged Phenomenal Information" Explanation

At this point, one might question this article's endeavor. Is it not possible, one might ask, that no explanations for the intuition that execution of episodic amnesiacs is wrong are forthcoming because the Supreme Court was obviously right? Does anyone *actually* have an intuition that episodic memory can make a difference? After all, the memory criterion's defenders do not clearly manifest a belief in a strong supporting intuition, and one could fairly say that Locke's account is over-theorized and at odds with how people actually understand moral responsibility. Even Leto's observation mentioned earlier seems more responsive to Vernon Madison's cognitive degeneration than the absence of merely his episodic memory. The remorse-based explanation, for its part, could be just as easily (and perhaps more easily) chalked up as a consequentialist theory than a retributive one, irrelevant to the retributive aims of justice.

In his article, *Memory and Punishment*, Christopher Birch hints at one last place where such a moral intuition, if it exists, may lie:

> Quite apart from the ability to experience repentance, internal knowledge of past wrongs is one of the critical matters that distinguishes the wrongdoer or perpetrator from every other person. The perpetrator who has suffered memory loss and is unable to recall how he came to commit those wrongs can now experience those wrongs only in the same fashion as the innocent. . . . One would experience that punishment as an accident of fate, akin to being run over by a motor car, rather

> than as justly deserved for what one recalls having intended at some point in the past. [176]

Birch points out that, even when someone can rationally comprehend their punishment, their experience of the punishment is different when they cannot remember committing the crime from when they can.[177] Something about this difference feels significant; something feels lost. Birch leaves unclear what exactly is lost and how this loss undermines some retributive aim in a manner other than a lack of repentance or personal continuity. This article will pick up where Birch left off and explore what difference memory makes.

First, before engaging with the memory issue directly, this article will address the interesting issue Birch raises about voluntariness. Birch provides some illustrative hypotheticals where, he proposes, one would not think an amnesiac deserves leniency: consider, for example, a political terrorist who knows he will be caught after assassinating the prime minister, and takes a drug that eliminates his entire memory of his previous life.[178] Although the terrorist would have no recollection of the crime, one's instinct may very well be to punish him anyway rather than allow him to exploit a "memory-loss" loophole in the justice system. But what difference does it really make if the terrorist removed his own memory voluntarily or not? Regardless of how the memory-loss occurs, the terrorist is at the time of punishment indistinguishable from the way he would have been had he lost his memory involuntarily. Under both alternatives he would still experience his punishment as an "accident of fate," as Birch says.[179] So, if there is something about experiencing punishment as an accident of fate that undermines its retributive aims, the cause of the amnesia should not seem to make a difference. For an illustration, take a further twist on Birch's hypothetical: instead of taking a drug that eliminates the terrorist's memory, imagine the terrorist drinks a magic potion that reverses his age back to infancy. Although the terrorist voluntarily erased his memory of the crime, it seems fairly certain that we would be less likely to punish the infant for the assassination. This would be unconscionable, regardless of the circumstances, because the infant

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[176] Birch, *supra* note 136, at 29.
[177] *Id.*
[178] *Id.* at 24.
[179] *Id.* at 29.

cannot rationally comprehend its punishment. But, if that is so, the cause of the amnesia is irrelevant. The same could be said when episodic memory loss undermines the aims of retribution.

So, what changes when the terrorist undergoes the kind of radical memory loss that deprives people of, as Birch writes, "[their] internal mental knowledge of those aspects of their past that form the background and prelude to their criminal acts[?]"[180] One answer could be that personal knowledge of the crime helps a prisoner appreciate the legal and moral legitimacy of his punishment. Birch hints at this interpretation, writing that a person who views his punishment "[like] an accident of fate" may suffer more from his punishment than someone whose memory of the crime allows him to appreciate his punishment as "justly deserved for what one recalls having intended at some [point] in the past."[181] By having personal memory of the crime, one can know to a practical certainty one's guilt, rather than just having to take the truth of one's guilt at the word of another. But does this undermine the aims of retribution? There are conceivable situations where one prisoner would suffer more than another when both are given the exact same sensory pain because of their different subjective emotional states. Perhaps a prisoner without memory can understand with less confidence that she is being treated fairly and suffers more on account of this doubt. Or, perhaps one prisoner facing execution values her continued existence more than another, despite the fact that both prisoners are set to receive the exact same lethal injections. Imagine the terrorist and his brother collaborated in the assassination and are both are equally liable for punishment. However, the terrorist is highly sensitive to pain, while his brother is abnormally insensitive to pain. Is it unjust that they both receive punishments of the same magnitude if one receives far greater suffering from it than the other? Would it be right for the state to inject the brother with a drug that heightens his sensitivity to pain to the terrorist's sensitivity level? Pugh and Maslen, discussing "neurointerventions" of this kind, maintain that deserved punishment is a factor of both the severity of the punishment imposed and the recipient's subjective sensitivity to the punishment.[182] If we accept

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[180] *Id.* at 27.

[181] *Id.* at 29.

[182] Pugh & Maslen, *supra* note 121, at 508 (explaining that, under a retributive theory of punishment, "if remorse is aversive enough to constitute suffering, then it may constitute or substitute for some of the deserved punishment.").

that the subjective suffering of a person being punished for a crime she does not remember committing is greater than that of a person with intact memory, this would argue that episodic memory loss can require a less severe punishment (so long as the punishment imposed at sentencing was already proportional).

There are two objections to this argument. First, the extent to which subjective suffering effects moral desert is questionable. If a criminal earnestly believes that her crime was justified and that she should not suffer any punishment at all, or if she believes that the state has no jurisdiction over her and no authority to enforce its laws against her, she may suffer extra indignity by believing that her punishment is not only painful but also undeserved. But it seems that whether she actually deserves less punishment depends not on what she believes about the validity of her punishment but on whether her punishment is in fact valid. It similarly seems improper that two equally guilty co-conspirators should receive different punishments based on how one values her freedom more than the other or otherwise had more subjective enjoyment of her life and liberty.

Second, even if subjective suffering should be factored into punishment, it is questionable whether this cuts for or against greater leniency for the amnesiac. To the extent prisoners with memory of the crime feel remorse for their actions, these prisoners may very well suffer more than prisoners without this memory, not less. If remorse truly is "a painful emotion, commanding sorrow for the situation, compassion for one's victim, and self-loathing,"[183] this would cut in favor of providing either more lenient treatment to the remembering prisoner or harsher treatment to the amnesiac prisoner, not the other way around. While a judge may impose lesser sentences on contrite defendants, it does not seem that a prisoner's remorse felt post-sentencing would suffice to render the sentence disproportionate.

This begs another interesting question: if the remembering prisoner actually gets *pleasure* from her memory of the crime, would this call for harsher treatment of the remembering prisoner and relatively more lenient treatment of the amnesiac? This might be true of a narrow class of cases where a person's wrongful acquisition of some privileged information is itself the harm and where forgetting the infor-

[183] *Id.* at 502.

mation learned through the commission of the crime would itself negate most of the crime's harm to the victim and prevent the perpetrator from enjoying ill-gotten gain.

One can see how this is the case where the right of privacy is concerned. Imagine Tom sneaks into a women's locker room and spies on Alice while she is changing. Alice suffers a dignitary injury from this invasion of her privacy, and Tom benefits from his crime by wrongfully obtaining privileged information about Alice in which he presumably saw value.[184] Now, further imagine that Tom trips and hits his head while fleeing and loses memory of the incident. Although Alice may suffer from a shaken peace of mind from the invasion of her privacy, she no longer suffers from the dignitary harm of Tom's wrongful possession of highly private information (i.e., information about her appearance in a state of nakedness). Tom, likewise, can enjoy no value from this information after forgetting it. Because the harm to Alice and the corresponding benefit to Tom are negated by the amnesia, the severity of punishment that Tom is liable for seems to be lesser than if the memory loss had not occurred.

A similar intuition is involved with a dimension of the human personality more alien to the law than privacy: interpersonal power dynamics. Knowledge of another can empower one against that other in practical ways, like knowing and exploiting another's vulnerabilities. But knowledge of privileged information can have a more psychological effect that operates in the realm of social status. Where power is grounded in interpersonal dynamics like love, fear, or respect, such power rests on its holder's ability to maintain these dynamics. The social power arising from these sources often rests in perception, which is shaped by the information accessible to the relevant perceivers. This is why a politician might fear the surfacing of an unflattering video during her campaign or why a bully might fear others learning things about him that reflect weakness or vulnerability. Additionally, insofar as one's power is a source of pride, unflattering exposure can

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[184] One may infer that, if Tom sought this information, Tom must have perceived value in its acquisition. This follows from the Guise of the Good Thesis, which maintains that a person "does nothing intentionally unless he regards it or its consequences as desirable." J. DAVID VELLEMAN, *The Guise of the Good*, *in* POSSIBILITY OF PRACTICAL REASON 99 (Oxford University Press 2d ed., 2002). This article will not defend this thesis here, though the thesis does have prominent defenders. *See, e.g.*, JOSEPH RAZ, *On the Guise of the Good*, *in* FROM NORMATIVITY TO RESPONSIBILITY 59–84 (2011).

cause causes not just a loss of practical influence but also injured dignity. Interestingly, this interplay between power, knowledge, and dignity is represented in a common feature of spiritual traditions throughout history and across world: the belief that knowing something's name or nature "gives one power over" it.[185] This power dynamic between knower and knowee in these traditions has a clear supernatural element to it (especially respecting the connection between naming and creation), but it can also be interpreted as a reflection of the dynamic described above. In Judaism, for instance, the likely reason behind the faith's prohibition against speaking the name of God aloud is that "naming God might be seen as an attempt to assert dominion over him, to duplicate illegitimately a power that God uniquely possessed."[186] Attaining such knowledge is considered a form of hubris because it disrupts the power dynamic between human and deity in "violation of universal or divine laws."[187] Hubris's wrongfulness is not just its subversive nature but also the insult implicit in "efforts at encroachment" on divine "prerogatives,"[188] in the display of "presumption toward the gods."[189] From that perspective, what defines hubris is not the victim's divinity but rather the diminishment of the victim's honor.[190] As N.R.E. Fisher explains, "one would expect to find implicit in almost all instances of *h[u]bris* the notion of injured honor; and that is in fact what I believe one does find."[191] This explains how, as Aristotle describes in *Rhetoric*, the mortal Agamemnon could be victimized by Achilles' hubristic words and actions.[192]

Is the dignitary injury suffered by one who loses social power undone when the damaging information is forgotten? That seems to be the case here as well. The injury is lost esteem, and since

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[185] Loren Graham, *The Power of Names: Religion & Mathematics*, PHILOCTETES CTR. (Nov. 11, 2009), http://philoctetes.org/news/the_power_of_names_religion_mathematics.
[186] *Id.*
[187] K. J. DOVER, GREEK HOMOSEXUALITY 35 n.15 (1989).
[188] DONALD E. GOWAN, WHEN MAN BECOMES GOD: HUMANISM AND HYBRIS IN THE OLD TESTAMENT 4 (1975).
[189] JOHN T. STRONG, SITTING ON THE SEAT OF GOD: A STUDY OF PRIDE AND HUBRIS IN THE PROPHETIC CORPUS OF THE HEBREW BIBLE 59 (2011).
[190] Daniel B. Levine, *Hubris in Josephus' "Jewish Antiquities" 1–4*, 64 HEBREW UNION COL. ANN. 51, 56 (1993).
[191] N.R.E. FISHER, HYBRIS AND DISHONOR: I 180 (1976).
[192] Levine, *supra* note 190, at 53.

knowledge of unflattering information is the cause of lost esteem, forgetting this information should also undo the dignitary harm. The key concept here is *dignity*. Both privacy and social power involve some good grounded in the preservation of privileged information, the publicity of which harms the dignity of the information's subject. However, when memory loss causes the privileged information to once again become private, the clock is effectively turned back on the dignitary harm of exposure. With its harm undone, the wrongful action becomes something akin to a failed attempt, which is generally considered to make a perpetrator less deserving of punishment than if the harm actually materialized.[193] Therefore, in the narrow class of cases that fit these criteria, episodic memory loss may make at least some difference in how much punishment a perpetrator deserves.

Can the same be said for capital crimes like murder, where the harm is more than solely dignitary and where the acquisition of privileged information is not the criminal's conscious objective? Suppose that a terrorist, in addition to feeling that the assassination of the prime minister is justified, also hates the prime minister. Once he carries out the assassination, suppose that the terrorist takes great pleasure in the memory of killing his hated foe and could take consolation in this memory even as he sits in prison for the rest of his days. Under these circumstances, could it be said that this terrorist gains some wrongful benefit from his memory of assassinating the prime minister, like Tom did from spying on Alice? Furthermore, although the assassination is not undone when the terrorist loses memory of committing it, does the terrorist nonetheless lose some ill-gotten gain that would undermine the aims of retribution to some extent?

One could understand violent crimes like murder as "knowledge-based" in the sense discussed above. In addition to the satisfaction one might derive from a crime consequentially, there is an experiential element to transgression that can carry value as well. Moreover, this experiential element comes hand-in-hand with digni-

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[193] *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 129 (rev. ed. 1988) ("[T]he almost universal practice of legal systems in fixing a more severe punishment for the completed crime than for a mere attempt."); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995) (observing that "most legal practice throughout the world treats failed and successful attempts quite differently").

tary harm to the victim, at least of the sort found in a Kantian conception of human rights. As the author discusses in greater detail elsewhere, Kant believed that a unique capacity for reason gives humans an autonomous nature that, in turn, entitles them to dignified treatment.[194] Kant's brand of liberal philosophy has increasingly guided American constitutional jurisprudence over the past century, as Michael J. Sandel has detailed in *Democracy's Discontent*.[195] Eighth Amendment jurisprudence reflects this influence in particular; after all, it is the Supreme Court's stated understanding that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[196] As Mary Sigler elaborates, Eighth Amendment jurisprudence manifests a "liberal-democratic" political morality involving respect for the inherent dignity of personhood.[197] So universal is this dignity among humankind that, as Justice Brennan observed in *Furman v. Georgia*,[198] "the fundamental premise of the Clause [is] that even the vilest criminal remains a human being possessed of common human dignity."[199] Decency, the state's commitment to which the Supreme Court recognized in *Trop v. Dulles* as an object of Eighth Amendment concern, involves "consideration for the basic human needs of individuals—those necessities they require 'just by virtue of being human.'"[200] These necessities are both physical and psychological, such that "as a general matter, it is indecent to subject individuals to humiliation or other threats to their self-respect."[201] The thrust of the Eighth Amendment is that even punishment, which is inherently unpleasant and dishonorable, must nonetheless reflect the respect for humanity that distinguishes decent, civilized societies.

This conception of dignity applies to victims as well as perpetrators. Insofar as this innate moral dignity animates certain funda-

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[194] *See* Elias Feldman, *Vaccination and the Child's Right to an Open Future*, 25 LEWIS & CLARK L. REV. 209, 233 (2021).
[195] *See id.* at 26 (discussing MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 28 (1996)).
[196] *Trop*, 356 U.S. at 100 (plurality opinion).
[197] Sigler, *supra* note 48, at 422–25.
[198] 408 U.S. 238 (1972).
[199] *Id.* at 273 (Brennan, J., concurring).
[200] Sigler, *supra* note 48, at 425 (citing Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 921 (2009)).
[201] *Id.* at 425 (citing AVISHAI MARGALIT, THE DECENT SOCIETY 1 (Naomi Goldblum trans., 1996)).

mental human rights, violation of these rights can cause not only material harm but also a corresponding dignitary harm.[202] Of course, people are commonly tempted to violate the rights of others, despite the effect of dehumanization or perhaps even for the purpose of dehumanization. The notion that a person might transgress for transgression's own experiential value has been explored more fully in literature than in philosophy. In *Crime and Punishment*,[203] Fodor Dostoyevsky characterizes Raskolnikov as a prideful and insecure youth who kills out of a desire to become a "superman," a Napoleonesque conqueror with the capacity to "step over a corpse or wade through blood" to advance his interests without feeling guilt at extinguishing another human life.[204] Raskolnikov explains that he killed Alyona Ivanova to test the boundaries of his own humanity:

> There was something else I wanted to know. . . . I wanted to find out then, and find out quickly, whether I was a louse like all the rest, or a man? Would be able to step over, or not! Would I dare to reach down and take, or not? Am I a trembling creature, or do I have the *right* [to kill, it is implied, though left unstated].[205]

As these statements suggest, Raskolnikov seeks to transgress the most fundamental boundary of human conduct to prove to himself that he was something more than human, a being unencumbered by the dictates of human morality. Raskolnikov transgresses not in pursuit of any material gain, but rather in pursuit of a piece of privileged *phenomenal information* regarding the experience of violating the most

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[202] This is not so much a characterization of Kant's philosophy as it is the author's own Kantian theory. The interplay between wrongful harm and dignitary injury is one that the author has explored previously in the context of the context of police misconduct and implicit racial bias. He writes, in relevant part, "[r]isk and incidents of police misconduct can together cause three distinct harms: the physical injury to the victim from the realized harm; the dignitary injury to the victim from the realized harm; and the dignitary injury to third-party racial minorities from the disproportionate risk itself." Elias R. Feldman, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J.L. & SOC. PROBS. 89, 93 (2019).

[203] FODOR DOSTOYEVSKY, CRIME AND PUNISHMENT (Richard Pevear & Larissa Volokhonsky trans., Random House rev. ed. 1992) (1866).

[204] Paul Chatham Squires, *Dostoyevsky's Raskolnikov: The Criminalistic Protest*, 28 J. AM. INST. CRIM. L. & CRIMINOLOGY 478, 483 (1937).

[205] CRIME AND PUNISHMENT, *supra* note 203, at 419.

sacred rights of other persons.[206] The law institutionalizes a reciprocal arrangement among members of society not to violate those sacred rights, to indulge in knowledge of this forbidden information, even when they might want to. The obligation to honor this arrangement is at the heart of the human experience, and it is precisely for that reason that Raskolnikov seeks to transcend his own humanity by breaching it. Yet, it is deeply ingrained in the human psyche and difficult to overcome, as Raskolnikov learns to great anguish. Indeed, Raskolnikov's crime shows how the two senses of hubris described above relate to each other: the destruction of human life at once violates the dignity of that life and subverts a natural order that dignifies that life in the first place. Those who do transgress this moral boundary, whether or not they come to regret doing so, receive that privileged information and whatever pleasure or pain that might come with it. It is that knowledge which distinguishes the amnesiac prisoner from the remembering one—the latter still possesses this information, while the former does not.

So, could it be that, when a prisoner loses memory of this phenomenal information, the aims of retribution are undermined? One may be tempted to view Raskolnikov and Tom similarly and apply the principle that, if one commits a crime to acquire some information (whether physical or phenomenal), one is less deserving of punishment if he loses this information than if he does not because he no longer enjoys the ill-gotten gain that came from possessing the information. As noted earlier, the significant difference between these two cases is that the harm Raskolnikov inflicts upon Ivanova is not purely dignitary. Even if Raskolnikov were to forget the experience of committing murder and lose any value from that phenomenal information, this would be as consequential as a robber stealing a watch from a pedestrian and having a second robber steal that watch from him in turn. Only wrongful harm matters for just desert, not wrongful gain. The latter appears significant only where disgorgement of wrongful gain occurs simultaneously with the harm's undoing.

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[206] The term "phenomenal information" is borrowed from David Lewis, who uses the term to describe the subjective information acquired from an experience. *See* David Lewis, *What Experience Teaches*, *in* PHILOSOPHY OF MIND: CLASSIC AND CONTEMPORARY READINGS 281, 285 (David J. Chalmers ed., 2002). This form of information is contrasted with "physical information," which is the kind of information one can acquire through empirical investigation. *Id.*

The point of these illustrations is to diffuse any moral intuitions that the prospect of executing episodic amnesiacs might elicit and show that those intuitions stem from sources other than memory loss itself. This dignity-based explanation for a moral prohibition against executing episodic amnesiacs appeared to be a promising one because of its consistency both Eighth Amendment jurisprudence and the Kantian conception of human dignity embedded within it. It may yet have some power for explaining intuitions about cases where the harm can be undone by the memory loss itself. However, removing the muddying factors of voluntariness, credibility, restitution, or wrongful gain from the equation, there does not seem to be anything about episodic memory loss that triggers these same intuitions when it comes to harms that cannot be undone by the memory loss itself. Memory loss here is incidental, a mechanism for undoing the harm rather than something significant in its own right. There is nothing about memory loss in itself, absent this functional role it can play in particular circumstances, which bears on the retributive aims of justice. In general, and especially with respect to the kinds of crimes that receive capital punishment, the Supreme Court's philosophical conclusion remains correct.

V. CONCLUSION

This article examined the philosophical question addressed by the Supreme Court in *Madison v. Alabama* and reached the same conclusion the Court reached: generally speaking, episodic memory loss does not undermine the retributive aims of justice to any extent. This answer may be obvious to those who feel no intuitive sense that such memory loss has moral significance. For those who do have some sense that at least *something* is different under those circumstances, this article does offer additional reasons for reaching that conclusion. This article has argued that whatever sense of moral discomfort one intuitively feels at the prospect of executing an episodic amnesiac, this intuition is unrelated to the episodic amnesia itself.

This is not to say that this intuition is necessarily baseless or that subsequent examinations of the issue will not yield explanations that this article could not find. There is an undeniable tug to this intuition, and it is not clear that this article has satisfactorily defused it. For example, nothing in this article's analysis fully accounts for the

intuitive disgust one feels when watching the *Black Mirror* episode "White Bear," in which a society punishes a child-murderer by subjecting her to psychological torture, erasing her memory of the experience, and repeating the torture day after day—all watched by the public as a form of sadistic amusement.[207] The episode leaves the viewer deeply unsettled and sympathetic to the murderer, though it is difficult for the viewer to articulate what exactly is wrong with what is unfolding onscreen.[208] Memory loss seems to play a central role in this perceived moral affront, and commentators on this episode have queried whether punishing the murderer after having erased her memory and knowledge of the crime violates the Eighth Amendment Cruel and Unusual Punishment Clause.[209] An examination of the retributive aims of justice alone seems incapable of explaining this intuition.

The difficulty of finding a retributive aim undermined by episodic memory loss may also reflect how narrow retribution's aims are compared to those of consequentialism. The clearest explanations for punishing the terrorist after his memory loss is that we want to disincentivize people from also causing wrongful harm. This consequentialist reasoning does not explain why the terrorist himself deserves to endure suffering proportional to the severity of his own crime. After all, if *everybody else* forgot the assassination ever happened, and nobody became any more likely to murder than before, even this would not relieve the terrorist of his liability for retribution. Retributive jus-

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[207] *Black Mirror: White Bear* (Zeppotron Feb. 18, 2013).

[208] As one reviewer writes, "most students [who view the episode] . . . immediately concede that White Bear Justice Park is *not* just" but "can't quite locate or articulate their objection to the injustice of the White Bear Justice Park." Doctor J, *A Punishing Lesson: On Black Mirror's "White Bear"*, READMOREWRITEMORETHINKMOREBEMORE (Nov. 17, 2018), http://www.readmorewritemorethinkmorebemore.com/2018/11/a-punishing-lesson-on-black-mirrors.html.

[209] *See, e.g.*, Kristie Garza, *The Neuroethics Blog Series On Black Mirror: White Bear*, EMORY CTR. FOR ETHICS: NEUROETHICS BLOG (Sept. 5, 2017), http://www.theneuroethicsblog.com/2017/09/the-neuroethics-blog-series-on-black.html ("If Victoria is unable to engage in these kinds of relationships to construct her identity, is memory erasure or alteration a reasonable punishment or does this enter into the domain of cruel and unusual punishment, as described by the US Constitution's 8th amendment?"). For further philosophical discussion of this episode, see Sid Simpson & Chris Lay, *White Bear and Criminal Punishment: How Far is too Far?*, *in* BLACK MIRROR AND PHILOSOPHY: DARK REFLECTIONS 50 (David Kyle Johnson, ed., 2019).

tice has a sort of metaphysical, karmic character that gives it life outside the awareness of morality-sensitive observers. It might be said, then, that the Eighth Amendment proportionality review regulates states in their punishment of criminals only to the extent retributive aims are called into question. Consequently, states are in truth subject to weaker judicial constraint on questions of criminal punishment than critics of proportionality review might fear. This explanatory gap between the intuitions that inform moral judgments and the articulable reasons underlying those intuitions may pose an unavoidable obstacle for judges who appeal to moral intuition in the resolution of Eighth Amendment Cruel and Unusual Punishment Clause questions.

There is an even simpler explanation for this explanatory gap: a standard based only on retribution rests on an incomplete understanding of what justice requires. There is a conflict between what someone justly deserves and what someone's dignity-based human rights protects them against. This is not a conflict between justice and goodness but rather a conflict between the justice of desert and the justice of inalienable rights. A sadistic criminal who tortures his victims to death may deserve a torturous death himself, but the penal system will not torture to death even such a vile offender because such treatment is inconsistent with the notion that "even the vilest criminal remains a human being possessed of common human dignity."[210] This is precisely the moral sentiment animating Eighth Amendment jurisprudence, a sentiment that explains why execution of the insane is worthy of prohibition even when retributive analysis cannot yield such a conclusion on its own. The Court's concern with dignity was particularly apparent in *Ford*, but the squishiness of this concept seems to have motivated a greater judicial interest in retribution's aims than dignity in subsequent cases. However, this analysis shows the difficulty that results from trying to divorce questions of retributive justice from the dignitary side-constraints built into Eighth Amendment jurisprudence.

[210] *Furman*, 408 U.S. at 273 (Brennan, J., concurring).