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The Theoretical and Practical Shortcomings of Necessitating Appreciation for Punishment—Madison v. Alabama, 139 S.Ct. 718 (2019)

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THE THEORETICAL AND PRACTICAL SHORTCOMINGS OF NECESSITATING APPRECIATION FOR PUNISHMENT—*MADISON V. ALABAMA*, 139 S.CT. 718 (2019)

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I. INTRODUCTION

In *Madison v. Alabama*,[1] the United States Supreme Court held that the Eighth Amendment[2] does not prohibit the execution of individuals who have no recollection of the crimes that they committed.[3] In reaching their conclusion, the Court set forth that the determinant of whether the execution may proceed is whether the death-row-inmate is competent—being able to appreciate why the state has sought capital punishment.[4]

Although this ruling is facially consistent with precedent,[5] the rationale employed by the Court relies on a skewed interpretation of retributivism that insufficiently appreciates both the victim's perspective and the societal perspective of the retributive value in the prescribed punishment, while overvaluing the importance of expiating the offender's guilt. Furthermore, the Court, in reaching their decision, relied on a moralistic explanation for why those who lack competency may not be executed,[6] arguing that it would "offend[] humanity."[7] This begs the question whether any legitimate justification exists for the criminal punishment of those who are not of sound mind, regardless of the offense.

This Case Note will begin by briefly summarizing the main theories of punishment that have guided lawmakers throughout history. It will then survey the history of the death penalty, emphasizing how capital punishment has been limited by the Eighth Amendment when interacting with the insane and the mentally incompetent.[8] Next, this Case Note will discuss the facts of *Madison* and elaborate on the rationale the Court gave in reaching its conclusion that those who cannot remember their crime may still be executed.[9] This Case Note goes on to argue that despite reaching the correct conclusion, the Court advocates for a confused test, which relies on a skewed interpretation of retributivism and exacerbates the conflation of insanity and incompetency (which has been compounded for the better part of two decades). Finally, this Case Note concludes with a discussion of how the Court's rationale leaves little justification for the punishment of the mentally incompetent in any capacity and provides possible alternatives to the "rational understanding" test that would better effectuate the purposes

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

[2] U.S. CONST. amend. VIII.

[3] *Madison*, 139 S. Ct. at 731. The Supreme Court also expanded its classification of mental incompetency, holding that delusions are not a prerequisite to being declared incompetent to face execution. Dementia alone may bar execution if it prevents the individual from reaching a rational understanding of why the state wants to execute them.

[4] *Id.* (quoting Panetti v. Quarterman, 551 U.S. 930, 958 (2007) "The sole question on which . . . competency depends is whether he can reach a 'rational understanding' of why the State wants to execute him.").

[5] *See, e.g.*, *Panetti*, 551 U.S. 930 (2007); Ford v. Wainwright, 477 U.S. 399 (1986). Although the verbiage has changed slightly since 1986, the test for competency to be executed has remained wholly the same.

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

[7] *Id.*

[8] *See infra* Part II.

[9] *See infra* Part III.

of punishment, and thwart the repercussions of the currently promulgated test for future cases.[10]

II. HISTORY

A. Theories of Punishment

Punishment predates the formation of modern societies.[11] At an instinctual level, it is understood that all actions have reactions: if a person eats, then he becomes full; if a person drinks, then his thirst is quenched; if a person places his hand in fire, then he is burned. The relation of harm and punishment is no different. It is evident that ancient civilizations recognized that harm to another required a remedy to cure the injustice.[12] The scholarly works of prominent philosophers such as Aristotle,[13] Thomas Hobbes,[14]John Locke,[15]and Jeremy Bentham,[16] although divergent on the nuances of what best form of governance would maximize society, unanimously accepted the proposition that a society without punishment is no society at all.[17]

Over time, four predominant justifications for punishment have emerged: (1) incapacitation, (2) rehabilitation, (3) deterrence, and (4) retributivism.[18] While these four justifications are theoretically distinct, their

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[10] *See infra* Part IV.

[11] JOHN LEWIS GILLIN, CRIMINOLOGY AND PENOLOGY 312 (D. Appleton-Century Company, 1st ed. 1926); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11 (J.H. Burns & H.L.A. Hart eds., Oxford University Press 1970) (1780).

[12] *See Early History of Punishment and Development of Prisons in the United States*, SAGEPUB.COM (2020), https://www.sagepub.com/sites/default/files/upm-binaries/97948_Chapter_1_Early_History_of_Punishment_and_the_Development_of_Prisons_in_the_United_States.pdf [https://perma.cc/Y96V-BAL3]. The *Code of Hammurabi* (1728–1686 B.C.) is credited as the earliest set of codified laws, which implemented a system of law known as *lex talionis*, or "law of equal retaliation." *Code of Hammurabi*, HISTORY.COM (Nov. 9, 2009) https://www.history.com/topics/ancient-history/hammurabi [https://perma.cc/L4FB-Z6L8]. The code had a total of 282 edicts, all written in the form of if/then. *Id.*

[13] *See* EVE RABINOFF, PERCEPTION IN ARISTOTLE'S ETHICS 150 (John Russen ed., Northwestern University Press 2018) (discussing that recognition between pleasure and pain, the most rudimentary punishment, is necessary for developing virtue).

[14] *See* THOMAS HOBBES, THE ENGLISH WORKS, VOL. III (LEVIATHAN) 38–50 (Sir William Molesworth, Bart. eds. 1839) (1651) (discussing the importance of the social contract, without which, society would delve into the state of nature—a state of war).

[15] *See* JOHN LOCKE, SECOND TREATIES OF GOVERNMENT: ON CIVIL GOVERNMENT § VII (Cambridge University Press 1960) (1689) (stating that every man has the right to punish any individual that violates the laws of nature).

[16] *See* JEREMY BENTHAM, *supra* note 11, at 11 ("Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*. It is for them alone to point out what we ought to do, as well as to determine what we shall do.").

[17] *See generally* RABINOFF, *supra* note 13; HOBBES, *supra* note 14; LOCKE, *supra* note 15; BENTHAM, *supra* note 11.

[18] Westel Willoughby, *A Survey of Ethical Theories of Punishment*, *in* RATIONAL BASIS OF LEGAL INSTITUTIONS 555, 555 (1923); *See* HORACE WYNDHAM, CRIMINOLOGY 21 (1929); GILLIN, *supra* note 11, at 312. There is a slight variation in the terminology of the sources,

applications are not mutually exclusive.[19] For example, society may be justified in removing a criminal from society to prevent future harm—incapacitation—and it may separately be justified in using the punishment of that criminal to set an example for other prospective criminals—deterrence.[20]

1. Incapacitation

Incapacitation is the simplest of the four justifications for punishment.[21] Punishments prescribed by incapacitation theory are largely coextensive with those prescribed by deterrence and retribution theories.[22] It is the proposition that society will be made better by removing the perpetrator and placing them in a remote, supervised setting, often through the use of state-sanctioned penitentiaries.[23] Despite being the simplest theoretical solution to crime, the implementation of incapacitation is heavily restricted. The Eighth Amendment to the United States Constitution ensures that only in the most heinous of circumstances can citizens be incarcerated indefinitely.[24] Thus, often it is only possible to incapacitate an offender for a relatively limited duration. Further, the practical consequence of incapacitation is the monetary burden of high inmate populations,[25] which is less problematic for deterrence theory and rehabilitation theory, where the intent is to prevent the initial commission of a crime and potential recidivism.

2. Rehabilitation

A presently disfavored theory of punishment in the United States, rehabilitation takes a perpetrator-centric approach to punishment. Despite

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therefore, I have simplified the terms into more universally recognized versions: "Expiation" and "Reformation" are combined into "Rehabilitation" and "Protection of Society," or "Prevention," is understood as "Incapacitation." *See also* Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."). Incapacitation is excluded from Justice Scalia's majority opinion. *See id.* However, that can be attributed to the fact that incapacitation is generally served by the three theories mentioned.

[19] GILLIN, *supra* note 11, at 312.

[20] *Id.*

[21] *See* Alana Barton, *Incapacitation Theory*, WORD PRESS 463, 463 (2010) https://marisluste.files.wordpress.com/2010/11/incapacitation-theory.pdf [https://perma.cc/8PFY-STFV].

[22] *Id.*

[23] *Id.*

[24] U.S. CONST. amend. VIII. There is an explicit prohibition on "cruel and unusual punishment." *But see* Schick v. Reed, 419 U.S. 256 (1974). While incarceration sentences must be proportional to the crime committed, the Supreme Court refuses to even acknowledge the proposition that the Eighth Amendment prohibits life sentences without the possibility of parole for adults.

[25] NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis, Bruce Western, & Steve Redburn, eds., National Academic Press 2014) (discussing the burden that placed on the United States because they incarcerate nearly twenty-five percent of the world inmate population).

its current unpopularity, rehabilitation theory is rooted in centuries-old indigenous cultures throughout the world. The theory was prevalent in American jurisprudence for almost 200 years until its demise in the mid-1970s.[26] Rehabilitation emphasizes the prospection of post-incarceration, where offenders were often sentenced to mandatory treatment programs to mitigate interference with reintegration into society.[27] Additionally, rehabilitation is effectuated through alternatives to the adversarial court system. For example, "restorative justice"[28] allows victims to meet with their offenders and speak about the emotional impact the trauma of the crime has caused.[29] In doing so, the goal is to not only restore the victim, which can be done through a variety of compensations,[30] but to "facilitate the offender's remorse,"[31] which is accomplished through a multitude of community involvement programs and educationally-based rehabilitation courses.[32]

While restorative justice is often praised for both its victim-oriented perspective and emphasis on eliminating recidivism,[33] in practice, it suffers from two preconditions that greatly limit its implementation potential.[34] First, for the process to begin, it requires the perpetrator to admit wrongdoing[35] and second, it requires the victim and the offender to come face-to-face.[36] Although the first precondition is not as problematic because

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[26] Cheryl Graves, Donyelle Gray & Ora Schub, *Restorative Justice: Making the Case for Restorative Justice*, 39 CLEARINGHOUSE REV. 219, 220 (2005) (describing that models of restorative justice are rooted in Native American traditions, as well as indigenous cultures in Africa and New Zealand); Etienne Benson, *Rehabilitate or Punish*, 34 AM. PSYCHOL. ASS'N. 46, 46 (2003) ("Since [mid-1970] rehabilitation has taken a back seat to a 'get tough on crime' approach that sees punishment as prison's main function . . . .").

[27] Benson, *supra* note 26, at 46.

[28] Hermann, *infra* note 48, at 80.

[29] *Id.* at 79–80 (explaining the process of restorative justice, "Victim and offender can come to an agreement, with the offender acknowledging the injury caused, along with the acknowledgement of the offender's responsibility of what can be done to restore a sense of justice."); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH. L. REV. 15, 25 (2002) ("[P]articipants discussed what had happened when the offence occurred, who the offence had affected and in what ways, and what could be done to repair the harm caused.").

[30] Hermann, *infra* note 48, at 80.

[31] *Id.* at 81.

[32] Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2321–22 (2013).

[33] Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2005 J. DISP. RESOL. 349, 355 (arguing that data shows restorative justice creates greater societal trust in the justice system and lowers recidivism rates).

[34] Dancig-Rosenberg, *supra* note 32, at 2320. Another critique by punitivists is that restorative justice fails to give a "just reaction[]" to serious crimes. *Id.* at 2323.

[35] *Id.* Restorative justice requires the voluntarism of both parties, which is reaffirmed throughout the process. However, this cannot be accomplished if someone maintains that they are innocent.

[36] *Id.*

most criminal proceedings result in guilty pleas,[37] the second precondition is especially troublesome because of the typically antagonistic relationship between victim and perpetrator.[38] Additionally, rehabilitation theory is criticized by proponents of retribution theory for being "soft" on criminals and for its reduction of perpetrators to "nonperson[s]" who no longer have the right to be punished.[39]

3. Deterrence

Deterrence is "based on the assumption that a detected wrongdoer will not commit himself a second time, and that if the 'example' made of him be sufficiently severe other people will be deterred, or at least have their criminal proclivities restrained."[40] While the proposition that punishment will prevent future criminal activity is sound—for it is only natural to avoid behavior that results in punishment—there is a fundamental critique that flows from it: if deterrence is effective, both initial criminal activity and recidivism should not exist.[41] Yet, crime occurs every day, ranging from petty offenses to heinous acts.[42] Additionally, the United States has reported a recidivism rate of a staggering eighty-three percent of inmates that were released from state penitentiary since 2005.[43] This number does not necessarily give an accurate depiction of the deterrent value of punishments, because it is impossible to measure the number of citizens who are deterred entirely from crime. Thus, only the portion of the population that was not originally deterred from crime is evaluated from an examination of

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[37] Rachel Frazin, *90 Percent of Federal Defendants Plead Guilty: Report*, HILL (June 11, 2019), https://thehill.com/regulation/court-battles/447893-90-percent-of-federal-defendants-plead-guilty-report/ [https://perma.cc/E497-AV9V] (citing a Pew Research Center study that found 90% of all federal cases resulted in a guilty plea in 2018). *But see* Dancig-Rosenberg, *supra* note 32, at 2322 ("Punitivists . . . have raised serious concerns regarding the ability of the restorative justice process to protect offenders' due process rights, and in particular the presumption of innocence. The admission requirement creates a risk of false admissions . . . .").

[38] *But see* Dancig-Rosenberg, *supra* note 32, at 2321 ("The restorative process has therefore often been described as an empowering experience, by contrast to the criminal process, which is commonly criticized as reawakening the trauma and disempowering the victim.").

[39] Herbert Morris, *Persons and Punishment*, *in* ON GUILT AND INNOCENCE 31, 46 (University of California Press 1976); *see also* Jeffrie Murphy, *Kant's Theory of Criminal Punishment, in* 16 RETRIBUTION, JUSTICE, AND THERAPY 82, 134–35 (Wilfrid Sellars & Keith Lehrer eds., 1979).

[40] WYNDHAM, *supra* note 18, at 22.

[41] *Id.* ("[I]t is obvious to anybody but a crank that, whatever the ultimate effect of punishment, it is not to deter.").

[42] John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RESEARCH CTR. (Nov. 20, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ [https://perma.cc/58BY-W6KC].

[43] Mariel Alper, Ph.D., Matthew R. Durose & Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005–2014)*, U.S. DEPARTMENT OF JUSTICE 1, 4 (May 2018), https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf [https://perma.cc/6Z97-Q357].

recidivism.[44] But, this statistic calls into question the legitimacy of the theory, nonetheless.

4. Retributivism

Retributivism is the oldest form of punishment, and likely, the most recognizable.[45] It is the principle in which "a man returns good for good, and evil for evil, and expects therefore to be punished for a wrong he or a member of his group commits."[46] Retribution, unlike the other theories of punishment, is not intended to be prospective.[47] Instead, its purpose is to rectify the injustice committed against the victim and society with an equivalent moral response.[48]

Retributivism is both criticized and praised for this focus.[49] It provides no value other than what is derived by those injured, yet it is not only the foundational component of the United States Justice System,[50] but is considered by many to be one of the most essential characteristics of punishment.[51] As philosopher Immanuel Kant famously illustrated, "even on the last day of a society's existence a murderer must be executed 'so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment.'"[52] Historical interpretations such as

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[44] Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S.C. L. REV. 785, 791 (2014).

[45] *Code of Hammurabi*, *supra* note 12.

[46] HANS KELSEN, Casualty and Retribution, *in* WHAT IS JUSTICE? 303, 304 (University of California Press 1960); *See* Willoughby, *supra* note 18, at 555–56 ("[T]hrough punishment the offender expiates his offense, suffers retribution for the evil which has been done, and thus is vindicated the principle justice which has been violated.").

[47] Deterrence is prospective in that its purpose if to prevent future crime. Rehabilitation is prospective in that its purpose is to cure criminals of their propensity for crime, thereby extinguishing any future criminal activity. Incapacitation is prospective in that its purpose is to remove criminals from society, thereby removing the ability to inflict harm in the future. *See* Steven Gey, *Justice Scalia's Death Penalty*, 20 FLA. STATE U.L. REV. 67, 106 (1992) ("Retributivists focus exclusively on the nature of past violations that justify present punishment, and disregard any future effect the punishment might have on the criminal or on society as a whole.").

[48] ALEC WALEN, RETRIBUTIVE JUSTICE (Edward Zalta ed., Stanford Encyclopedia of Philosophy 2020) (quoting Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 CRIM. L. & PHIL. 5, 11 (2007)) ("[A] retributivist is a person who believes that the primary justification for punishing a criminal is that the criminal *deserves* it.") (emphasis in original). *See* WYNDHAM, *supra* note 18, at 21–22. *But see* Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16 SEATTLE J. FOR SOC. JUST. 71, 84 (2017) (discussing that although vengeance is thought of as synonymous with retribution, retribution should be thought of instead as a justification for punishment).

[49] WYNDHAM, *supra* note 18, at 22.

[50] Eleanor Hannon Judah & Rev. Michael Bryant, *Rethinking Criminal Justice: Retribution vs. Restoration, in* CRIMINAL JUSTICE: RETRIBUTION VS. RESTORATION 1, 1 (Eleanor Hannon Judah & Rev. Michael Bryant eds., Haworth Social Work Practice Press 2004) ("Our present criminal justice philosophy is based on the concept of retribution, that is 'something given or demanded in repayment, especially punishment.'") (citations omitted).

[51] GILLIN, *supra* note 11 (describing retribution as "instinctive in nature").

[52] Gey, *supra* note 47, at 105 (quoting IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 102 (John Ladd trans., Hackett Publishing Company, Inc., 2nd ed. 1965)).

this have led leading theorists, such as Michael Moore, to summarize retributivism as a society punishing a criminal with the sole purpose of giving him what he deserves.[53]

B. Death Penalty

1. Early History

The death penalty has been practiced in the United States since the nation's independence was declared in 1776.[54] Its origin dates back to the earliest documentations of codified law,[55] and it is one of the many principles extracted from English common law that has guided the American Justice System.[56] Early colonial America saw capital punishment written into law for as many as seventeen crimes, ranging from adultery to murder.[57] Soon after inception of the new nation, American states began reducing the punishment incrementally.[58]

2. Nineteenth and Twentieth Century History

The death penalty abolitionist movement in the United States originated with Thomas Jefferson, who first introduced legislation limiting the death penalty to crimes of treason and murder while a member of the Virginia Legislature in the late 1700s.[59] The movement continued to gain support, first resulting in the condemnation of public executions,[60] then reaching a pinnacle when Wisconsin became the first state to abolish the death penalty.[61] Abolitionist support continued to gain momentum, resulting

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[53] Michael S. Moore, *Justifying Retributivism*, 27 ISRAEL L. REV. 15, 17–18 (1993) ("[A] retributivist believes that the murderer should be punished because he deserves it, even though no other goodwill thereby be achieved.").

[54] *See Early History of the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty [https://perma.cc/3J5Q-QMB4]; *see also* Raymond Bye, *Recent History and Present Status of Capital Punishment in the United States*, 17 J. CRIM. L. & CRIMINOLOGY 234, 234 (1926) (explaining that death penalty laws in the U.S. have been modified since 1788, proving that they have existed since the beginning of U.S. history).

[55] *Early History of the Death Penalty*, *supra* note 54.

[56] Sheherezade C. Malik & D. Paul Holdsworth, *A Survey of the History of the Death Penalty in the United States*, 49 U. RICH. L. REV. 693, 694 (2015) (discussing that almost identically, capital punishments mirrored "biblically speaking, capital crime.") (citation omitted).

[57] Bye, *supra* note 54, at 234 (noting that even up until 1892, there were an astounding twenty-five offenses punishable by death under military law).

[58] Malik & Holdsworth, *supra* note 56, at 696. Virginia was the first state to limit capital punishment to premeditated murder in 1796. *Id.* However, it is clear from the constitution that capital punishment was both considered and intended. *Id.* The Fifth Amendment states, "No person shall . . . be deprived of life, liberty, or property without due process of law." *Id.* at 695 (citing U.S. CONST. amend. V.).

[59] *The Abolitionist Movement*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/the-abolitionist-movement [https://perma.cc/HRG4-FTFD].

[60] Bye, *supra* note 54.

[61] RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 9 (Lexington Books, 1991).

in twenty percent of states having ended the practice by the end of World War I.[62]

Disputing the necessity and purpose of the death penalty, leaders on both sides of the debate grounded their arguments in the theories of punishment.[63] Proponents cited the retributive and deterrent value of the death penalty,[64] arguing that only a punishment of the most extreme magnitude could adequately balance the moral scales and discourage the most recalcitrant delinquents. Opponents took a drastically different perspective, arguing that there is no theory, aside from incapacitation, that is served by putting a person to death.[65]

3. The Death Penalty Today

Through the mid-twentieth century, the abolitionist movement overtook the nation. In 1966, public support for capital punishment reached a record low of forty-two percent.[66] The Vietnam War, as well as the Civil Rights Movement, seemingly aroused a societal shift away from state-sanctioned killing.[67] In 1972, the movement culminated with the case of *Furman v. Georgia*.[68]

Prior to *Furman*, state legislatures had exclusive discretion over the legality of the death penalty.[69] Furman was an African American man that was sentenced to death after he murdered an individual who startled him during a robbery of a Georgian home.[70] The case was consolidated with two others in which African American men were convicted and sentenced to death.[71] *Furman* was granted certiorari by the Supreme Court, challenging the constitutionality of capital punishment under the Eighth[72] and Fourteenth Amendments.[73] *Per curiam*, all nine justices wrote separate opinions that ultimately reversed the sentences of the three men and

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[62] Malik & Holdsworth, *supra* note 56, at 698. From 1900 to 1918, the "Progressive Era" saw attempted reform regarding business law, immigration, and imprisonment. *Id.* Of the ten states to eradicate capital punishment, eight reinstated it the following year, only to reaffirm the abolishment in later years. *Id.*

[63] *The Abolitionist Movement, supra* note 59.

[64] *Id.*; *Capital Punishment*, INTERNET ENCYCLOPEDIA OF PHIL., https://iep.utm.edu/cap-puni/#H4 [https://perma.cc/UHW6-E8CH].

[65] HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994 7 (Oxford University Press 1996) ("[Abolitionists] drew their rhetorical ammunition from European reformers like Cesare Beccaria, whose *Essay on Crime and Punishments* was published in the United States in the 1770s and was frequently cited by prison reformers and abolitionists.") (citation omitted). *See also* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764).

[66] Malik & Holdsworth, *supra* note 56, at 701.

[67] *Id.*

[68] 408 U.S. 238 (1972).

[69] Robert A. Stein, *The History and Future of Capital Punishment in the United States*, 54 SAN DIEGO L. REV. 1, 8 (2017).

[70] *Furman*, 408 U.S. at 252 (Douglas, J., concurring).

[71] *See* Jackson v. State, 225 Ga. 790, 791 (1969); Branch v. State, 447 S.W.2d 932, 932–33 (Tex. Crim. App. 1969).

[72] *See* U.S. CONST. amend. VIII.

[73] *See* U.S. CONST. amend. XIV, § 1; *Furman*, 408 U.S. at 252 (Douglas, J., concurring).

suspended capital punishment throughout the nation.[74] Despite the lack of a unanimous rationale for the result, the Court held that when the death penalty is imposed arbitrarily and discriminately, the Constitution prohibits its administration.[75]

A victory for the abolitionists, Justice Marshall remarked in the conclusion of his concurrence:

> In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.[76]

However, the victory was short-lived. Merely four years later, the Court heard *Gregg v. Georgia*.[77] The Defendant, Gregg, was sentenced to death under the newly revised Georgia penal code, which delineated specific guidelines for when capital punishment may be sought, to reduce ambiguity and discrimination.[78] Gregg robbed and murdered two men who picked him up when he was hitchhiking.[79] A plurality of an almost identical Court[80] upheld the sentence, ruling that the death penalty is not unconstitutional *per se*.[81] In reaching its conclusion, the Court explained that the death penalty serves "two principle social purposes: retribution and deterrence of capital crimes by prospective offenders."[82]

Today, twenty-eight states still have capital punishment written into their criminal codes.[83] However, of those twenty-eight states, eleven have not performed an execution within the last decade.[84] Moreover, since the *Gregg*

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[74] *Furman*, 408 U.S. at 239–40.
[75] Stein, *supra* note 69, at 9–10.
[76] *Furman*, 408 U.S. at 371 (Marshall, J., concurring) (quoting R. CLARK, CRIME IN AMERICA 336 (1970)).
[77] Gregg v. Georgia, 428 U.S. 153 (1976).
[78] Stein, *supra* note 69, at 13–14.
[79] *Gregg*, 428 U.S. at 158–59.
[80] Stein, *supra* note 69, at 14.
[81] *Id.* at 15; *see Gregg*, 428 U.S. at 206.
[82] *Gregg*, 428 U.S. at 183.
[83] *States and Capital Punishment*, NAT'L CONFERENCE OF STATE LEGIS. (Aug. 11, 2021) https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx [https://perma.cc/WE66-BKFZ]. While twenty-eight states still have capital punishment on the books, three states have suspended the sentence due to either a governor-sanctioned moratorium or their respective state supreme court ruling it unconstitutional as currently administered. *Id.*
[84] John Gramlich, *California Is One of Eleven States That Have the Death Penalty but Haven't Used It in More Than a Decade*, PEW RESEARCH CTR. (Mar. 14, 2019) https://www.pewresearch.org/fact-tank/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade/ [https://perma.cc/AF2J-GL7T].

decision, the Supreme Court has articulated several exceptions to the constitutionality of capital punishment, including its administration to juveniles,[85] to defendants convicted of rape,[86] to the "mentally retarded,"[87] and to the mentally insane.[88] Accordingly, while a majority of states still prescribe capital punishment in their criminal statutes, it is apparent that the current climate on execution favors the abolitionists.[89] While these limitations have not been entirely uncontroversial, they have come as a result of society shaping the way the Supreme Court has applied the Eighth Amendment's Cruel and Unusual Punishment Clause.

C. The Evolution of the Eighth Amendment

Just as the shift in public attitude towards capital punishment is traceable throughout two and half centuries of American history, so too is the evolution of the Eighth Amendment. While public perception often over-emphasizes the effect that the "will of the people" has on the enforcement of constitutional amendments in jurisprudence,[90] the same cannot be said regarding the Cruel and Unusual Punishment Clause of the Eighth Amendment.[91]

The text of the Eighth Amendment, while clear in its language, is not so clearly applied. Originating in the Magna Carta[92] and deriving its

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[85] Roper v. Simmons, 543 U.S. 551, 569 (2005) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993) (explaining that juveniles cannot face the death penalty because "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.")) (describing that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'").

[86] Enmund v. Florida, 458 U.S. 782, 801 (1982); *see also* Kennedy v. Louisiana, 554 U.S. 407 (2008) ("[T]he death penalty can be disproportionate to the crime itself where the crime did not result, or was not intended to result, in death of the victim" thereby making it a violation of the Eighth Amendment.").

[87] Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[88] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort or understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.").

[89] *But see* Jonathan Mitchell, Commentary, *Capital Punishment and the Courts*, 130 HARV. L. REV. F. 269, 272 (2017) ("[T]he Supreme Court's efforts to restrict the death penalty have had the paradoxical effect of strengthening and entrenching the institution of capital punishment.").

[90] Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 WM. & MARY SCH. SCHOLARSHIP REPOSITORY 1515, 1520 (2010) (describing that while Justices are influenced by public opinion, the effect should not be exaggerated, for it is usually on the family and friends of Justices that shape opinions) (quoting Justice Cardozo explaining that the Court cannot escape the "great tides and currents which engulf the rest of man.").

[91] U.S. CONST. amend VIII.

[92] J.C. HOLT. MAGNA CARTA, app. IX (Cambridge University Press 1965) (1215) (describing the need for equality in crime in punishment as "[a] free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity . . . .").

direct language from the English Bill of Rights,[93] the scope of the Eighth Amendment has transformed throughout the centuries.[94] The Supreme Court, in 1879, first attempted to give an exact definition to "cruel and unusual," but was unsuccessful, stating, "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted."[95] In 1910, the Court again attempted, and failed, to provide clarity, meekly explaining that the definition "has not been decided," but "the terms imply something inhuman and barbarous—torture and the like."[96] In 1985, the Court, faced with the issue once again, remarked:

> [T]he words of the Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society" and the penalty may not degrade "the dignity of man," which is the "basic concept underlying the Eighth Amendment."[97]

In effect, the resulting test was nothing more than an introspective judgment of equivalence: did the punishment match the crime? Societal norms and expectations of the time were the factors that decided the question.[98]

Applying the loosely conceived balancing test, the Supreme Court, in *Coker v. Georgia*, held that the Eighth Amendment prohibits punishments that "are 'excessive' in relation to the crime committed."[99] Further convoluting Eighth Amendment jurisprudence, in *Gregg v. Georgia*, the Court presented the purposeful and proportionality test, making a punishment unconstitutional "if (1) it makes no measurable contribution to the acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly

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[93] English Bill of Rights 1689, 1 W. & M. (Eng.).

[94] *Cruel and Unusual Punishment*, 52 LEGAL INFO. INST., CORNELL L., https://www.law.cornell.edu/constitution-conan/amendment-8/cruel-and-unusual-punishments [https://perma.cc/NG5G-E242].

[95] Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879). Although the Court did not give a definition, they did deem punishments such as torture, drawing and quartering, disemboweling alive, beheading, and public dissection unconstitutional.

[96] Weems v. U.S., 217 U.S. 349, 368 (1910) (declaring that twelve years imprisonment with hard labor is too excessive for the crime of falsifying public records). Despite the apparent failure in defining cruel and unusual punishment, *Weems* is often cited as providing the framework for the "principle of proportionality." *See* Dan Bubis & Jax Bubis, *8th Amendment*, REVOLUTIONARY WAR & BEYOND, https://www.revolutionary-war-and-beyond.com/8th-amendment.html [https://perma.cc/PXJ3-MNHA].

[97] Trop v. Dulles, 356 U.S. 86, 100–01 (1985) (determining that denationalizing a citizen is cruel and unusual punishment).

[98] *But see* Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (explaining that the Court has made clear that "[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.").

[99] 433 U.S. 584, 600 (1977) (ruling that capital punishment could not be administered for the crime of rape because it was disproportionate to the actual crime committed).

out of proportion to the severity of the crime."[100] Therefore, a punishment was unconstitutional if it found no support in the theories of punishment or if it were far more severe than the harm caused, thereby offending the moral standards set forth in society. While the Court was still unable to articulate an exact definition of cruel and unusual punishment, the purpose and proportionality test has been instrumental in the aforementioned limitations imposed on the constitutionality of the death penalty.[101]

D. Criminal Insanity v. Criminal Incompetency

Criminal insanity and criminal incompetency, mistakenly thought of as equivalent, are two distinct issues that can alter criminal proceedings.[102] Insanity is an affirmative defense used by the accused to argue that they were not of sound mind *during the commission of the crime*.[103] It is described by the American Psychological Association as a result of a variety of mental disorders causing the defendant to "grossly and demonstrably impair perception or understanding of reality."[104] Conversely, incompetency is a test of whether the accused is *presently fit to stand trial*.[105] Put simply, the two conditions relate to entirely different periods in time.[106] Both can affect the defendant momentarily or permanently.[107] Therefore, it is the case that while a defendant may be successful in arguing an insanity defense, he may still be competent to stand trial; for if he were incompetent, no trial could take place.[108] Moreover, while the defense of insanity is for the jury to decide, incompetency is a question for the judge as the determination must be made prior to the commencement of trial.[109] Though insanity and incompetency

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[100] 428 U.S. 153, 173 (1976).

[101] *Cruel and Unusual Punishment*, *supra* note 94. The purpose and proportionality test extends beyond the discussion of capital punishment. It has been cited by the Supreme Court in a variety of cases pertaining to the Eighth Amendment. *See* Solem v. Helm, 463 U.S. 277, 284 (1983) ("There is no basis for the State's assertion that the general principle of proportionality does not apply to felony sentences."); Graham v. Fla., 560 U.S. 48, 72 (2010) (describing that the concept of proportionality guides the decision that the sentence of life without parole is unconstitutional for juveniles who did not commit homicide); Miller v. Ala., 567 U.S. 460 (2012) (holding that the sentence of life without the possibility of parole is still an option for juveniles who commit homicide).

[102] John G. Magnus, *Mental Incompetency*, 18 BAYLOR L. REV. 22, 24–25 (1966) ("[V]arious cases and writings indicate considerable confusion between the concepts of competency to stand trial and insanity . . . . [I]t would appear desirable to keep these concepts separate.").

[103] *Forensic Psychologists in Determining Insanity and Competency to Stand Trial*, FORENSICPSYCHOLOGYEDU, https://www.forensicpsychologyedu.org/insanity-and-competency-to-stand-trial/ [https://perma.cc/FM2X-Q64Z].

[104] A. E. Daniel et al., *Factors Correlated with Psychiatric Recommendations of Incompetency and Insanity*, 12 J. PSYCHIATRY & L. 527, 528 (1984).

[105] Magnus, *supra* note 102, at 27 ("[A] person cannot be required to plead to an indictment or be tried for a crime while he is so mentally disordered as to be incapable of making a rational defense.").

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Forensic Psychologists in Determining Insanity and Competency to Stand Trial*, *supra* note 103.

have been clear and distinct concepts, recent jurisprudence has blurred the line between them and expanded incompetency from a question presented at trial to a question continuing to the administration of capital punishment.

In *Ford v. Wainwright,* the Supreme Court held that the criminally insane could not be put to death because it violated the Eighth Amendment's Cruel and Unusual Punishment Clause.[110] Writing for the majority, Justice Marshall relied on the theories of punishment to condemn the act, stating that "such an execution has questionable retributive value, presents no example to others and thus has no deterrence value, and simply offends humanity."[111] Applying this rationale, Marshall concluded by decreeing, "the Eighth Amendment prohibits execution of 'one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.'"[112] Thus, administering capital punishment to the insane would violate the first element of the purpose and proportionality test from *Gregg.*

This rationale was reaffirmed in *Panetti v. Quarterman*, where Justice Anthony Kennedy, writing for the majority, reflected on the retributive role that capital punishment serves:

> [I]t might be said 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 of the prisoner is so serious that the ultimate penalty must be sought and imposed.[113]

While the two Courts both purported to apply the purpose and proportionality test—producing the similar conclusion that the insane could not be executed—they relied on two different rationales. Whereas the test in *Ford* asked the Court to determine whether the individual's mental illness prevented comprehension of why the execution would be administered and the consequence of execution—thereby asking a question of *sanity*—*Panetti* interpreted the test as requiring *competency*, where the question is not of sanity, but of rational understanding as to why the State intends to impose execution.[114] As a result, "a category of defendants defined by their mental state" were deemed incompetent to be executed.[115] Consequently, confusion struck the lower courts who faced the burden of implementing a test that blurred the distinction between insanity and incompetency and seemingly

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[110] 477 U.S. 399 (1986).
[111] *Id.* at 407.
[112] *Id.* at 417.
[113] 551 U.S. 930, 958 (2007).
[114] *Ford*, 477 U.S. at 417 (stating that the Eighth Amendment prohibits the execution of "one whose mental illness prevents him from comprehending the reasons for the penalty or its implications."). Justice Powell more eloquently offered that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422 (Powell, J., concurring); *Panetti*, 551 U.S. at 958.
[115] *Ford*, 477 U.S. at 419.

extended the test from whether a defendant can stand trial to a test of whether a defendant can stand punishment.[116] The Court did not hear another case involving the constitutionality of capital punishment of the insane until *Madison v. Alabama*, in 2019.

III. THE *MADISON* DECISION

A. The Facts

In 1985, officer Julius Schulte was called to the residence of M. Green to investigate a missing child.[117] Officer Schulte encountered Vernon Madison, who was there to collect personal items from Green, his recently declared ex-girlfriend.[118] Upon Green's request, Officer Schulte remained at the residence.[119] Madison left the premises, returned with a pistol, and shot Officer Schulte twice in the back of the head as he sat in his patrol car.[120] Madison was convicted of capital murder and sentenced to death.[121] Madison's conviction was reversed twice by the Alabama Court of Appeals, once for discrimination in the *voir dire* process and once for the introduction of inadmissible evidence.[122] During the third trial, Madison was found guilty of murder again and sentenced to death.[123]

During the subsequent thirty years of incarceration, Madison had no mental deficiencies.[124] Then, in 2015, Madison began suffering a series of strokes that occurred regularly through 2016.[125] As a result, he was diagnosed with vascular dementia, producing "disorientation, confusion, cognitive impairment, and memory loss."[126] Madison petitioned the trial court for a stay of execution, arguing that he had become mentally incompetent and that he was unable to recall his crimes.[127] Madison was awarded a competency hearing, where the State's experts testified that Madison was neither delusional nor psychotic, and therefore did not qualify as mentally incompetent.[128] The trial court, applying the *Panetti* rational

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[116] *See Panetti*, 551 U.S. at 978 (Thomas, J., dissenting).
[117] Madison v. Ala., 620 So. 2d 62, 64 (Ala. Crim. App. 1992), *aff'd*, *Ex parte Madison*, 718 So. 2d 104 (Ala. 1998).
[118] Madison v. Ala., 620 So. 2d at 64.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] Madison v. Ala., 139 S. Ct. 718, 723 (2019).
[127] *Id.* Madison argued that "'he no longer understands' the 'status of his case' or the 'nature of his conviction and sentence.'" *Id.* Madison also had a borderline-intelligence level IQ of 72, rendering him unable to perform basic cognitive functions. Brief for Petitioner at 21, Madison v. Ala., 139 S. Ct. 718 (2019) (No. 17-7505).
[128] *Madison*, 139 S. Ct. at 724. One of the examining doctors stated that Madison "demonstrate[d] retrograde amnesia" about his crime, meaning he had no "independent recollection[]" of the murder. *Id.* However, he was "able to discuss his case" and "appear[ed] to understand his legal situation." *Id.*

understanding test, deemed Madison competent to stand execution.[129] After a series of appeals, Madison petitioned the Supreme Court and was granted certiorari.[130]

B. The Rationale

Arguing before the Supreme Court, Madison brought two challenges.[131] First, and most prominently, whether failing to remember the crime that brought forth the capital punishment was enough to be deemed mentally incompetent.[132] Second, whether dementia, which generally does not result in delusions and psychosis, is a mental illness that warrants a stay of execution.[133] Writing for the majority, Justice Kagan stated that both issues could be resolved using the *Panetti* rational understanding test.[134] Justice Kagan began by asking a simple question: regardless of what illness plagued Madison, could he reach a "rational understanding of why the State seeks to execute him? If so, the Eighth Amendment poses no bar to his execution."[135] To the majority, it seemed clear that both questions could be resolved using the *Panetti* test.[136]

Addressing whether the inability to remember the crime warranted a stay of capital punishment, the majority held that while memory loss can be a factor in analyzing the test of rational understanding, in isolation, this

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[129] *Id.* (explaining that Madison failed to show that he did not "rationally understand the punishment he is about to suffer and why he is about to suffer it.").

[130] *Id.* at 725–26. Madison first sought habeas relief in federal court. The case made its way to the Supreme Court, where the Court determined that the state court did not "error 'beyond any possibility for fair minded disagreement'"—when it found Madison had the necessary understanding to be executed. Dunn v. Madison, 138 S. Ct. 9, 12 (2017) (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)). When Madison's execution date was set in 2018, he again argued to the district court that he lacked mental competency and that his condition had further deteriorated since his last competency hearing. *Madison*, 139 S. Ct. at 725. His motion for a new competency hearing was denied. *Id.* He then petitioned the Supreme Court. *Id.* at 726.

[131] *Madison*, 139 S. Ct. at 726; *see* Brief for Petitioner, *supra* note 127, at 39–46 (describing Madison's central argument to the Court as an attempt to convince the Court that there is no penological objectives served by his execution).

[132] *Madison*, 139 S. Ct. at 726. Madison stated in numerous sections of his writ of certiorari that his lack of recollection of the crime removed any justification for the execution. *See id.* at 733 (Alito, J., dissenting) (quoting Pet. for Cert. 2, 18, 22, 23, "Because [petitioner's] disability renders him unable to remember the underlying offense for which he is to be punished, his execution does not comport with the evolving standards of decency required by this Court's Eighth Amendment jurisprudence . . . ." and "imposing death on a prisoner, who . . . suffers from substantial memory deficits . . . serves no retributive or deterrent purpose . . . . [W]here the person being punished has no memory of the commission of the offense for which he is to be executed, the 'moral quality' of that punishment is lessened and unable to match outrage over the offense.").

[133] *Id.* at 726.

[134] *Id.* at 726–27 ("As the parties now recognize, the standard set out in *Panetti* supplies the answers to both questions.").

[135] *Id.* at 719.

[136] *Id.*

would not be enough to prevent a finding of rational understanding.[137] Justice Kagan explained that the rationale behind the *Panetti* test rested on the retributive value of execution, which she argued is nonexistent when "a prisoner cannot appreciate the meaning of a community's judgment."[138] But, memory loss alone does not necessarily mean that the prisoner cannot appreciate the value of their punishment.[139] Moreover, Justice Kagan reiterated that it would "offend humanity to execute a person so wracked by mental illness that he cannot comprehend the 'meaning and purpose of the punishment.'"[140] Therefore, there must be additional psychological effects hindering the prisoner to render them incompetent.[141]

To the issue of whether dementia could permit a stay of execution, the majority held that it could.[142] Again, focusing on the retributive value of execution, Justice Kagan explained that the specific diagnosis is inconsequential to the test of rational understanding, because a diagnosis is simply a term of art.[143] It does not alter the retributive value, or lack thereof, when a prisoner cannot "understand the societal judgement underlying his sentence;"[144] only the symptoms exhibited are relevant.[145]According to Justice Kagan, this was made apparent by the *Panetti* Court, when they moved away from the term "mentally insane" that was emphasized in *Ford*,[146] and implemented more inclusive terms such as "mental illness, mental disorder, and psychological dysfunction."[147] Thus, "if and when that failure of understanding is present, the rationales kick in—irrespective of whether one disease or another is to blame."[148]

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[137] *Id.* at 727 ("Consider initially a person who cannot remember his crime because of a mental disorder, but who otherwise has full cognitive function. The memory loss is genuine . . . . But the person remains oriented in time and place; he can make logical connections and order his thoughts; he comprehends familiar concepts of crime and punishment.").

[138] *Id.* (citing Ford v. Wainwright, 477 U.S. 399, 407 (1986)).

[139] *Madison*, 139 S. Ct. at 727. ("[A] person who can no longer remember a crime may yet recognize the retributive message society intends to convey with a death sentence.").

[140] *Id.*

[141] *Id.* (emphasizing that loss of memory alone would not suffice to pass the rational understanding test, Justice Kagan provided an effective analogy: "Do you have an independent recollection of the Civil War? Obviously not. But you may still be able to reach a rational—indeed, a sophisticated—understanding of that conflict and its consequences.").

[142] *Id.* at 726. *But see id.* at 734–35 (Alito, J., dissenting) (explaining that the sole issue upon which certiorari was granted was whether someone who does not remember their crime could be executed; the second issue should not have been heard because it was outside the scope of what was granted by the Court originally).

[143] *See id.* at 727.

[144] *Id.* at 728 (explaining that it is only the effect of the diagnosis that matters: Justice Kagan stated, "the standard has no interest in establishing precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension."); *see* Panetti v. Quarterman 551 U.S. 930, 958–59 (2007).

[145] *Madison*, 139 S. Ct. at 728.

[146] Ford v. Wainwright, 401 U.S. 399, 410 (1986).

[147] *Panetti*, 551 U.S. at 936, 959–60.

[148] *Madison*, 139 S. Ct. at 728.

IV. ANALYSIS

The purpose of this Case Note is not to say that the *Madison* majority failed to provide a logical argument, but that in reaching their conclusion, they failed to recognize and address broader principles that, when absent, raise questions that necessitate immediate resolution.

A. A Skewed Interpretation of Retributivism

The most salient problem in Justice Kagan's opinion in *Madison* is her overvaluation of the role retribution plays in the analysis of the application of the death penalty for the mentally incompetent.[149] Justice Kagan echoes the language of Justice Powell's concurrence in *Ford*, stating, "retributive force[] depends on the defendant's awareness of the penalty's existence and purpose."[150] However, this understanding of retributivism is neither consistent with the traditional approach to the theory of punishment, nor the contemporary understanding of its value in American jurisprudence.

As discussed previously,[151] the origins of retributivism predate American law.[152] Over the centuries, divergent species of retributivist theory have emerged and retreated, but there are essential characteristics of retributivist theories which do not vary: first, vindication, whether achieved by society or the victim, comes from punishment; and second, the criminal receives no more punishment than is deemed either deserved or necessary for the vindication to occur.[153] Across these mounting factions, universally recognized amongst retributivist scholars is Michael Moore's principle of desert.[154] Articulated in his writing, *The Moral Worth of Retribution*, Moore explores the hierarchy of duties and rights that all autonomous individuals possess.[155] Of these, a primary duty is to refrain from injuring fellow individuals.[156] A secondary duty is to amend any injustice that has been caused.[157] The consequence of these duties is the need for uniform punishment.[158] Thus, punishment is a means to give culpable wrongdoers their "just deserts" and the role of society is to ensure that these punishments are distributed prudently and consistently.[159] Modern retributivists have slightly altered this notion of duty to that of a right, which allows society to

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[149] *Id.* at 727.
[150] *Id.* at 723 (citing *Ford*, 477 U.S. at 421).
[151] *See supra* Section II.A.2.
[152] *Code of Hammurabi, supra* note 12.
[153] *See* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979); Nigel Walker, *Even More Varieties of Retribution*, 74 PHIL. 595 (1999).
[154] Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND THE EMOTIONS 179, 182 (F. Schoeman ed., Cambridge University Press 1986).
[155] Moore, *supra* note 53, at 32.
[156] *Id.*
[157] *Id.* (explaining this duty as the need to "correct the injustice that I have caused in injuring or killing another by making amends in whatever way I can, including compensation.").
[158] *Id.*
[159] *Id.*; *see also* Douglas Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 974 (2000) (describing the extensive costs that offset the advantages of state punishment).

justify disproportionate leniency when it so chooses, but never disproportionate severity.[160]

It is evident that theoretical underpinnings of retributivism have guided the decisions of the Supreme Court; the Court has adapted an identical theory of proportionality in its evaluation of Eighth Amendment claims.[161] The Court, in its death penalty jurisprudence, has maintained that the American penal system rests primarily on retributivism, with attention to deterrence.[162] Yet, in a string of cases—*Ford*, *Panetti*, and now *Madison*—the Court has grossly undervalued the perspective of society and the victim in assessing the retributive good of punishment.[163] Instead, the Court overemphasizes the perpetrator's comprehension of the punishment's value, which contradicts the very nature of the theory.[164]

It is incompatible with mainstream retributive theory, which has been universally predicated on the premise that punishment is administered for the purpose of vindication, that the constitutionality of imposing the death penalty should rest upon the criminal's capacity to appreciate why society has deemed it necessary to put them to death. This not only distorts the theoretical justification, but also is inconsistent with the philosophy espoused by the Court when it states that there are two categories in which retributivism serves the justice system.[165] In *Roper v. Simmons*, Justice Kennedy stated:

> Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.[166]

This passage illuminates two important points in relation to the discussion of *Madison*. First, in referencing the two variations of retribution the Court recognizes, it is noteworthy that Justice Kennedy stated capital punishment is either an "expression of the community's moral outrage," or a "balance for the wrong of the victim."[167] There is no mention of the offender's appreciation of the punishment in accomplishing either of these goals. This is consistent with the conceptual framework of retributivism. It simply does not matter if the offender can appreciate their punishment.

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[160] Walker, *supra* note 153.
[161] Gregg v. Ga., 428 U.S. 153, 173 (1976).
[162] And deterrence to a lesser degree. *See, e.g.*, Roper v. Simons, 543 U.S. 551, 569 (2005); Atkins v. Va., 536 U.S. 304, 319 (2002); Ford v. Wainwright, 477 U.S. 399, 409–10 (1986); Enmund v. Fla., 458 U.S. 782, 801 (1982). All of the aforementioned cases imposed restrictions on death penalty application and all of the cases referenced the relation of the punishment to retributivism.
[163] Madison v. Ala., 139 S. Ct. 718, 723 (2019).
[164] *Id.* at 727.
[165] *Roper*, 543 U.S. at 571.
[166] *Id.*
[167] *Id.*

If it is the case that the goal is an expression of the moral outrage felt by the community, there is no less outrage when a perpetrator can no longer appreciate the punishment, for it is only the punishment itself that alleviates the outrage.[168] If the goal is to balance the wrong done to the victim, then again, it does not matter if the perpetrator can appreciate the punishment, because the punishment itself provides that balance.[169] To Justice Kennedy's point: retributivism is not served by putting a juvenile or an insane person to death, because the act of murder does not equate to the same level of moral outrage or imbalance as when performed by a fully cognitive-functioning adult. This is because a minor or insane individual cannot recognize the significance of their actions.[170] But, this is wholly different from the situation in *Madison*, where the defendant is now unable to recognize why the state would choose to punish him, but the defendant was of sound mind at the time of committing the crime. Thus, the second point emerges: Justice Kennedy makes clear that retribution is not served if the blameworthiness of the offender is diminished.[171] However, it logically follows that blameworthiness is dependent on the state of mind at the time the crime was committed—not at the time of punishment.

To illustrate this point, imagine two individuals, X and Y. Remember that retributivism calls for proportionality, so punishment must equal the value of the blameworthiness. X and Y commit identical crimes, both resulting in first-degree homicide convictions and death sentences. Both have the same blameworthiness the moment they commit their crimes because it is at that point that society is harmed. Now, if Y is immediately executed, retribution is achieved because the moral outrage of the society has been quelled. Thus, Y received a punishment proportionate to the blameworthiness. If X was a child or mentally insane, his blameworthiness would be less than Y because society has determined that juveniles and the mentally insane cannot comprehend the consequences of their actions.[172] Therefore, X cannot be punished by death, because it would be disproportionate. However, as is the case in *Madison*, X (Madison) is an adult, who was of sound mind at the commission of the crime. Even if X forgets his crime before his execution, his blameworthiness does not decrease. Society's need for vindication and expression of disapproval is left unsatisfied; therefore, the death sentence would remain proportional, despite X not knowing why he is being executed.

This thought-experiment is intended to show that despite the *Madison* Court reaching the correct conclusion—that Madison could be put to death regardless of his memory deficiency—the question to ask is not whether he can appreciate the punishment, but only whether the punishment is proportional to the blameworthiness incurred at the time the crime was committed.

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[168] Moore, *supra* note 53, at 15–16.
[169] *Id.*
[170] *Roper*, 543 U.S. at 569.
[171] *Id.* at 571.
[172] *Id.* at 569.

Where retributivism is implemented and punishment is intended to proportionally vindicate a harm, the only point at which the perception of the offender is prudent is at the commission of the crime. Otherwise, what counterargument could be raised against a perpetrator who fundamentally believes that he is innocent, yet is convicted and sentenced to death? Like the offender who has a newly developed mental illness that leaves him unable to appreciate his punishment, the offender who believes he is innocent may hold the same lack of appreciation for punishment. Therefore, the skewed interpretation of retribution relied on by the Court would make his punishment equally invalid. Little argument can be raised to support this result.

Furthermore, an implication of Justice Kagan's insistence on the offender being able to appreciate their punishment is the presumption that the offender is being relieved of their guilt upon receiving punishment.[173] However, this too displays the shortcoming of the test. Imagine a future society that can scan the brain and tangibly view guilt. Suppose there is serial murderer who has brutally killed fifteen children but has now had a change of heart and feels perpetual guilt. Justice Kagan's test necessitates that the offender be able to appreciate their punishment and so they are relieved of moral guilt through punishment. Therefore, if the serial murderer were utterly incapable of being relieved of their guilt, then Justice Kagan's approach would prohibit punishment. Surely, this could not be the case; common sense requires that the serial murderer be punished.

Moreover, while less critical to this discussion, it is worth mentioning that Justice Kagan failed to account for the effect on deterrence within her opinion.[174] In *Ford*, the Court acknowledged that deterrence, long recognized in American jurisprudence, is one of the purposes of capital punishment.[175] However, while relying on the rationale of *Ford*, Justice Kagan omitted any mention of deterrence, focusing solely on the retributive justification for punishment.[176] While Justice Kagan may have brushed off a discussion of deterrence because someone who cannot remember their crime likely cannot be deterred due to mental illness, it is nevertheless problematic once it becomes clear that the majority's purported offender-centric view of retributivism is unworkable. The deterrent value of capital punishment, while not uncontroversial,[177] is to affect a marginal reduction

[173] Madison v. Ala., 139 S. Ct. 718, 727 (2019).
[174] *See id.* at 728.
[175] Ford v. Wainwright, 477 U.S. 399, 407 (1986) ("[I]t provides no example to others and thus contributes nothing to whatever deterrence value is intended to be served by capital punishment.").
[176] *See Madison*, 139 S. Ct. at 718.
[177] Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927, 927 (1983). *See* THORSTEN SELLIN, THE DEATH PENALTY 19–24 (The American Law Institute, 9th ed. 1959); KARL F. Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS AM. ACAD. POL. & SOC. SCI. 54 (1952). These two authorities are frequently cited in abolitionist arguments, showing that there is no deterrence achieved through the implementation of the death penalty. *But see* Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). This

in the supply of the most heinous offenses.[178] The fact that Madison no longer remembers his crime is irrelevant to the theory of deterrence because he was of sound mind at the commission of the crime. Therefore, deterrence theory supports the execution in the case of *Madison*.

Ultimately, Justice Kagan's opinion adheres too mechanistically to precedent. Starting in *Ford*, and reinforced in *Panetti*, the Supreme Court has purported an offender-centric view of retributivism that finds no support in the theoretical confines of retributivism. Critics often point out that the shortcoming of this theory is the disregard for the offender's humanity.[179] However, this is the consequence of a judicial system enamored with the need to balance injustice.[180] Justice Kagan, reiterating the point of previous courts, stated that there is a "moral 'intuition' that 'killing one who has no capacity' to understand his crime or punishment 'simply offends humanity.'"[181] This emphasis on morality highlights another shortcoming of the jurisprudence surrounding the execution of those who cannot appreciate their punishment.

B. A Convoluted Distinction Between Insanity and Incompetency, and the Imbalance of "Moral Worth"

Criminal insanity is understood as "lacking criminal responsibility because of a mental disorder or defect therefore lack[ing] the capacity to appreciate crime."[182] As explained previously,[183] this is different from criminal incompetency, where the test is to determine whether the accused is of a mental state that will prohibit their ability to raise an effective defense.[184] However, the Court, beginning in *Ford*, blurred the distinction between the two concepts when it established that the mentally insane could not be executed, but implemented a test of competency to analyze whether execution could proceed; competency that had previously been relevant in determining whether an offender was fit to stand trial.[185] This ill-suited

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is one of the earliest empirical studies showing a correlation between the death penalty and deterrence. It was cited by the Solicitor General in an amicus brief supporting the death penalty during the case of *Gregg v. Georgia*, 428 U.S. 153 (1976), which resulted in the Court finding capital punishment not to be *per se* unconstitutional. *See also* Ernest Van Den Hagg, *On Deterrence and the Death Penalty*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 141, 145 (discussing the deterrent value of the death penalty).

[178] Forst, *supra* note 177, at 928.

[179] David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992) (arguing that it is a common mistake for retributivists to believe that "[r]etributivism accords the proper *respect* to the personhood of the criminals who are punished.").

[180] *See generally* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 186–87 (Oxford University Press 1997) (stating that retribution is a human instinct that has guided the formation of laws).

[181] Madison v. Ala., 139 S. Ct 718, 722–23 (2019) (citing Ford v. Wainwright, 477 U.S. 399, 407, 409 (1986)).

[182] *Forensic Psychologists in Determining Insanity and Competency to Stand Trial, supra* note 103.

[183] *See supra* Section II.D.

[184] Magnus, *supra* note 102, at 22.

[185] *Ford*, 477 U.S. at 417.

conjunction has facilitated the promulgation of the unsupported version of retributivism, where morality is emphasized rather than formality.

Early English common law has guided policy makers in their understanding of the acceptability of punishing the insane.[186] Rarely was execution tolerable.[187] William Blackstone, in his *Commentaries on the Laws of England*, branded the act as inhumane, stating, "[i]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself."[188] This sentiment has been consistently affirmed, and today, every state within the Union has some form of defense of insanity written into law.[189] However, an inability to appreciate the commission of a crime is entirely different than the standard set forth in *Ford*, requiring an appreciation of punishment.

It is indisputable that moral constraints bar the execution of one who could not appreciate their crime while committing it. This would be no different than condemning the actions of a child. Indeed, historically, the insane have often been equated with children.[190] It would no doubt "offend humanity" to levy the most severe punishment on one who did not understand that what they did was wrong. However, the same cannot, and should not, be said for someone who knew the consequences of their actions when committing heinous acts, but who later lost appreciation for the punishment. Justice Powell intimated as much in his concurrence in *Ford*, when he stated that "Perce[ption]" and "aware[ness]" of punishment alone, satisfies the constitutional threshold of the Eighth Amendment.[191]

Morality is deeply rooted in American jurisprudence. Prescribers of natural law point to the language of the Declaration of Independence, stating, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[192] This language gave way to one of the most fundamental protections of the Constitution: that every citizen of the United States is entitled to the protection of due process of law.[193] It is through this principle, in conjunction with the prohibition on cruel and unusual punishment, that the Supreme Court has barred execution of the insane and held that the incompetent are unfit to stand trial.

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[186] *Id.* at 406. ("the practice has consistently been branded 'savage and inhumane.'").
[187] *Id.*
[188] 4 WILLIAM BLACKSTONE, COMMENTARIES *16.
[189] *The Insanity Defense Among the States*, FINDLAW (Jan. 23, 2019), https://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html [https://perma.cc/VUE8-LEXZ].
[190] *See* Peter Ash, *But He Knew It Was Wrong: Evaluating Adolescent Culpability*, 40 J. AM. ACAD. PSYCHIATRY & L. 21, 21 (2012); Laurence Armand French, *Mental Retardation and the Death Penalty: The Clinical and Legal Legacy*, 69 FED. PROB. 16, 16–20 (2005).
[191] *Ford,* 477 U.S. at 421–22 (Powell, J., concurring).
[192] U.S. DECLARATION OF INDEPENDENCE.
[193] U.S. CONST. amend. V ("[N]or be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property without due process of law.").

Scholars have argued that the same moral constraint that bars execution of the insane also bars the adjudication of the incompetent.[194] The same moral confines allegedly necessitate a bar on the execution of those who develop insanity after conviction; however, this is not the case.[195] Blackstone went on to say that "if, after judgment, he becomes of non-sane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."[196] The argument is that it would be inhumane and thus, immoral, to execute a post-conviction insane criminal because it removes the potential to bring a challenge to prove their innocence. Therefore, the competency for execution is a natural extension of the competency to stand trial. However, as Justice Powell explained in his concurrence of *Ford*, this argument has little merit because "[m]odern practice provides far more extensive review of convictions and sentences than did the common law . . . . It is thus unlikely indeed that a defendant today could go to his death with knowledge of undiscovered trial error that might set him free."[197] Thus, the claim that post-conviction insanity will prevent a defense from being raised prior to execution—which is the concern of incompetency—is unrealistic in today's justice system, and therefore, does not risk offense to humanity. Furthermore, common law concerns over incompetency stemmed largely from the fact that execution took place almost immediately after sentencing.[198] Therefore, the concern was that if the prisoner was incompetent at execution, he was more than likely incompetent during trial.[199] This problem is nonexistent in the modern American legal system because of the extended time between trial and execution.[200]

Scholars also present an argument on the disproportionality of moral worth when post-conviction insanity affects an offender who is set to be executed.[201] The Court in *Ford* applied this theory, quoting one scholar who contended that the "moral quality . . . has lesser value" for an insane person.[202] However, this argument was addressed already in the preceding discussion of the purpose of retributivism.[203] There is no less value in executing someone with post-conviction insanity because the harm to

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[194] BLACKSTONE, *supra* note 188, at *16.
[195] *Ford*, 477 U.S. at 407 (citing 3 E. COKE, INSTS. 6 (6th ed. 1680); 1 M. HALE, PLEAS OF THE CROWN 35 (1736); 1 W. HAWKINS, PLEAS CROWN 2 (7th ed. 1795); HAWLES, REMARKS ON THE TRIAL OF MR. CHARLES BATEMAN, 11 HOW. ST. TR. 474, 477 (1685)).
[196] BLACKSTONE, *supra* note 188, at *17.
[197] *Ford*, 477 U.S. at 422 (Powell, J., concurring).
[198] *Id.* at 420.
[199] *Id.*
[200] *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row [https://perma.cc/RF37-YNNT] ("Death-row prisoners in the U.S. typically spend more than a decade awaiting execution. Some prisoners have been on death row for well over 20 years.").
[201] *Ford*, 477 U.S. at 408.
[202] *Id.* (quoting Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 387 (1962)).
[203] *See supra* Section IV.A.

society was incurred while the offender was of sound mind. Therefore, since society has already determined that the death penalty was the proportionate sentence, only the capital punishment could alleviate the harm to the populous.

By applying the same concept of morality, which supports the prohibition of the execution of the insane, to the precondition of competency, which has morphed from the ability to stand trial to the ability to appreciate the punishment, the Court confused two separate components of the justice system that are not intended to intersect.[204] Insanity is a possible mental state during the commission of the crime; incompetency is an ability to raise an effective defense.[205] If the Court insists on adopting an exclusively offender-centric view of retribution that is predicated on a lopsided perspective of morality, the question of what justification exists for any form of punishment for those who suffer from mental illness becomes apparent.

C. A Lack of Justification for Any Punishment

The preceding sections of this Case Note illustrated several difficulties afflicting the rationale of the majority in *Madison*.[206] Although Justice Kagan did not deviate from the precedent set in *Ford* and *Panetti*, the consequence of the continually reaffirmed rule—that the sole question is whether the offender could reach a rational understanding of why the state has sought execution—is that there is little argument to support punishment of the insane. If we accept the Court's contention of *Ford*, *Panetti*, and *Madison*, that the post-conviction mentally insane should be exempt from capital punishment if they cannot appreciate their punishment, then they must also be exempt from all other punishment because none of the fundamental theories of punishment, both articulated and omitted by the Court, support otherwise.

The prevailing justifications for the death penalty come from deterrence and retribution.[207] Incapacitation can also support the death penalty, although rehabilitation theories cannot.[208] Justice Kagan, in reaching her conclusion that it is permissible to execute someone who does not recall their crime, solely relied on retribution.[209] Holding that the perpetrator must be capable of appreciating their punishment, the majority advanced their offender-centric view of retributivism. Now that it is apparent the *Panetti* test is unworkable, the majority is left without any legitimate justification for its decision.[210] This is problematic because the Court reached its decision, not

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[204] Magnus, *supra* note 102, at 22–23.
[205] *Id.*
[206] *See supra* Sections IV.A & B.
[207] Ford v. Wainwright, 477 U.S. 399, 406–08 (1986).
[208] *But see* Harris v. Ala., 513 U.S. 504, 517 (1995) (finding incapacitation "largely irrelevant" to the analysis of execution).
[209] Madison v. Ala., 139 S. Ct. 718, 722–23 (2019).
[210] With the only justification for the test disproven, the result must be that the test would fail.

through examination of theory and legal standards, but through its own arbitrary intuition of what is right and wrong.[211]

Regardless, even if we were to accept this offender-centric view of retributivism, another shortcoming becomes apparent. The same argument against capital punishment would be equally as strong against the incarceration of post-conviction insane persons.[212] Assume that Madison was unable to appreciate the reason why the state sought to execute him. This would undoubtedly be a result of the cognitive impairment that had befallen him. It seems unlikely then that his cognitive impairment would allow him to appreciate being left in prison for the remainder of his life. So, how would the Court be able to justify that punishment but not the other? Fortunately, Justice Kagan did not have to decide this question; but the question remains, nonetheless. The offender-centric version of retributivism surely is not satisfied by the lesser sentence of life imprisonment because it is still morally inappropriate to allow someone to wither away in prison while oblivious to the reason why.[213]

Moreover, it does not seem immediately clear how deterrence would be furthered by any reduction in the punishment of the post-conviction insane. In *Ford,* Justice Marshall, writing for the majority, stated that execution of the insane "provides no example to others and thus contributes nothing to whatever deterrence value is intended."[214] Again, this same argument easily applies to lesser punishment. Punishing Madison to any extent would not function as a warning for others who suffer from insanity because they already lack the requisite ability of comprehension. Perhaps the argument would be that the punishment serves to deter the general populous to the same extent as the punishment of an ordinary offender serves as deterrence. However, this view of deterrence would not coincide with the *Panetti* rule, for it would allow for execution regardless of mental state.

The only theory of punishment which has any value—without being counterintuitive to the Court's administration of the *Panetti* test—is incapacitation. But incapacitation alone is both morally reprehensible, and

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[211] One of the largest critiques of the Supreme Court is the notion of "judicial activism." *See* James Rogers & Georg Vanberg, *Resurrecting Lochner: A Defense of Unprincipled Judicial Activism*, 23 J.L., ECON. & ORG. 442, 445 (2007) ("[J]udicial activism . . . represents an unwarranted intrusion of the judiciary into democratic decision making.").

[212] *See* Lauren Perry, *Hiding Behind Precedent: Why* Panetti v. Quarterman *Will Create Confusion for Incompetence Death Row Inmates*, 86 N.C. L. REV. 1068, 1085 (2008) ("[T]he Court does not address the fact that mentally incompetent individuals must have a rational understanding to be executed, but that no such understanding is required for incarceration.").

[213] Katie Quandt, *Life Without Parole Is No Moral Alternative to the Death Penalty*, AM. MAG. (April 30, 2018), https://www.americamagazine.org/politics-society/2018/04/10/life-without-parole-no-moral-alternative-death-penalty [https://perma.cc/Y73R-2BLW] (quoting Pope Francis who described life imprisonment as "death penalty in disguise.").

[214] Ford v. Wainwright, 477 U.S. 399, 407 (1986).

constitutionally questionable.[215] For the Court to advance the rationale that it is going to incarcerate for the sole purpose of taking the mentally insane "off of the streets," it would revert society to a period in time when mandatory institutionalizations were commonplace.[216] This period in the history of mental health institutions has been widely condemned in the United States.[217] Additionally, little discussion must be given to rehabilitation because the theory is inapplicable. If post-conviction inmates were able to recover from their insanity, the issue of capital punishment administration would be irrelevant.

If the pitfalls of the *Panetti* test were not apparent from its deviant model of retributivism, its defects are plainly evident in the consequence of its application. An administration of the test is devoid of any clear answer for why its application would not extend to all punishments of the post-conviction insane. The rule must either be reworked or replaced.[218]

D. Alternatives to the Panetti Test

As should be apparent, the administration of the *Panetti* test by the *Madison* majority, while consistent with precedent, is deeply problematic. Even at the time of the formation of the test, criticisms arose regarding its practical application. Justice Thomas stated in his *Panetti* dissent that the Court had done nothing more than present a "half-baked holding that leaves the details of the insanity standard for the District Court to work out."[219] Since the decision, clarity about what constitutes the "rational understanding" necessary to appreciate punishment has not been further elucidated. As predicted by Justice Thomas, lower courts have had the burden of implementing a test that cannot be fully understood.[220] Instead of perpetuating this problem, an alternative to the *Panetti* test should be devised.

One compelling alternative consistent with the moral constraints of the majority would be to delineate indicia of specific circumstances that would trigger a stay of execution.[221] This test would require a compilation of diagnoses, preferably performed by a board of psychologists. Although this takes discretion out of the hands of the Court, it places the question squarely

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[215] Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 2 (2017) ("[I]ncapacitation justifies incarceration, only insofar as it reduces crimes overall, and at an acceptable social cost.").

[216] Rob Whitley, *The Antipsychiatry Movement: Dead, Diminishing, or Developing*, PSYCHIATRIC ONLINE (Oct. 1, 2012), https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201100484 [https://perma.cc/XJ9C-RUK3] (describing the antipsychiatry movement that began in the 1960s which challenged the common practices taking place within mental institutions).

[217] *Id.*

[218] Several other issues have been raised regarding the *Panetti* test's procedural requirements upon the states. Those arguments have been omitted because they do not serve a purpose in the current discussion. *See* Perry, *supra* note 212, at 1069 (discussing the potential ramifications of the *Panetti* test).

[219] Panetti v. Quarterman, 551 U.S. 930, 978 (2007) (Thomas, J., dissenting).

[220] Perry, *supra* note 212, at 1083.

[221] *Id.* at 1084.

in front of the experts who are currently responsible for making the much more oblique determination of rational understanding.[222] Moreover, this would create a bright-line rule that would compel uniformity in its administration.[223] While one of the foremost concerns with capital punishment is the risk that it may be administered to innocent individuals, this test would likely be overinclusive, preventing the execution of the less obvious cases that currently exist, where rational understanding is heavily disputed.[224]

Another alternative would simply be to allow the execution of post-conviction insane offenders. This would rebuff the offender-centric view of retributivism, instead conforming to the traditional interpretation of the fundamental theory of punishment. As articulated, there is both retributive and deterrent value in the execution of any prisoner who was of sound mind during the execution of the crime.[225] This would not only prevent any disagreement over diagnoses, but it would also expedite the currently strung-out administration of the punishment. Moreover, it would resolve the confusion currently engendered by the *Panetti* test. For instance, the *Panetti* Court references a predicament that a psychopath would create under the currently administered test.[226] It may very well be the case that they suffer from no mental illness and yet are not able to appreciate their punishment simply because they are "so self-centered and devoid of compassion as to lack all sense of guilt."[227] While the *Panetti* Court fails to address how this case would be resolved, under the alternative rule, it would be a nonissue because there is no question of appreciation of punishment. If a jury of peers were not persuaded by a defense of insanity, then there would be no later examination, and execution could commence.

The final alternative, while not a replacement of the *Panetti* test, would be a procedural adjustment that would all but eliminate the problem of post-conviction insanity. If a temporal restriction were placed on capital punishment, requiring its administration to occur within a designated period, it would drastically lower the likelihood of offenders acquiring insanity. The length in time that offenders spend on death row is already a topic which abolitionists use to argue against capital punishment.[228] From 1984 to 2017, the average time between sentencing and execution has risen from 74 to 243 months.[229] This means that the average death row inmate waits more than twenty years for their execution.[230] Ironically, not only does

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[222] *Id.* (citing Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-6407) ("there is no meaningful way to define 'rational understanding.'")).

[223] *Id.* (discussing that while experts may disagree about rational understanding, it is less likely that they will disagree about actual diagnosis).

[224] *Id.*

[225] *See supra* Section IV.A.; Chris Koepke, Panetti v. Quarterman*: Exploring the Unsettled and Unsettling*, 45 HOUS. L. REV. 1383, 1402 (2008).

[226] Panetti v. Quarterman, 551 U.S. 930, 960–61 (2007).

[227] *Id.* at 961.

[228] *Time on Death Row*, *supra* note 200.

[229] *Id.*

[230] *Id.*

this extended period of wait increase the likelihood of independently developing mental illness, but it may also play a causal role in the development of mental illness.

Death Row Syndrome, or the Death Row Phenomenon, is the theory that the mental strain of awaiting execution causes cognitive deterioration, the extent of which is dependent on the length of the wait.[231] This theory originated in the extradition hearings of the European Court of Human Rights, where it was determined that the United Kingdom would not extradite accused criminals to any country where the death penalty was administered.[232] To justify their decision, the court reasoned that the lengthy period between conviction and administration is as psychologically damaging as torture.[233] Additionally, it has been explained that "death row inmates live in a state of constant uncertainty over when they will be executed' and that 'this isolation and anxiety results in a sharp deterioration of the [] mental capacity'" of inmates.[234] The practical restraint on this alternative is that while the length is dependent on a number of variables, the largest factor is the extent to which the offender appeals his conviction and sentence of death.[235]

V. CONCLUSION

In *Madison v. Alabama*, the Court concluded that the Eighth Amendment does not prohibit the execution of those that do not recall the commission of their crimes. However, in reaching this decision, the Court adopted a test that requires the offender to appreciate why the state has chosen to administer capital punishment. While this is consistent with precedent, the rationale behind the test is ultimately grounded in an unfounded, offender-centric view of retributivism that incorrectly infuses the Court's own view of morality. As a result, the decision seems to be little more than an example of judicial activism. The apparent lack of remaining justification for the incarceration of the post-conviction insane, the numerous hypotheticals, and the convoluted distinction between mental insanity and incompetency, all point to the fact that requiring an appreciation for punishment is an unworkable standard that must be replaced. The Supreme Court has a duty to ensure that the Constitution is being adhered to, however, they must also be held accountable when the decisions they reach lack foundation.

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[231] Perry, *supra* note 212, at 1076; Benson, *supra* note 26, at 46 (explaining several studies conducted that show mental health deterioration from extended incarceration). One of these studies is the infamous Stanford Prison Experiment. Haney and Zimbardo explained that incarceration causes "psychologically healthy individuals [to] become sadistic or depressed when placed in a prison-like environment."). *Time on Death Row*, *supra* note 200.

[232] *Time on Death Row*, *supra* note 200.

[233] *Id.*

[234] Perry, *supra* note 212 (quoting Stephan Blank, *Killing Time: The Process of Waiving Appeal, The Michael Ross Death Penalty Cases*, 14 J.L. & POL'Y 735, 752 (2006)).

[235] *Time on Death Row*, *supra* note 200.