

***Panetti v. Quarterman*: Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?**

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The Supreme Court’s reversal of the Fifth Circuit’s refusal to grant federal habeas relief to Texas death row inmate Scott Panetti¹ was an odd finale to a Term widely viewed as reflecting a sharp turn to the right under the stewardship of the new Chief Justice, John Roberts. Indeed, the same day *Panetti* was decided, the Court handed down its invalidation of two voluntary school desegregation plans,² leading Justice Breyer to offer a lengthy and stinging dissent from the bench, which included the dire lament: “It is not often in the law that so few have so quickly changed so much.”³ A month later, Senator Charles Schumer gave a rousing speech decrying the way the Senate had been hoodwinked during Roberts’s confirmation hearings, recalling with derision Roberts’s pledge of judicial modesty in which the then-nominee described the role of a judge as mere “umpire” rather than player in legal disputes. Quipped Schumer, “If the past Supreme Court Term were a movie, it might be called ‘The Umpire Strikes Back.’”⁴ While the Term was undoubtedly a disappointment overall to liberals, it was not nearly so bleak in the arena of capital punishment. A victory for a death row inmate is a rare event in any Term, and *Panetti* was one of four capital reversals from Texas alone in the 2006 Term. To carry on Schumer’s parody, while the “Umpire” may have been striking back, the “Death Star” (Lone Star?) was under serious attack.

Panetti thus has clear political import: in a Court trending toward the right, it reflects a solid coalition of five justices who are willing to put the brakes on the use of capital punishment—at least in the nation’s death penalty powerhouse, a state responsible for the lion’s share of executions since 1976.⁵ The Court’s

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¹ The Supreme Court’s decision in the case is *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007).

² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

³ Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1.

⁴ Schumer Declares Democrats Hoodwinked into Confirming Chief Justice Roberts, Urges Higher Burden of Proof for Any Future Bush Nominees, July, 27, 2007, <http://www.senate.gov/~schumer/SchumerWebsite/pressroom/record.cfm?id=280107&>.

⁵ Texas is responsible for 405 of the 1,099 executions since 1976, and more than half (26 out of 41) of the executions performed thus far in 2007. See Death Penalty Info. Center, Number of

decision in *Panetti* managed to discredit the Eighth Amendment holdings of *both* the Texas state courts and the Fifth Circuit, reflecting the same exasperation with these courts' parsimonious (at best) or mutinous (at worst) readings of Supreme Court precedent that was evident in the Court's other capital reversals earlier in the Term.⁶ Just a few weeks before announcing its decision in *Panetti*, the Court also rejected the state of Texas's plea to review a decision of the very closely divided *en banc* Fifth Circuit, which (finally) offered capital defendants a generous interpretation of Supreme Court precedent.⁷

At the same time, however, a different coalition on the Court has been reining in the other outlier in the administration of capital punishment—the Ninth Circuit, which has regularly pushed the envelope of the Court's Eighth Amendment jurisprudence to protect capital defendants, usually from the state of California, which has the largest death row in the country.⁸ Justice Kennedy, the key swing vote here as elsewhere, abandoned the liberal wing of the Court to reverse all three Ninth Circuit grants of habeas relief in capital cases this past Term.⁹ This Kennedy-led crusade to temper both the Fifth Circuit's enthusiasm and the Ninth Circuit's reluctance to allow executions to go forward is reminiscent of the middle ground forged in an earlier era of death penalty regulation. In the 1970s and 1980s, a centrist coalition (of which Justice Stevens is the only member still sitting on the Court) forged a middle path between death penalty abolitionists (Brennan and Marshall) and death penalty de-regulators (Burger, Rehnquist, and Scalia). This “mend it, don't end it” approach led to the creation of the complex body of law that the Court now oversees in the Fifth, Ninth, and other federal circuits, as well as in state supreme courts. Kennedy seems determined to keep the Court on the same middle path in its role as overseer of the centrist legacy, and he has used his swing vote to maintain this course throughout this past Term.

What *Panetti* means in terms of mapping the overarching politics of the Court is much clearer, however, than what it means in its particulars for the complex

Executions by State and Region Since 1976, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Oct. 10, 2007).

⁶ See *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007); *Smith v. Texas*, 127 S. Ct. 1686 (2007).

⁷ See *Quarterman v. Nelson*, 127 S. Ct. 2974 (2007) (denying certiorari); *Nelson v. Quarterman*, 472 F.3d 287 (2006) (*en banc*) (granting federal habeas relief on the ground that Texas's capital sentencing procedure failed to give constitutionally sufficient effect to petitioner's mitigating evidence in violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Tennard v. Dretke*, 542 U.S. 274 (2004)).

⁸ California has 660 inmates on its death row, as compared to 393 in Texas. See Death Penalty Info. Center, *Death Row Inmates by State and Size of Death Row by Year*, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#state> (last visited Oct. 10, 2007). But in executions, Texas by far outstrips California, with 405 compared to 13 since 1976. See Death Penalty Info. Center, *Number of Executions by State and Region Since 1976*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Oct. 10, 2007).

⁹ See *Ayers v. Belmontes*, 127 S. Ct. 469 (2006); *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007); *Uttecht v. Brown*, 127 S. Ct. 2218 (2007).

body of capital punishment law of which it is now a part. While the case garnered by far the most media attention among the four capital cases from Texas that were reviewed by the Supreme Court this past Term, little of that attention focused on the particular legal issues presented by the case. Rather, much ink was spilled documenting the gruesomeness of the crime and the oddities of the defendant. The facts of the case were indeed horrifying: Panetti broke into the home of his estranged wife's parents and gunned down his in-laws in front of his wife and daughter; he then held hostage his wife and daughter until eventually surrendering to police. And the defendant's odd behavior ensured that the capital trial that ensued was a circus: Panetti, who had long suffered from severe mental illness, stopped taking his anti-psychotic medication and insisted on representing himself. During his trial, he engaged in behavior that his appointed standby counsel later described as "bizarre," "scary," and "trance-like."¹⁰ Dressed in a cowboy suit, Panetti rambled incoherently and badgered the judge, the prosecuting attorney, and witnesses. He attempted to subpoena over 200 witnesses, including John F. Kennedy, the Pope, and Jesus. When he testified about the crime, he assumed the personality of "Sarge" and spoke in odd, fragmented sentences, such as: "Sarge, boom, boom. Sarge, boom, boom, boom, boom."¹¹

The most obvious legal issues raised by Panetti's trial were not the ones that the Supreme Court agreed to review. Amazingly, Panetti was found competent to stand trial for his life and to represent himself, and these findings were affirmed every step of the way in appellate and post-conviction proceedings. So was the jury's rejection of his insanity defense. The issues before the Court involved only Panetti's much more recent mental competence—his competence *to be executed*—and thus called upon the Court to interpret its cryptic precedent in *Ford v. Wainwright*,¹² which established that "the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."¹³ As Justice Powell, who cast the crucial fifth vote in *Ford*, recognized in his concurring opinion: "[t]hat conclusion leaves two issues for our determination: (i) the meaning of insanity in this context, and (ii) the procedures States must follow in order to avoid the necessity of *de novo* review in federal [habeas] courts. . . ."¹⁴ According to Powell, the standard for competence to be executed requires that those who are executed know the fact of their impending execution and the reason for it,¹⁵ and the "basic requirements" of due process for determining whether a prisoner is competent to be executed are that "[t]he State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel,

¹⁰ Panetti v. Quarterman, 127 S. Ct. 2842, 2849 (2007).

¹¹ These facts are from the Brief for Petitioner at 11–14, Panetti v. Quarterman, 127 S. Ct. 2842 (2007) (No. 06-6407).

¹² 477 U.S. 399 (1986).

¹³ *Id.* at 409–10.

¹⁴ *Id.* at 418 (Powell, J., concurring).

¹⁵ *Id.* at 422.

including expert psychiatric evidence that may differ from the State's own psychiatric evidence."¹⁶

Scott Panetti's case raised questions about both of these holdings, but the Court's opinion is notable for how little it manages to say in answering them. As for the first holding regarding the substantive standard for competence, Panetti "knew" in some minimal sense the fact of his impending execution and the reason for it: he knew that he had been convicted of killing his in-laws and that the state of Texas *claimed* that this was the reason that it was seeking to execute him. But according to expert testimony offered by Panetti's lawyers, Panetti was convinced that this stated reason was a "sham" and that the *real* reason Texas sought to execute him was "to stop him from preaching."¹⁷ The defense experts testified that Panetti's longstanding "schizo-affective disorder" was responsible for this "genuine" and "fixed" delusion.¹⁸ The Supreme Court held that the Fifth Circuit's narrow and formalistic test for competence to be executed, which foreclosed any consideration at all of the rationality of a prisoner's awareness of his pending execution, was "too restrictive,"¹⁹ but the Court also acknowledged that "a concept like rational understanding is difficult to define"²⁰ and it declined "to set down a rule governing all competency determinations."²¹ Instead, the Court remanded for further development of the record and factual findings, and it invited the district court to try to formulate and apply a more precise standard in the first instance.

The Court was similarly non-committal about the second holding regarding the necessary procedures for considering a claim of incompetence to be executed. Accepting that Panetti had made a substantial showing of incompetence in his initial submissions to the state court, the Court concluded that Panetti was denied "an adequate opportunity to submit expert evidence in response to the report filed by the court-appointed experts."²² It is not clear whether the Court means that Panetti should have been afforded the evidentiary hearing that he repeatedly requested, or simply that he should have been permitted to file further affidavits from defense experts rebutting the claims made by the court-appointed experts. The holding is muddled by the Court's litany of the many particular inadequacies of the state process in Panetti's case, including misinformation supplied by the court and a possible failure of the court to adhere to a state law requirement that a final competency hearing be held.²³ Thus, it remains an open question whether, in

¹⁶ *Id.* at 427.

¹⁷ Panetti v. Quarterman, 127 S. Ct. 2842, 2859 (2007).

¹⁸ *Id.*

¹⁹ *Id.* at 2860.

²⁰ *Id.* at 2862.

²¹ *Id.*

²² *Id.* at 2857.

²³ *Id.* at 2856–57.

the context of *Ford* competency determinations, the sort of “paper hearings”²⁴ preferred by many Texas post-conviction courts comport with the requirements of due process. The Court held only that what occurred in Panetti’s particular case was inadequate; it made clear that it was not prepared to decide “whether other procedures, such as the opportunity for discovery or for the cross-examination of witnesses, would in some cases be required under the Due Process Clause.”²⁵

It may be that the most significant holding of *Panetti* is its interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), permitting Panetti to file his *Ford* claim in a second habeas petition after an earlier petition raising challenges to his conviction and sentence had been denied. AEDPA flatly forbids “second or successive” habeas petitions except in narrow circumstances not applicable to Panetti’s case.²⁶ But the Court held that requiring all death row petitioners to raise *Ford* claims in their initial federal habeas petitions, long before their executions were even scheduled, would require diligent attorneys to raise such claims in every case—even if frivolous—in order to preserve the issue for those prisoners whose mental health turned out to deteriorate on death row to such a degree as to preclude execution. The Court concluded that the perverse implications of such a requirement for habeas practice, along with the failure of such a requirement to promote AEDPA’s purposes of furthering comity, finality, and federalism, counseled against a formal, literal reading of the language of the statute. This holding is one that may have important consequences not only for death row petitioners with *Ford* claims, but also for all habeas petitioners in future interpretations of AEDPA. What consequences it will have more broadly, however, seems to be entirely up to Justice Kennedy, given that *Panetti*’s AEDPA holding is in tension with the Court’s decision exactly two weeks earlier in *Bowles v. Russell*,²⁷ in which the opposite 5-4 alignment (with Kennedy swinging the other way) refused to make an equitable exception to the time limits in the Federal Rules of Appellate Procedure. The Court held that a habeas petitioner’s appeal was time-barred, even though he filed it with the 17-day period erroneously granted by the district court to appeal, because the applicable Rule granted only 14 days. In *Bowles*, the Court declined to take the practical and purposive approach to statutory interpretation that it later applied in *Panetti*. Thus, even though *Panetti*’s habeas holding is more clear and far-reaching than its interpretations of *Ford*, we are still left wondering what, precisely, it will mean for the future.

²⁴ Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1887 (2006) (describing Texas post-conviction proceedings in which “trial courts hold euphemistically termed ‘paper hearings’ in which the two sides submit conflicting affidavits, and the court simply endorses one version (typically the prosecution’s) over the other”).

²⁵ *Panetti*, 127 S. Ct. at 2858.

²⁶ 28 U.S.C. § 2244(b)(2) (2000).

²⁷ 127 S. Ct. 2360 (2007).

The tensions and uncertainties that plague *Panetti*'s three central doctrinal holdings are substantial and important. But they pale in comparison to the larger tensions and uncertainties that plague the Supreme Court's Eighth Amendment jurisprudence. *Panetti* leaves us not only with questions about particular doctrines, but also with more global questions about the proper scope of Eighth Amendment constraints on punishment and the methodology for determining that scope. What follows is a brief sketch of three of these deeper questions that are highlighted and exacerbated by *Panetti*.

I. IS THE EIGHTH AMENDMENT AGNOSTIC ABOUT PENOLOGICAL PURPOSES?

In the non-capital context, the Supreme Court has insisted that the Eighth Amendment's prohibition against cruel and unusual punishments entails a requirement—albeit a minimal one—of “proportionality.” But what must punishments be proportional *to*? And what methodology should the Court use in making this determination? The Court's answers to these questions have rightly been termed a “mess”²⁸ and recently have led numerous scholars to offer ways to “clean [it] up.”²⁹ In the morass, however, one theme has remained consistent: the Court insists that the Constitution is agnostic when it comes to penological purposes. That is, states are free to choose their penal goals and to structure their punitive practices to achieve those goals.

In one of the Court's earliest cases applying the Eighth Amendment to state criminal prohibitions, *Powell v. Texas*,³⁰ a badly fractured Court upheld the petitioner's conviction for public drunkenness, despite the trial court's “finding” that he suffered from a compulsion to drink that was a product of the “disease” of chronic alcoholism. Writing for the plurality, Justice Marshall explained that the Court should be wary of constitutionalizing the substantive criminal law because “[it] has always been thought to be the province of the States” to address “the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.”³¹ In the Court's most recent case applying the Eighth Amendment to a non-capital criminal

²⁸ Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005).

²⁹ *Id.* See also Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005); Pamela S. Karlan, *“Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005); Margaret Raymond, *“No Fellow in American Legislation”: Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251 (2006); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L. REV. 263 (2005).

³⁰ 392 U.S. 514 (1968).

³¹ *Id.* at 536.

sentence, *Ewing v. California*,³² the Court upheld a sentence of twenty-five years to life for the theft of three golf clubs under California's harsh "three-strikes-you're-out" sentencing regime. Once again, the Court stressed "the primacy of the legislature, the variety of legitimate penological schemes, [and] the nature of our federal system"³³ as reasons to take a highly deferential stance in reviewing state punishment outcomes under the Eighth Amendment. The Court insisted that "the Constitution 'does not mandate adoption of any one penological theory.'"³⁴ Only if a punishment is grossly disproportionate with regard to *any* possible purpose of punishment should the Court perform a more searching Eighth Amendment analysis. The Court observed that California's draconian sentencing scheme reflected its legislature's judgment that "protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime."³⁵ That legislative choice was entitled to deference under the Eighth Amendment, held the Court, despite Ewing's substantial claim that his punishment exceeded what could be considered just in relation to his moral culpability, under a retributive or "just deserts" theory.

Whatever one thinks of the Court's "any penological theory will do" approach in its non-capital Eighth Amendment cases, it at least has the virtue of being unambiguous. The Court's Eighth Amendment cases in the capital context are another story. Starting in *Furman v. Georgia*,³⁶ members of the Court began to talk in terms of the purposes of punishment, rejecting capital punishment as "cruel and unusual" if it could not be said to serve any valid penological end,³⁷ or for some of the justices, if it could not serve any penological end more effectively than a less severe penalty.³⁸ Quickly, though, the Court's capital cases began to narrow the field of valid ends that capital punishment might serve. In *Gregg v. Georgia*,³⁹ the plurality explained that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence,"⁴⁰ relegating incapacitation to a footnote—in sharp contrast to its more recent non-capital cases. Less than a decade later, in

³² 538 U.S. 11 (2003).

³³ *Id.* at 23 (quoting *Harmelin v. Michigan*, 510 U.S. 957, 1001 (1991)).

³⁴ *Id.* at 25 (quoting *Harmelin*, 510 U.S. at 999).

³⁵ *Id.* at 25.

³⁶ 408 U.S. 238 (1972).

³⁷ *Id.* at 313 (White, J., concurring) (capital punishment invalid as administered because "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice").

³⁸ *Id.* at 286 (Brennan, J., concurring) (capital punishment invalid because it "cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment"); *id.* at 359 (Marshall, J., concurring) (capital punishment invalid because it "serves no purpose that life imprisonment could not serve equally well").

³⁹ 428 U.S. 153 (1976).

⁴⁰ *Id.* at 183.

Spaziano v. Florida,⁴¹ the Court engaged in a lengthy and confusing discussion about whether the purposes of capital punishment differ from those of other criminal punishments, accepting that “the primary justification for the death penalty is retribution,” while at the same time acknowledging that “the distinctions between capital and noncapital sentences are not so clear” and that the death penalty, like ordinary criminal punishments, also serves other ends.⁴² As for incapacitation, the *Spaziano* Court noted ambiguously (and in the passive voice) that although “incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding.”⁴³ Since then, the Court has been fairly consistent in reiterating *Gregg*’s emphasis on the twin goals of retribution and deterrence as permissible penological ends for capital punishment, most notably in its recent cases outlawing capital punishment for juvenile offenders and offenders with mental retardation.⁴⁴

Consistent, however, is not the same as convincing. It is hard to accept the Court’s claims that there is no plausible deterrence rationale that might support a legislative choice in favor of capital punishment in many of the contexts in which the Court has so held. For example, as the dissenters in *Atkins v. Virginia* and *Roper v. Simmons* argued, it is implausible that any deterrent effect of capital punishment is wholly inapplicable to *all* juveniles or people with mental retardation: “[S]urely the deterrent effect of a penalty is adequately vindicated if it successfully deters many, but not all, of the target class.”⁴⁵ This criticism has particular strength in the *Ford* competence-to-be-executed context. As one scholar has trenchantly observed:

[A]ssuming executions have *any* deterrent effect, executions of people with mental illness are as likely to deter as any other type of execution. Indeed the deterrent effect of the death penalty might even be *enhanced* because the populace would be assured of the state’s resolve to kill and potential criminals who bank on their ability to malingering illness will be faced with the most powerful dissuasion.⁴⁶

Rather, a better understanding of the Court’s holdings is that retribution alone is a necessary limit on the constitutional use of capital punishment. Indeed, it is hard to make much sense of the Court’s Eighth Amendment jurisprudence without such an understanding. The Court’s insistence that a capital defendant is

⁴¹ 468 U.S. 447 (1984).

⁴² *Id.* at 461.

⁴³ *Id.* at 461–62.

⁴⁴ See *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁴⁵ *Atkins*, 536 U.S. at 351 (Scalia, J., dissenting); see also *Simmons* 543 U.S. at 621–22 (Scalia, J., dissenting).

⁴⁶ Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 671 (2000) (footnote omitted).

constitutionally entitled to an individualized sentencing decision—during which the sentencer must consider any evidence about the defendant’s offense, background, and character that might call for a sentence less than death—seems to enshrine retribution alone as a necessary condition for the constitutional imposition of the death penalty.⁴⁷ The Court’s emphasis on ensuring a “reasoned *moral* response”⁴⁸ to a capital defendant’s crime, too, seems necessarily to require an assessment of individual moral culpability—the touchstone of retributive theory.

Confusingly, the Court continues to speak of multiple permissible purposes of capital punishment, leaving numerous questions hanging: Is incapacitation ever to be accorded any weight in evaluating a legislative choice in favor of capital punishment? If not, why not? What distinguishes capital punishment from other criminal punishments that renders incapacitation an insufficient legislative interest? Is retribution a constitutional limit on the permissible use of capital punishment? Or can a deterrent effect—which researchers are increasingly seeking to prove⁴⁹—suffice to justify the death penalty, even upon offenders who lack sufficient culpability in retributive terms? If retribution alone is a necessary constitutional limit, once again, why only in the context of capital punishment?

Panetti not only fails to answer these questions, it highlights and heightens the tensions that currently exist. On the incapacitation question, the *Panetti* opinion is silent on whether incapacitation may ever be considered among the “proper purposes” of capital punishment. Rather, it states simply that “[g]ross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the punishment can serve *no proper purpose*.”⁵⁰ Of course, awareness of the link between a crime and its punishment is not necessary for capital punishment to forever incapacitate a dangerous murderer, so it seems logical to conclude from this statement that incapacitation is excluded from the Court’s lexicon of “proper purposes.” But the Court never exactly says so. And the Court’s silence on this issue continues to leave litigants and lower federal and state courts at a loss. The openness of this question is reflected in Texas’s brief on the merits, when it addresses incapacitation as one of the “modern penological interests behind the death penalty”—but only in a footnote, citing the incapacitation footnote in *Gregg* and the confusing discussion in *Spaziano*.⁵¹

⁴⁷ Indeed, I have argued elsewhere that this retributive focus on moral culpability is the best way to understand the Court’s individualized sentencing requirement in capital cases. See Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 *YALE L.J.* 835 (1992).

⁴⁸ See *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring).

⁴⁹ See generally Jeffrey Fagan, *Death and Deterrence Redux: Science, Law, and Causal Reasoning on Capital Punishment*, 4 *OHIO ST. J. CRIM. L.* 255 (2006) (reviewing the new wave of deterrence studies that have appeared in the past five years).

⁵⁰ *Panetti v. Quarterman*, 127 S. Ct. 2842, 2862 (2007) (emphasis added).

⁵¹ Brief for Respondent at 43 n.24, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407).

As for whether retribution is a constitutional requirement, *Panetti* is similarly cagey. All of the briefs filed on both sides of the case spent virtually all of their allotted pages focusing on whether the execution of someone like Panetti furthered any retributive purpose, suggesting that the litigants predicted that the Court would treat retribution as a necessary constitutional limit on the use of capital punishment. But while the Court gives retribution pride of place in its discussion, it stops short of explicitly endorsing the primacy of retribution in the capital context. Rather, the *Panetti* opinion lists all of the diverse reasons offered by Marshall's plurality opinion in *Ford* for why the execution of an insane person might be considered cruel and unusual punishment, including its failure to deter others or to serve a retributive purpose. Then, the *Panetti* Court goes on to single out retribution:

Considering the last—whether retribution is served—it 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.⁵²

Does this singling out of retribution mean that the furthering of a retributive purpose is a necessary condition for constitutional imposition of the death penalty? If so, then why list all of Marshall's other reasons, and why the tentative language: "it might be said . . ."? And why, too, the continued insistence on the twin goals of retribution *and* deterrence, and the continued silence on the relevance of incapacitation?

Moreover, *Panetti*'s understanding of retribution stands in stark contrast to the work that retribution has done in much of the rest of the Court's Eighth Amendment cases. In the individualization context, the Court has insisted that jurors must at least consider evidence that lessens the moral culpability of the defendant. And in *Atkins* and *Simmons*, the Court relied upon retribution to categorically rule out capital punishment for those offenders "whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."⁵³ But the role of retribution as invoked by the *Panetti* Court is more obscure, given that Panetti's mental state at the time of his execution has nothing to do with his culpability at the time of his crime. Rather, the Court stresses the interest in having the offender "recognize . . . the gravity of his crime" and in having "the community as a whole" affirm its judgment of the culpability of the offender. How both of these interests are encompassed by retribution (the same retribution that requires punishment proportionate to culpability?) is never explained. Nor does the Court explain why the community's expressive interest is

⁵² *Panetti*, 127 S. Ct. at 2861.

⁵³ *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

undermined by the execution of an offender who has become mentally incompetent: why can't the execution still express abhorrence of the offender's culpable act committed when the offender presumably *was* competent? In addition to leaving the primacy of retribution in question, the *Panetti* Court manages to raise new questions about the *meaning* of retribution as well.

At the end of the day, the most one can say about the *Panetti* decision's implications for the debate about the constitutional purposes of capital vs. non-capital punishment is that the Court, like many a fine law student, has left its options wide open.

II. WHAT SHOULD HAPPEN WHEN PENOLOGICAL PURPOSES, EMERGING CONSENSUS, AND COMMON LAW PRACTICE CONFLICT IN EIGHTH AMENDMENT ANALYSIS?

In *Atkins* and *Simmons*, the Court's discussion of the penological purposes advanced by the imposition of capital punishment served only to confirm the Court's central Eighth Amendment judgment that there was an emerging national consensus that the execution of offenders with mental retardation and offenders under the age of eighteen was no longer in accord with "evolving standards of decency." In contrast, in *Panetti*, the Court began and ended with penological purposes, though it invited the district court to apply its *Atkins* and *Simmons* methodology on remand. What should happen if it turns out that the competency standard rejected by the Court is not rejected by consensus? Or worse, that it is *supported* by consensus?⁵⁴

The converse of this problem exists as well. The discussion in the previous section sketched some of the vulnerabilities in the Court's conclusion that execution of an offender who had become mentally incompetent "can serve no proper purpose." What if a court were to conclude that in fact, such executions *do* serve proper penological purposes, but that there is nonetheless a societal consensus against the practice? In *Simmons*, the Court reiterated that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."⁵⁵ Should the Court's bringing of its own judgment to bear ever validate a practice that consensus appears to reject?

A third conundrum arises from the consideration of common law practice. The Court in *Ford* began by determining that execution of the insane was among "those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted,"⁵⁶ and then concluded that "[t]his

⁵⁴ It appears that Texas is not alone in applying such a narrow and formalistic competency standard. *See, e.g.*, *Timberlake v. State*, 858 N.E.2d 625 (Ind. 2006).

⁵⁵ *Simmons*, 543 U.S. at 563 (citation and internal quotations omitted).

⁵⁶ *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

ancestral legacy has not outlived its time.”⁵⁷ But what if it turns out that the ancestral legacy is more generous to a capital defendant than modern practice? Does common law practice trump current consensus? What if we don’t evolve toward greater decency?

Panetti raises each of these possible conflicts. The problems arise because the Court has identified three possibly conflicting sources of Eighth Amendment prohibition in the capital context: common law practice, emerging consensus, and the Court’s own judgment about the purposes of capital punishment. But the Court hasn’t yet found a case where these conflict (though it has acknowledged that emerging consensus trumps common law practice, at least when the consensus reflects our evolution toward greater decency). The questions raised by the *Panetti* case, however, create the possibility of such conflicts, and the Court gives little if any guidance as to how to address them.

The *Panetti* Court began with the clear consensus recognized in *Ford*—in both common law practice and current legislation—against the execution of the insane. But the *Panetti* Court did not turn to either common law practice or current legislation to decide what the substantive insanity standard should be. Rather, it turned to its own judgment about the purposes of capital punishment to conclude that the Fifth Circuit’s narrow standard was insufficient. However, it declined to formulate the proper standard, remanding instead for the district court to make that determination in the context of more fact-finding—and for application of the “emerging consensus” approach of *Atkins* and *Simmons*. What can such a remand possibly mean? What if the district court decides to canvas the application of the *Ford* standard in other states (as both *Panetti* and Texas did in their briefs before the Supreme Court, both claiming victory)? And what if the district court should conclude that there is no consensus rejecting the Fifth Circuit’s narrow and formalistic standard? Would such a finding invalidate the Court’s conclusion that the standard is constitutionally inadequate? It doesn’t seem plausible that the Court meant its holding to be provisional in this way. But what, then, did its remand instructions mean? And, more generally, what should happen in future cases when the Court’s own judgment about penological purposes invalidates a capital punishment practice in the absence of a consensus against that practice?

Or consider the converse. What if a different Supreme Court were to conclude that the rationale of *Ford* was simply wrong, that there *are* good reasons to execute those who have become incompetent while awaiting execution (reasons that might flow from incapacitation, deterrence, or retribution of some sort or another)? Or what if *any* court were to reach a similar conclusion about some other use of capital punishment that appears to be rejected by contemporary consensus (the execution of child rapists who do not kill might be such an example⁵⁸)? What weight should be accorded a court’s “own judgment” in an

⁵⁷ *Id.* at 408.

⁵⁸ *See, e.g., State v. Kennedy*, 957 So. 2d 757 (La. 2007) (upholding capital sentence for child rapist).

Eighth Amendment calculus if the court's judgment would permit a practice that consensus appears to eschew?

More rarely, but not impossibly, what if common law at the time of the Founding precluded practices that are now more commonplace? An amicus brief filed on behalf of a group of legal historians in support of Panetti argued that "the common law did not draw the fine lines"⁵⁹ delineated by the Fifth Circuit, citing Blackstone's report of a refusal to execute someone who was only "half a madman."⁶⁰ If the Fifth Circuit's approach were widely adopted (and if the historians' account of common law practice is correct), could an emerging modern consensus *rescue* a practice that would have been eschewed at the Founding? Or is the Eighth Amendment a one-way ratchet, giving modern capital defendants all the "decency" they would have had in the eighteenth century, as well as any further protections that have developed since then?

Panetti represents an uneasy departure from the Court's recent precedents in its failure either to note early common law practice or to canvas current consensus before invalidating the competency standard adopted by the Fifth Circuit. Perhaps the Court meant to suggest that common law and consensus are relevant only to the "big picture" question about whether a practice—execution of the insane—is constitutionally permissible, but not to the more technical question of what exactly counts as "insane." If that is so, however, the Court needs both to state it more clearly and explain *why* it should be so. In any event, the Court's decision in *Panetti* has only heightened questions about the relationship among the different sources of Eighth Amendment authority.

III. WILL THE COURT'S EIGHTH AMENDMENT JURISPRUDENCE REMAIN LARGELY PROCEDURAL, OR WILL IT MORE EXTENSIVELY REGULATE SUBSTANTIVE OUTCOMES IN CAPITAL CASES?

Panetti heightens a third ambiguity in the Supreme Court's Eighth Amendment capital jurisprudence. The early cases that established the Court's current scheme of constitutional regulation of capital punishment took a largely procedural approach to delineating the implications of the Eighth Amendment for state death penalty practices. The first major constitutional intervention, *Witherspoon v. Illinois*,⁶¹ dealt with the composition of capital sentencing juries, and then the watershed decisions in *Furman* and *Gregg* established that certain kinds of capital sentencing procedures—the "guided discretion" schemes upheld in

⁵⁹ Brief for Legal Historians as Amici Curiae Supporting Petitioner at 14, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407).

⁶⁰ *Id.* at 16 (internal quotation marks omitted).

⁶¹ 391 U.S. 510 (1968) (holding that the Eighth Amendment forbids the exclusion of jurors from capital sentencing proceedings merely because they expressed conscientious scruples against the death penalty).

Georgia, Florida, and Texas⁶²—passed constitutional muster and allowed executions to proceed again after a four-year constitutionally required hiatus. Most of the constitutional litigation that followed over the past thirty-plus years has been along these procedural dimensions, filling in the outlines of the Court's evolving vision of a constitutionally adequate capital sentencing process. The Court, with rare exceptions (until recently) steered clear of direct regulation of capital sentencing *outcomes*. Rather, despite invitations to rule on claims regarding disparate racial impact in capital sentencing patterns⁶³ and the wholesale inappropriateness of executing juvenile⁶⁴ or mentally retarded offenders,⁶⁵ the Court continued to generate ever more nuanced Eighth Amendment doctrine regarding the adequacy of state capital sentencing procedures, while turning a blind eye to particular outcomes or patterns of outcomes.⁶⁶

In very recent years, however, the Court has forged a bold and startling new path with its decisions in *Atkins* and *Simmons*, outlawing the execution of juvenile and mentally retarded offenders. These cases, which both overturned fairly recent precedents, reflect a new willingness to develop substantive limitations on the use of capital punishment under the Eighth Amendment. They also reflect a new methodology for detecting “evolution” in “standards of decency” in their consideration of the views of the world community, expert organizations, diverse religious groups, and the public (as reflected in polling data).⁶⁷ These new developments have led litigants, courts, legislatures, and the bar to consider new substantive challenges to capital sentencing practices, including the permissibility of executing those suffering from serious mental illness at the time of their offenses,⁶⁸ and the cruelty of current lethal injection protocols.⁶⁹

Panetti was a case that could have been decided either on substantive or procedural grounds. Indeed, many thought that the case would be dismissed on

⁶² See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

⁶³ See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁶⁴ See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁶⁵ See *Penry v. Lynaugh*, 492 U.S. 302 (1989).

⁶⁶ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 414 (1995) (critiquing the Court's unwillingness to address outcomes of capital sentencing processes under the Eighth Amendment).

⁶⁷ See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002).

⁶⁸ See, e.g., Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169 (2005); Christopher Slobogin, *Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations*, 54 CATH. U. L. REV. 1133 (2005).

⁶⁹ See, *Baze v. Rees*, 2007 U.S. LEXIS 966 (Sept. 25, 2007) (granting certiorari to consider Eighth Amendment challenge to Kentucky's lethal injection protocol); see also Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301 (2007).

purely procedural grounds, as a second habeas petition formally precluded by AEDPA. Once the Court decided to reach the merits, though, there was still a plausible procedural resolution of the case: the Court could have agreed with the lower federal courts' rejection of the state-court competency proceedings as procedurally inadequate while affirming the Fifth Circuit's narrow competency standard. Such a holding would have been at peace with the Supreme Court's earlier procedurally focused Eighth Amendment jurisprudence—and, indeed, with *Ford* itself, which was in large part a case about inadequate state procedures for addressing claims of incompetence at the time of execution. In fact, the Court addressed in great detail the procedural inadequacies of the state court proceedings in the case—listing with precision the many failings of the state trial court—when it could have simply affirmed the lower federal courts' holdings on this issue.

But the Court also went on to address the substantive question of the proper standard for assessing competence to be executed and forged new ground in its rejection of the Fifth Circuit's restrictive standard. Although the Court claimed to be governed by the “logic” of *Ford*,⁷⁰ it established a new logic by creating a hierarchy among the many competing rationales listed in *Ford* and focusing its discussion on the retributive rationale for *Ford*'s “substantive restriction on the State's power to take the life of an insane prisoner.”⁷¹ Moreover, as the Court recognized, its invalidation of the Fifth Circuit's standard will inevitably require the announcement of a new minimum standard for the evaluation of competence to be executed, and the grounds for that standard will draw the Court (or lower courts in the first instance) into the same kind of substantive Eighth Amendment jurisprudence reflected in the *Atkins* and *Simmons* decisions.

The earlier, largely procedural, Eighth Amendment doctrine had some clear advantages for the Court. It was more respectful of states' substantive choices and penological theories: as long as a state provided adequate guidance to its capital sentencers, it was free to guide them wherever it liked. Moreover, as members of the judiciary, the Court could feel confident in its judgments about the adequacy of procedures and did not need to worry about its institutional competence to address statistical claims of discrimination or psychological claims about the cognitive abilities of juveniles or offenders with mental retardation or mental illness. But procedural Eighth Amendment doctrine had some serious limitations, too. For one thing, it didn't seem to work: many have criticized the Court's Eighth Amendment doctrine for failing in its mission to remedy the apparent arbitrariness that plagued the pre-*Furman* capital punishment regime.⁷² Moreover, the procedural

⁷⁰ See *Panetti v. Quarterman*, 127 S. Ct. 2842, 2861–62 (2007).

⁷¹ *Ford v. Wainwright*, 477 U.S. 399, 405 (1986).

⁷² See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More than Three Decades After Furman*, 71 BROOK. L. REV. 797 (2005); Steiker & Steiker, *supra* note 66, at 358.

innovations that were most likely to work in addressing this problem—demanding truly adequate counsel and extensive post-conviction review—would be so expensive and time-consuming that they were extraordinarily politically unpopular and (not surprisingly) not high on the Court’s list of constitutionally required procedural rights in capital cases.

But substantive regulation of capital punishment has its own set of costs and benefits. It allows the Court to address directly the very thing that procedural regularity is meant to ensure—an acceptable set of capital sentencing outcomes. And it allows the Court to be responsive to popular national (and international) opinion about the proper scope of capital punishment. In short, it allows the Court to put some moral meat on the idea of “evolving standards of decency.” But it inevitably draws the Court into line-drawing that feels both more nakedly political and more beyond its institutional competence—such as the questions it gingerly addressed in *Panetti* about the proper purposes of capital punishment and the capabilities of those with “schizo-affective disorder.”

Which way will the Court’s Eighth Amendment jurisprudence evolve? Should *Atkins* and *Simmons* be viewed as mere temporary divergences from the largely procedural Eighth Amendment? Or is the Court newly willing to venture further into the moral and cross-disciplinary morass of substantive regulation of capital punishment? *Panetti* offers very little in the way of predictive help. On the one hand, the Court reversed on substantive as well as procedural grounds. But the Court was reluctant to go very far with a substantive analysis, choosing a remand that will permit it to avoid a definitive ruling on the substantive issue for as long as it likes. On the question of whether the constitutional ban on executing the incompetent is more robustly a substantive or a procedural right, the *Panetti* decision remains—as on all of the other issues discussed above—profoundly non-committal.

* * * * *

The immediate work in the wake of *Panetti* is obvious: on remand, the district court will have to figure out what competency standard to apply in place of the Fifth Circuit’s rejected one. And Texas courts more generally will have to figure out what procedures to offer death row inmates who raise claims regarding their competence to be executed. But the larger work that lies ahead on the Court’s continuing Eighth Amendment project is more open-ended, more puzzling, and much higher in stakes. Hard as it may be to decide what a “rational understanding” of a death sentence entails, it is even harder to envision the day when it will be clear what constitutes a “rational understanding” of the Supreme Court’s Eighth Amendment jurisprudence. *Panetti* brings us no closer to that day, but it illuminates some of the difficulties that await.