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Blurred Lines: How to Rationally Understand the “Rational Understanding” Doctrine After *Madison v. Alabama*

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Blurred Lines: How to Rationally Understand the “Rational Understanding” Doctrine After *Madison v. Alabama*

Abstract

In Madison v. Alabama, the Supreme Court held that a capital inmate’s inability to remember his crime did not render him incompetent to be executed. The Court reasoned that an individual who suffers from episodic memory loss may still “rationally understand” society’s reasons for sentencing him to death for a crime he once committed. This Note explores the impact of memory loss on a person’s self-identity, and consequently challenges the notion that a capital inmate who no longer remembers his crime can truly have a rational understanding of it. Specifically, this Note examines how memory loss substantially weakens the two main justifications the Court supplies for capital punishment. First, execution of a defendant who no longer remembers his crime offers society less retribution because the person being punished lacks psychological continuity with the person who committed the crime. Second, this change in identity calls into question the morality of execution in these circumstances because such a punishment may not be proportional to the crime committed. Ultimately, this Note proposes that the Court adopt a categorical ban on capital punishment for those who cannot remember their crime, which will alleviate the burden placed on mental health professionals to determine whether an inmate can “rationally understand” his crime.

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I. INTRODUCTION

Imagine a person with vascular dementia who, day after day, becomes increasingly confused about his surroundings.¹ This person has trouble performing everyday tasks such as getting dressed, brushing his teeth, or walking by himself.² He cannot recite the alphabet, count by threes, or rephrase simple sentences.³ He is reported to have a “very substantial deficit in regard to working memory” and, due to the absence of effective treatments for regions of the brain damaged by a lack of blood flow, “there is little hope of stopping the disease or its progression.”⁴ But this person has also lived on death row for the past thirty years, and now his execution is imminent.⁵ Even though this person’s cognitive abilities have “sharply deteriorated,” when asked if he understands that the State wishes to execute him as punishment for crimes he committed in 1985, he answers in the affirmative.⁶ Yet, this defendant has no memory of committing the crimes that are described to him.⁷

According to the recent holding of *Madison v. Alabama*, the Eighth Amendment does not protect this defendant from execution.⁸ Because he can understand that he once committed a crime, and that the State seeks retribution by executing him for committing that crime, this defendant is deemed competent to be executed.⁹

In 1986, *Ford v. Wainwright* laid the groundwork for claims involving competency to be executed.¹⁰ Between 1986 and 2012, 5,724 individuals

1. Brief for the American Psychological Ass’n and American Psychiatric Ass’n as Amici Curiae in Support of Petitioner at 9, *Madison v. Alabama*, 139 S. Ct. 718 (2019) (No. 17-7505).

2. *Id.* at 9–10.

3. *Id.* at 10.

4. *Id.* at 9–10 (quoting ECF No. 8-3 at 17, *Madison v. Dunn*, No. CV 16-00191-KD-M, 2016 2732193 (S.D. Ala. May 10, 2016)).

5. *Madison*, 139 S. Ct. at 723.

6. *Id.* at 723–24.

7. *Id.* at 723.

8. *Id.* at 731 (“[T]he Eighth Amendment may permit executing Madison even if he cannot remember committing his crime.”).

9. *Id.* at 731 (citing *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)) (“The sole question on which Madison’s competency depends is whether he can reach a ‘rational understanding’ of why the State wants to execute him.”).

10. 477 U.S. 399, 417 (1986) (“It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications.”).

were sentenced to death.¹¹ However, only 141 of those individuals filed *Ford* claims, arguing that mental illness prevented them from understanding the reasons for their executions.¹² Only 21 of these claims were successful.¹³ The scarcity of *Ford* claims is likely due to the vague language that the Supreme Court has used to define competency, which makes it difficult for attorneys to argue and prove incompetency on a case-by-case basis.¹⁴ The Supreme Court has framed the standard for a defendant's competency to be executed as one of "rational understanding"—in other words, a defendant is competent to be executed if he can rationally understand the reason for his execution.¹⁵ Through *Madison*, the Court has made this competency standard even more elusive in application by holding that even defendants who have no memory of committing their crimes may still be considered competent to be executed.¹⁶

While capital cases comprise a relatively small percentage of the criminal docket for most states,¹⁷ the gravity of their outcomes makes it

11. John H. Blume, Sheri Lynn Johnson & Katherine E. Ensler, *Killing the Oblivious: An Empirical Study of Competency to be Executed Litigation*, 82 UMKC L. REV. 335, 344 (2014).

12. *Id.* at 344. Of the individuals who brought *Ford* claims during this time, over half had brought competency challenges earlier in the litigation. *Id.* at 349. What's more, nearly a quarter of them "had previously been found incompetent to stand trial or proceed" in their cases. *Id.* Of course, this also means that those defendants were later found competent once again. *Id.* at 349 n.69. However, this statistic works to refute the claim that *Ford* would result in a flurry of frivolous incompetency claims. *Id.* at 352 ("[T]he Rehnquist/Burger fear of frivolous competency to be executed litigation has not materialized.")

13. *Id.* at 344.

14. *Id.* at 355 ("Despite its vague contours, the *Ford/Panetti* standard is stringent in theory and very difficult to satisfy in practice."); see also Carol S. Steiker, *Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 288 (2007) ("Scott Panetti's case raised questions about both [the substantive and procedural standards of claiming incompetence], but the Court's opinion is notable for how little it manages to say in answering them.")

15. *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007).

16. See *Madison v. Alabama*, 139 S. Ct. 718, 727 (2019). Prior to *Madison*, some scholars seemed to believe the concepts of memory and rational understanding were intertwined. See, e.g., Bruce Ebert, *Competency to be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane*, 25 LAW & PSYCHOL. REV. 29, 41 (2001) ("If a prisoner cannot remember or retain the reason for this punishment, or even the fact that he is going to be executed, then, clearly, he should be found incompetent for the purposes of execution.")

17. See *Gallup Poll—For First Time, Majority of Americans Prefer Life Sentence To Capital Punishment*, DEATH PENALTY INFO. CTR. (NOV. 25, 2019) <https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment>. This percentage continues to decline, as death sentences have decreased by fifty percent since 2010. *Id.*

imperative that the judiciary correctly define the standard for competency.¹⁸ This Note explores the holding of *Madison v. Alabama* and argues that the Court applied the “rational understanding” standard for competency to be executed too narrowly by deciding that memory loss alone has no effect on competency.¹⁹ Part II provides a brief overview of the death penalty’s reinstatement and the constitutional restrictions the Supreme Court has upheld for the execution of certain groups over time; it also addresses the key cases dealing with the effect of mental illness on competency to be executed.²⁰ Part III discusses the facts of *Madison* and the Court’s reasoning in concluding that memory loss does not automatically preclude capital punishment unless it affects a defendant’s rational understanding of his crime and punishment.²¹ Part IV.A argues that the Court’s holding is inconsistent with the retributive value of capital punishment because an individual who loses his memory of a crime also loses his psychological connection to the crime and undergoes a change in identity.²² Part IV.B then asserts that no retributive value can be gained from punishing a different identity, and consequently, the punishment is disproportionate to the offense.²³ Part V discusses the implications of *Madison*’s outcome, addresses concerns that this case even further disguises the true meaning of “rational understanding,” and proposes a categorical prohibition against executing a defendant who cannot remember his crime.²⁴ Finally, Part VI concludes that memory of the crime is a quintessential element for a defendant to have a rational understanding of the reasons for his execution.²⁵

18. See John L. Farringer IV, *The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to be Executed*, 54 VAND. L. REV. 2441, 2493 (2001) (“Time should be spent to ensure that the rule against executing the insane is being applied properly in actual cases. State legislatures and the Supreme Court owe such an effort not just to prisoners facing death, but to a society yearning for a restored conscience.”). Others have used even more extreme language to describe the need for more precise standards for execution. See, e.g., Linda Malone, *Too Ill to Be Killed: Mental and Physical Competency to Be Executed Pursuant to the Death Penalty*, 51 TEX. TECH L. REV. 147, 167 (2018) (“[The death penalty’s] reinstatement in *Gregg v. Georgia* is a failed experiment with human life that has devolved into human experimentation in methods of execution of often feeble and otherwise impaired prisoners.”).

19. See *infra* Parts IV, V.

20. See *infra* Part II.

21. See *infra* Part III.

22. See *infra* Section IV.A.

23. See *infra* Section IV.B.

24. See *infra* Part V.

25. See *infra* Part VI.

II. HISTORY OF THE DEATH PENALTY IN THE COURTROOM

A. *The Death Penalty's American Beginning and States' Discretion*

The practice of capital punishment in America is as old as the country itself.²⁶ Support for capital punishment and a perceived need for the institution is deep-rooted in America; however, equally deep-rooted is the criticism of the practice and the struggle for states to define its scope in light of the Eighth Amendment's ban against cruel and unusual punishment.²⁷ Before 1976, states had complete discretion in molding the boundaries of capital punishment, and in turn, states left this issue largely in the hands of juries to determine whether a defendant's conduct warranted capital punishment.²⁸ The Supreme Court's decision in *Furman v. Georgia* put a stop to states' discretion in imposing capital punishment and deemed the current state of the death penalty unconstitutional under the Eighth Amendment due to states' arbitrary application of the punishment.²⁹ States

26. See Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 813–15 (1995) (explaining that America “inherited” England’s capital punishment regime and retained many of its intricacies).

27. See U.S. CONST. amend. VIII; see also Fletcher, *supra* note 26, at 814–15 (“Since colonial times, there have been sporadic efforts to abolish the death penalty in the United States, and many individual states have repealed capital statutes.”).

28. See Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 4 (1972) (citing *McGautha v. California*, 402 U.S. 183, 197 (1971)) (“Justice Harlan [in a pre-1976 opinion] was convincing in arguing that juries should take the punishment decision under submission without standards to guide the determination: it should be done this way because it must be done this way. Experience has shown that it is all but impossible ‘to identify before the fact those homicides for which the slayer should die.’”). This allowance of state discretion reveals a recurring theme throughout this Note: courts’ avoidance of bright line rules and use of vague terms in death penalty jurisprudence is likely due to the difficulty in evaluating what characteristics make a human life fit for death as a matter of law. See, e.g., *id.* at 26 (explaining that the Justices may have contradicted themselves in two Supreme Court rulings on the death penalty because “with twenty-five score human lives in their hands, they were unable to appreciate the virtues of consistency”).

29. *Furman v. Georgia*, 408 U.S. 238 (1972). Three defendants were sentenced to death, two under Georgia’s state procedures and the other under Texas’s. *Id.* at 239. The majority held that the imposition of the death penalty in these cases would violate the Eighth Amendment, with each Justice providing different reasoning for this conclusion through individual concurring opinions. *Id.* at 239–40. In sum, the concurring Justices took issue with the complete discretion states had previously possessed in imposing the death penalty, such as Justice Brennan, who believed “[i]t is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable.” *Id.* at 286 (Brennan, J., concurring). Chief Justice Burger, however, feared the majority’s approach stepped into the role of the legislative body, and he emphasized that “it is essential to our role as a court that we not seize

then struggled to refine their death penalty statutes to comply with the Eighth Amendment, and in turn, to evaluate what factual scenarios could legally justify execution of defendants.³⁰ The Court did not see another death penalty case for another four years—the only four years in American history where no federally permissible means of execution existed.³¹

B. Reaffirmation of the Death Penalty

The Supreme Court reversed course in *Gregg v. Georgia*, where it addressed the constitutionality of the death penalty as a whole and, holding that capital punishment did “not invariably violate the Constitution,” attempted to clarify the proper role for capital punishment in light of the Eighth Amendment’s mandate against the infliction of cruel and unusual punishment.³² The Court began by exploring the case law that had guided interpretations of the Eighth Amendment “in a flexible and dynamic manner,” and concluded that at the very least, the Eighth Amendment required “that the punishment not be ‘excessive.’”³³ The Court determined that two requirements must be met to successfully avoid excessive punishment: 1) “the punishment must not involve the unnecessary and wanton infliction of pain,” and 2) “the punishment must not be grossly out of proportion to the severity of the crime.”³⁴ As long as these two tests were satisfied, the judiciary’s role in the imposition of the punishment was complete, and deference should be extended to the legislature as the representative of the people.³⁵

upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.” *Id.* at 376 (Burger, C.J., dissenting).

30. See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 *FORDHAM URB. L.J.* 347, 373 (1999) (“The immediate response to *Furman* was a short-lived movement toward statutes that eliminated all jury discretion by mandating imposition of a death penalty upon establishment of certain predicate facts.”).

31. See Thomas Adcock, *A History of the Death Penalty in America*, 36 *CORNELL L.F.* 6, 6 (2010).

32. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

33. *Id.* at 171–73.

34. *Id.* at 173.

35. *Id.* at 175 (“We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.”). *But see* Hugo Adam Bedau, *Gregg v. Georgia and the “New” Death Penalty*, 4 *CRIM. JUST. ETHICS* 3, 6 (1985) (“Judicial intervention here does not entail judicial meddling with every other legislative choice in the penal code. The question was never one of requiring states to impose the ‘least severe

The Court then looked to common law tradition and the contemporary views of American citizens for support of the death penalty, noting in particular that thirty-five states had attempted to rework their death penalty statutes to maintain their constitutionality in response to the *Furman* holding.³⁶ The Court also relied on the retributive value of capital punishment, arguing that the instinct to seek retribution is a part of human nature, and it is the government's duty to provide its people with access to retribution.³⁷ The Court concluded that despite the death penalty's uniqueness "in its severity and irrevocability," the Court was required to hold, "in the absence of more convincing evidence, that the infliction of [death] as a punishment for murder is not without justification and thus is not unconstitutionally severe."³⁸

C. Judicial Limitations on Who Is "Fit" for Capital Punishment

Even in light of its reaffirmation of the death penalty, the Supreme Court has established that the Eighth Amendment's meaning is not static and should instead adapt to society's changing moral values.³⁹ Accordingly, the Court has limited the application of the death penalty since *Gregg*, reexamining society's view on the morality and retributive value of the death penalty under various circumstances.⁴⁰

The Court in *Coker v. Georgia* emphasized the importance of looking to state laws when evaluating the public's view of what is morally acceptable.⁴¹ In *Coker*, the defendant was sentenced to death for raping a woman after escaping a correctional facility where he was serving sentences for other crimes.⁴² The Court determined that "[a]t no time in the last 50 years have a

penalty'; it was always only that of requiring them to impose the alternative, very severe penalty of long-term imprisonment . . .").

36. *Gregg*, 428 U.S. at 176–80.

37. *Id.* at 183 ("This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.").

38. *Id.* at 187.

39. *See* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

40. *See infra* notes 41–55 and accompanying text.

41. 433 U.S. 584, 593 (1977) (looking to state laws in order to "seek guidance . . . from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman").

42. *Id.* at 587.

majority of the States authorized death as a punishment for rape,” and the overall judgment of state legislatures “weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.”⁴³ The Court concluded that while the crime of rape is “reprehensible . . . it does not compare with murder, which does involve the unjustified taking of human life.”⁴⁴ It emphasized that a punishment of death is disproportionate to a crime that does not involve death, even if the defendant has had prior convictions for murder.⁴⁵

The Court applied similar reasoning in *Enmund v. Florida* to a prisoner who was convicted for acting as an accomplice to felony murder.⁴⁶ Again looking to state law to gauge the public’s opinion, the Court concluded that “only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die.”⁴⁷ Thus, it held that execution was an excessive penalty for one “who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed,” and therefore does not cause “an affront to humanity.”⁴⁸ Turning to the retributive value of executing an accomplice of felony murder, the Court emphasized that the focus must be on the accomplice’s individual culpability, meaning it must analyze the “relevant facets of the character and record of the individual offender.”⁴⁹ The Court concluded that no retributive end is served by executing an individual who does not share the “personal responsibility and moral guilt” of the actual murderer.⁵⁰

Most recently, the Court held in *Roper v. Simmons* that the Eighth Amendment does not allow for the execution of juvenile offenders under eighteen years of age.⁵¹ The Court again determined that objective factors

43. *Id.* at 593, 596.

44. *Id.* at 597–98.

45. *Id.* at 599.

46. 458 U.S. 782, 788–89 (1982) (noting the objective approach of the *Coker* Court and endeavoring “to analyze the punishment at issue in this case in a similar manner”).

47. *Id.* at 792.

48. *Id.* at 797.

49. *Id.* at 798 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

50. *Id.* at 801 (holding that execution of an individual who did not intend to commit murder “does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts”).

51. 543 U.S. 551, 568 (2005).

weigh against execution of this category of individuals.⁵² It found that youths do not have the same level of culpability as adults because youths are more susceptible “to immature and irresponsible behavior,” and thus a crime committed by a minor is not necessarily “evidence of irretrievably depraved character.”⁵³ The Court reasoned that “the case for retribution is not as strong with a minor as with an adult” because “[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults.”⁵⁴ Thus, the Court concluded that execution of juvenile offenders is unconstitutional.⁵⁵

These cases reflect a pattern of two core values that the Court upholds when considering how the Eighth Amendment restricts capital punishment.⁵⁶ First, the continued culpability of the defendant is essential to serve the death penalty’s retributive values, which means that the Court must singularly focus on the character and identity of the capital defendant.⁵⁷ Second, capital punishment is justified only where the crime that was committed is equal to the punishment in both severity and permanence.⁵⁸

Defendants who lose their memory of the crime they committed

52. *Id.* at 567 (“[T]he objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002))).

53. *Id.* at 570; *see also id.* (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”).

54. *Id.* at 571. The Court also expressed concern that the diminished culpability of a juvenile defendant might be overlooked by a jury where the details of a brutal or heinous crime were also presented, even though the defendant’s immaturity or vulnerability should properly call for a lesser sentence. *Id.* at 572–73. It emphasized the difficulty that even expert psychiatrists face in distinguishing “between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Id.* at 573. The Court concluded that “[i]f trained psychiatrists with the advantage of clinical testing” hesitate to make such a distinction, “States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender merits the death penalty.” *Id.*

55. *Id.* at 571.

56. *See supra* notes 33–34 and accompanying text.

57. *See Roper*, 543 U.S. at 570; *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

58. *See Coker v. Georgia*, 433 U.S. 584, 598 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)) (“We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.”); *Enmund*, 458 U.S. at 797.

undergo a change in identity as a result, which lessens their degree of culpability.⁵⁹ Consequently, the retributive value of executing this class of individuals is questionable, and therefore the severity of the punishment is likely disproportionate to the crime.⁶⁰ The Supreme Court’s “rational understanding” standard for capital punishment involving mentally ill defendants, however, has allowed this class of individuals to slip through its cracks.⁶¹

D. *The Rise of the “Rational Understanding” Doctrine for Mentally Ill Capital Prisoners*

Changing societal values have led the Court to recognize another limitation on capital punishment.⁶² The Court has limited the execution of “mentally incompetent” prisoners by analyzing the same rationales as cases involving other classes of prisoners—morality and retributive value.⁶³ Perhaps the most influential case to address the use of the death penalty on the mentally incompetent was *Ford v. Wainwright*, where the Court conclusively held that the Eighth Amendment prohibits the execution of an insane prisoner.⁶⁴ The Court again considered “objective evidence of contemporary values” but began its analysis by considering common law justifications for barring execution of the insane.⁶⁵ Notably, the Court quoted Blackstone for the proposition that “if, after judgment, [a man] becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound

59. For a more in-depth explanation of why this is the case, see *infra* Section IV.A.

60. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“When the choice is between life and death, th[e] risk [that a court might impose a disproportionate sentence] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.”).

61. See generally *Madison v. Alabama*, 139 S. Ct. 718, 729 (2019) (“But delusions come in many shapes and sizes, and not all will interfere with the understanding that the Eighth Amendment requires.”).

62. See *infra* notes 63–84 and accompanying text.

63. See *supra* notes 41–55 and accompanying text.

64. 477 U.S. 399, 409–10 (1986). Alvin Ford was convicted of murder and sentenced to death in 1974. *Id.* at 401. It was undisputed that Ford was competent at the time of his crime, at trial, and sentencing. *Id.* In 1982, however, Ford’s personality began to change, and he began to suffer from severe delusions. *Id.* at 402. Three psychiatrists evaluated Ford’s competency and all three came to different conclusions as to the extent to which he could understand his current situation, but the Governor of Florida nevertheless signed Ford’s death warrant without explanation. *Id.* at 403–04.

65. *Id.* at 406–08.

memory, he might have alleged something in stay of judgment or execution.”⁶⁶ This proposition became the foundation of the common law analysis of capital punishment for mentally ill defendants.⁶⁷

The Court observed that with respect to the common law prohibition of putting the insane to death, “the reasons for the rule are less sure and less uniform than the rule itself.”⁶⁸ This is because scholars have developed various explanations over time: some have argued that execution of the insane “simply offends humanity,” while others have noted the lack of deterrent value in executing insane criminals because “it provides no example to others.”⁶⁹ More recently, scholars have expressed doubt “that the community’s quest for ‘retribution’” is served by executing the mentally incompetent.⁷⁰ Nevertheless, the Court concluded that “[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment.”⁷¹

The Court further clarified what it means to be “mentally competent” in *Panetti v. Quarterman*, recognizing that *Ford* “did not set forth a precise standard for competency.”⁷² In *Panetti*, the defendant had been prescribed medication for his mental disorders that “would be difficult for a person not suffering from extreme psychosis even to tolerate,” and during trial, the defendant engaged in “‘bizarre,’ ‘scary,’ and ‘trance-like’” behavior.⁷³ There was evidence that the defendant stopped taking his medication prior to trial, and “the state trial court found him incompetent to waive the

66. *Id.* at 406–07 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25).

67. *See id.* at 408–09 (“It is clear that the ancient and humane limitation upon the State’s ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England.”).

68. *Id.* at 407.

69. *Id.* at 407–08 (citing 3 EDWARD COKE, INSTITUTES 6 (6th ed. 1680)).

70. *Id.* at 408; *see also* Joan P. Cafone, *Execution of the Insane*, 5 N.Y.L. SCH. J. HUM. RTS. 433, 436 (1988) (“[A]lthough many explanations have been offered, there is no general agreement as to why there should be a rule proscribing the execution of mentally incompetent capital inmates. Indeed, some commentators observe that the uneasiness over invoking the insanity exemption may represent deeper public misgivings about the death penalty itself.”).

71. *Ford*, 477 U.S. at 410.

72. *Panetti v. Quarterman*, 551 U.S. 930, 957 (2007). The defendant was convicted of murder and sentenced to death in 1995. *Id.* at 937.

73. *Id.* at 936.

appointment of state habeas counsel.”⁷⁴ Expert testimony further revealed that the defendant believed the state’s express reason for executing him was a “sham,” and the state truly wished to execute him to “stop him from preaching.”⁷⁵ Nevertheless, the district court found that the defendant was competent to be executed.⁷⁶ The circuit court affirmed, relying on three findings: 1) the defendant was “aware that he committed the murders,” 2) the defendant was “aware that he [would] be executed,” and 3) the defendant was “aware that the reason the State ha[d] given for the execution [was] his commission of the crimes in question.”⁷⁷

The Supreme Court reversed the circuit court’s judgment, holding that the standard set forth in the lower courts was “too restrictive to afford a prisoner the protections granted by the Eighth Amendment.”⁷⁸ Considering the retributive justification for the death penalty, the Court stated “that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime” and affirms society’s judgment that the defendant’s culpability is so severe “that the ultimate penalty must be sought and imposed.”⁷⁹ The Court reasoned that “[t]he potential for a prisoner’s recognition of the severity of the offense and the objective of community vindication” is inhibited when a defendant’s mental condition causes an inability to connect “his awareness of the crime and punishment” to “the understanding of those concepts shared by the community as a whole.”⁸⁰

Thus, the Court concluded that while *Ford* did not construct a precise definition for “mental incompetency,” the general principles that the Court’s holding alluded to were not served by the state’s law that emphasized a defendant’s understanding of the expressed reason for the execution rather than the defendant’s subjective belief about why the execution is taking

74. *Id.* at 936–37.

75. *Id.* at 954–55.

76. *Id.* at 956.

77. *Id.*

78. *Id.* at 956–57, 962.

79. *Id.* at 958; *see also* Gerald H. Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268, 274 (1961) (“The ethics of republican government lead us to the conclusion that punishment shall not be meted which inflicts pain or loss without necessity.”); *see also* Cafone, *supra* note 70, at 461 (“Capital punishment, as the most severe and irremediable form of punishment imposed, is intended to be utilized only where serious offenses have been committed and where few mitigating factors are present.”).

80. *Panetti*, 551 U.S. at 958–59.

place.⁸¹ Further, the Court emphasized that “[a] prisoner’s *awareness* of the State’s rationale for an execution is not the same as a *rational understanding* of it.”⁸² However, the Court noted “that a concept like rational understanding is difficult to define,” and it refrained from attempting “to set down a rule governing all competency determinations.”⁸³ Thus, the rational understanding standard left the meaning of competency to be executed as ambiguous as before.⁸⁴

III. MADISON’S CASE: CAPITAL PUNISHMENT AND MEMORY LOSS

Unsurprisingly, this ambiguity resurfaced in *Madison v. Alabama*.⁸⁵ Vernon Madison was sentenced to death in 1985 for killing a police officer,⁸⁶ and he has spent the remainder of his life since then on death row.⁸⁷ After suffering from major strokes in 2015 and 2016, Madison was diagnosed with vascular dementia, and consequently was unable to remember “committing the crime for which he [had] been sentenced to die.”⁸⁸ Consequently, Madison petitioned “for a stay of his execution on the ground that he” was no longer mentally competent, “argu[ing] that ‘he no longer underst[ood]’ the ‘status of his case’ or the ‘nature of his conviction and sentence.’”⁸⁹ The State rebutted, arguing that regardless of what Madison remembered, he satisfied the *Ford* and *Panetti* standards for

81. *Id.* at 959.

82. *Id.* (emphasis added); *see also id.* at 960 (“Gross 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.”).

83. *Id.* at 959–61.

84. *See Steiker, supra* note 14, at 300 (concluding that “*Panetti* brings us no closer” to a genuine understanding of what constitutes competency to be executed, but rather “it illuminates some of the difficulties that await”).

85. 139 S. Ct. 718, 726–27 (2019).

86. *Id.* at 723. This Note, along with the case itself, accepts as true that Madison was guilty and deserving of capital punishment at the time he initially committed the crime and was initially convicted. *See id.* at 723. However, this Note proceeds under the notion that the extent of a defendant’s culpability can change over time depending on the circumstances that a defendant is confronted with. *See* Christopher Birch, *Memory and Punishment*, 19 CRIM. JUST. ETHICS 17, 29 (2000) (“[T]he offender’s deserving punishment is not something determined once and for all immediately after the commission of a crime, but it is something that must be sustained until the punishment has been completed.”).

87. *Madison*, 139 S. Ct. at 723.

88. *Id.*

89. *Id.*

competency because he could rationally understand the reason for his execution sentence.⁹⁰

Both Madison and the State introduced expert testimony to support their arguments regarding Madison's mental competency.⁹¹ Madison's expert reported "that although Madison 'underst[ood] the nature of execution' in the abstract, he did not comprehend the 'reasoning behind' Alabama's effort to execute *him*."⁹² Conversely, the State's expert found that Madison did not appear to be delusional, and therefore, he could comprehend his legal situation.⁹³ The trial court ultimately found Madison competent to be executed in light of the State's expert testimony, holding that Madison appeared to have a rational understanding of his punishment and why he would suffer it, and did not appear delusional.⁹⁴ After seeking habeas review in federal court, the Eleventh Circuit held that Madison had shown indisputable error in the state court's ruling.⁹⁵ The Supreme Court reversed the circuit court, however, and held that the trial court did not clearly err in concluding that Madison was competent to be executed.⁹⁶

After the state set an execution date, Madison returned to state court and again argued that his mental state prohibited his execution.⁹⁷ The state court, citing *Ford* and *Panetti*, again found Madison competent for execution, and the Supreme Court granted a petition for certiorari for direct review of the state court's decision.⁹⁸ The Court presented three issues for review: 1) "whether *Panetti* prohibits executing Madison merely because he cannot remember committing his crime,"⁹⁹ 2) "whether *Panetti* []permits executing

90. *Id.* at 723–24.

91. *Id.* at 724.

92. *Id.*

93. *Id.*

94. *Id.* at 724–25.

95. *Id.* at 725.

96. *Id.* (citing *Dunn v. Madison*, 138 S. Ct. 9, 12 (2017)). Because habeas petitions are subject to the deferential standard set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA), the Court emphasized that its holding was limited to this deferential context. *Id.* The Court declined to make any determination of Madison's competency under a non-deferential standard. *Id.*

97. *Id.* While Madison reiterated the same facts and arguments that he had previously made to the state court, he additionally argued that his mental state had worsened, and asserted that the State's expert from the original trial had since lost his license to practice psychology. *Id.*

98. *Id.* at 726. Because the Court was now directly reviewing the state court's decision, the deferential AEDPA standard no longer applied. *Id.*

99. *Id.* The Court stated that Madison conceded this point at oral argument, where he agreed with Chief Justice Roberts that "simply blacking out" without any evidence of a mental disorder is

Madison merely because he suffers from dementia, rather than psychotic delusions,”¹⁰⁰ and 3) whether, applying the answers to these questions to Madison’s case, his execution could proceed.¹⁰¹

Addressing the first issue, the Court held that someone who has genuine memory loss but “remains oriented in time and place” and “comprehends familiar concepts of crime and punishment” may still satisfy the standard for mental competency under *Ford* and *Panetti*.¹⁰² The Court reasoned that *Panetti* emphasizes “understanding, not memory” and concluded that “one may exist without the other.”¹⁰³ The Court analogized remembering one’s crime to remembering the Civil War or one’s first day of school to clarify the distinction: while an “independent recollection” may not exist in either case, it is still possible to understand that those events occurred.¹⁰⁴ Thus, the Court held that a defendant who does not remember his crime may still be

insufficient to satisfy the *Ford* standard of incompetency. *Id.* (“But at this Court, Madison accepted Alabama’s position on the first issue.”); Transcript of Oral Argument at 11, *Madison*, 139 S. Ct. 718 (No. 17-7505). However, Madison’s counsel quickly clarified that this concession was rooted in the evidentiary difficulties associated with proving memory loss. Transcript of Oral Argument, at 12 (“[W]e recognize that it’s too easy for any offender to say ‘I don’t remember.’ Defendants at trial often use defenses of ‘I don’t remember.’ It doesn’t preclude the state from trying them, from convicting them, from sentencing them.”). For further discussion of the distinction between true memory loss and mere claims of memory loss that are never brought to bear, see *infra* notes 229–232 and accompanying text.

100. *Madison*, 139 S. Ct. at 726. The Court also noted that the State conceded this point at oral argument. *Id.* During the argument, counsel for the State admitted that “if someone has vascular dementia or any other mental illness, if it precludes them from having a rational understanding of their punishment, and that they will die when they’re executed, they would meet the Ford [sic] and Panetti [sic] standard.” Transcript of Oral Argument, *supra* note 99, at 36.

101. *Madison*, 139 S. Ct. at 729. The dissent argued that the Court should not have heard this case at all, because the petition for certiorari only addressed the first two issues that the parties conceded. *Id.* at 731–38 (Alito, J., dissenting). Justice Alito stated that “there [was] no inkling” in the petition of the argument that the state court’s decision was based on an erroneous view of the law, and he suggested “that the real reason for [the] decision [was] doubt on the part of the majority regarding the correctness of the state court’s factual finding.” *Id.* at 734, 738 (Alito, J., dissenting). However, the majority rejected this reasoning, presumably on the ground that resolution of the issues in the petition necessarily involved review of the state court’s competency analysis and, because of the change in the standard of review now that AEDPA no longer applied, the Court’s “decision on Madison’s habeas petition [could not] help resolve the questions raised here.” *Id.* at 726.

102. *Id.* at 727.

103. *Id.*

104. *Id.* (“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. Do you recall your first day of school? Probably not. But if your mother told you years later that you were sent home for hitting a classmate, you would have no trouble grasping the story.”).

competent to be executed if he nevertheless understands why he is to be punished.¹⁰⁵

The Court justified its reasoning by finding that its conclusion was consistent with the framing *Panetti* set out in its Eighth Amendment inquiry, which concerned the retributive and moral values involved in execution.¹⁰⁶ *Panetti* found that retributive value stems from appreciation of “the meaning of a community’s judgment,” and here the Court found that “a person who can no longer remember a crime may yet recognize the retributive message society intends to convey with a death sentence.”¹⁰⁷ Likewise, while the *Ford* and *Panetti* Courts concluded that it “‘offends humanity’ to execute a person so wracked by mental illness that he cannot comprehend the ‘meaning and purpose of the punishment,’” this Court found that the “‘offense to morality must be much less when a person’s mental disorder causes nothing more than an episodic memory loss.”¹⁰⁸ Thus, the Court concluded that retribution is still served and moral values are not upended by executing a defendant who cannot remember his crime.¹⁰⁹

Addressing the second issue, the Court held that while memory loss alone is insufficient to satisfy the *Panetti* standard, psychotic delusions are not necessary to qualify an individual as mentally incompetent.¹¹⁰ The Court reasoned that the standard concerns a lack of rational understanding of the community’s judgment, regardless of the cause of such a condition.¹¹¹ Moreover, the Court determined that the justifications set forth in *Ford* and *Panetti* supported this conclusion because those justifications were also concerned with the effect of incomprehension rather than its cause.¹¹² The Court suggested that dementia would implicate Eighth Amendment concerns if, for example, a person was incapable of retaining any memories such that “even newly gained knowledge” was “quickly forgotten,” or if “cognitive deficits prevent the acquisition of such knowledge at all, so that memory

105. *Id.*

106. *Id.*

107. *Id.* (citing *Panetti v. Quarterman*, 551 U.S. 930, 958–59 (2007)).

108. *Id.* (“Moral values do not exempt the simply forgetful from punishment, whatever the neurological reason for their lack of recall.”).

109. *Id.*

110. *Id.* at 728.

111. *Id.* (“Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.”).

112. *Id.* at 729 (“[I]f and when [a] failure of understanding is present, the rationales kick in . . .”).

gaps go forever uncompensated.”¹¹³

Turning to the third issue—the mental competency of Madison himself—the Court held that remand was necessary because it was unclear whether the state court had found him competent under the erroneous assumption that only delusional states satisfied the *Panetti* standard.¹¹⁴ The Court held that while the original decision evaluating Madison’s competency stated that Madison had a rational understanding of his sentence, the more recent evaluation that the Court was reviewing did not incorporate that language.¹¹⁵ Further, the original decision emphasized Madison’s lack of delusions without discussing his dementia.¹¹⁶ Thus, the Court remanded the case to the state court and, because much of the original expert testimony and reporting relied on erroneous interpretations of the law, instructed the court to supplement the record as necessary.¹¹⁷

IV. THE RETRIBUTIVE AND MORAL VALUE OF EXECUTING THOSE WHO DON’T REMEMBER

The Court’s reading of the rational understanding requirement unnecessarily narrows the application of the *Panetti* standard.¹¹⁸ Rational understanding of the community’s reason for its judgment is undoubtedly a key requirement under the Eighth Amendment.¹¹⁹ However, rational understanding is not as restrictive of a standard as it might appear, particularly when comparing understanding of one’s crimes to understanding the Civil War.¹²⁰ In order to evaluate the constitutionality of executing

113. *Id.* at 727–28.

114. *Id.* at 729–31.

115. *Id.* at 730.

116. *Id.* at 730–31.

117. *Id.* at 731 (emphasizing that the state court must ensure “that if [Madison] is to be executed, he understands why”).

118. *See infra* Parts IV, V.

119. *See* J. D. Feltham, *The Common Law and the Execution of Insane Criminals*, 4 MELB. U.L. REV. 434, 468 (1964) (“[P]erhaps the most convincing purpose for which the rule [against execution of the insane] has been said to exist in modern circumstances is that punishment should not be inflicted upon a person incapable of comprehending the reason why he is punished.”).

120. *See* *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007) (“[A] concept like rational understanding is difficult to define.”); Jules L. Coleman, *Rational Choice and Rational Cognition*, 3 LEG. 183, 198 (1997) (“Davidsonian considerations do not appear to establish psychological rationality—that is, the very different claim that agents are rational. Rational-choice theory (and rationalistic theories generally) require the psychological, not the epistemological, sense of

criminals who do not remember their crimes, a further inquiry into the two justifications provided in *Madison* is necessary—retributive value and moral offense.¹²¹ Due to the identity shift and psychological disconnect that memory loss causes, the execution of defendants who cannot remember their crimes does not satisfy retributive values and consequently is an excessive punishment.¹²²

A. *Retributive Value: Memory Loss and Punishment*

In considering retributive value, the *Panetti* Court began with the premise that “capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime”¹²³ Thus, the individual’s ability to connect the meaning of the crime with the meaning and the purpose behind the punishment is essential to satisfying retributive ends.¹²⁴ This connection is never fully realized, however, if the individual has no recollection of committing the crime and therefore can only ever view the crime in the abstract.¹²⁵

rationality.”).

121. *Madison*, 139 S. Ct. at 727. These values are often included in discussions about justifications of the death penalty, and often the discussions of these two values are intertwined with one another. See Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 979 (1985) (“[E]ven though crime control may be a primary purpose of punishment, only retribution can ultimately justify punishment.”); see also *id.* at 1006 (“Desert is centrally important in answering not only the secondary question, ‘whom may we punish?’ but also the primary questions, ‘why do we punish?’ and ‘why is it (if it is) moral or just or right for us to do so?’”). However, this Note will discuss these two values individually. See *infra* Sections IV.A, IV.B.

122. See *infra* Sections IV.A, IV.B.

123. *Panetti*, 551 U.S. at 958.

124. See Gale, *supra* note 121, at 1005 (“If a person’s chance of receiving punishment does not relate to her own conduct, she has no incentive to forego the possibility of any perceived gain that might accrue from breaking the criminal laws.”); see also Douglas N. Husak, *Retribution in Criminal Theory*, 37 SAN DIEGO L. REV. 959, 979–80 (2000) (“Consider . . . a case in which a person engages in immoral conduct that he believes to be criminal. He subsequently discovers, much to his surprise and relief, that his conduct was not proscribed by an existing criminal statute after all. In such a case, one might think that the weight to be given to the principle of legality might be insufficient to override the value of realizing retributive justice.”).

125. See O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1256–57 (2011) (“Modifying memory neurobiologically seriously complicates [the goal of retributive justice] by preventing access to accurate accounts of the crime, or by preventing authentic emotions (felt in the appropriate degree) integral to appraising culpability, such as . . . empathy”); see also Birch, *supra* note 86, at 27 (“What we value about a contrite individual is not merely her regret at having committed the offense but her regret about the type of person she was and the life she led prior to committing the offense. Radical memory loss deprives individuals of the internal mental knowledge

In understanding the connection between an offender's crime and the community's judgment of capital punishment, the offender's ability to retain episodic memory of the crime is essential.¹²⁶ Episodic memory is the faculty that allows individuals to remember events in sequence as if they are reliving the experience in real time.¹²⁷ Retaining an emotional memory of the crime, which is distinct from episodic memory, is also crucial.¹²⁸ To illustrate the relevance and intersection of episodic and emotional memory in the context of crime and punishment, one scholar proposed various hypothetical situations where an offender's memory is manipulated.¹²⁹

Case 1 involves a defendant who robs a convenience store, kills the store clerk, and is later sentenced to death.¹³⁰ The defendant is able to reflect on his own unfortunate upbringing as well as his actions' effect on the victim's family and community.¹³¹ Consequently, the defendant is able to construct—and the jury is able to appreciate—his mitigation case out of genuine sorrow and remorse.¹³² In Case 2, however, the defendant commits the same crime but is later affected by “anterograde amnesia,” which wipes out his memory of the crime, and therefore he “finds it difficult to reflect on the details of the crime to generate a sense of empathy in himself for the victim, and, by extension, remorse.”¹³³ Finally, in Case 3 the defendant commits a crime under the influence of a drug that allows him to remember the facts of the crime but blocks out any memories of shame or pain, which

of those aspects of their past that form the background and prelude to their criminal acts.”).

126. See Snead, *supra* note 125, at 1205 (“[Episodic memory] is arguably the richest form of memory and is certainly most directly relevant to the relationship between memory and punishment.”).

127. See MICHAEL E. HASSELMO, *HOW WE REMEMBER: BRAIN MECHANISMS OF EPISODIC MEMORY 1* (2013) (“Like the snow under my feet, my episodic memory retained mental footprints showing where I faced, where I turned, and even how fast I moved.”).

128. See Snead, *supra* note 125, at 1218 (discussing a study that revealed that emotional memories “exist in a seamlessly integrated fashion with [episodic] memories, adding affective content that deeply influences how such [episodic] memories are understood and experienced”).

129. *Id.* at 1251–54. The author describes the interplay between episodic and emotional memory as remembering “fitly and truly.” *Id.* at 1246. Remembering “fitly” requires that a memory “be animated by a morally appropriate sentiment” and given an appropriate weight, while remembering “truly” requires recalling the facts and events as they occurred. *Id.*

130. *Id.* at 1251.

131. *Id.*

132. *Id.*

133. *Id.* at 1252.

leaves his claim for mitigation without “a truly felt element of regret.”¹³⁴

Case 1 poses no threat to achieving retributive justice because the defendant maintained full mental capacity throughout the execution of his crime and implementation of his punishment, recognized the mental state he was in that led him to committing his crime, and was, therefore, able to take full advantage of all the litigation tactics that due process afforded him.¹³⁵ Case 2, however, raises more complex questions about the defendant’s “personal identity” when he committed the crime and the defendant’s identity when he is later punished for it.¹³⁶ In Case 3, the defendant remembers the crime “truly” but not “fitly” and thus, his lack of emotional connection between the crime he committed and the punishment that the community seeks detracts from the punishment’s retributive value.¹³⁷

As these cases demonstrate, the reason that a lack of “episodic” or “emotional” memory presents a challenge to the punishment’s retributive value is that these memories make people who they are.¹³⁸ When an individual loses his memory of an important event, his consciousness is disrupted and his identity is inherently changed.¹³⁹ This is because a

134. *Id.*

135. *Id.* at 1254. Retribution focuses on *who* is punished for crimes because it “forbids punishment of those individuals who have done no wrong.” *Id.* Because the defendant in Case 1 does not undergo an appreciable change in mental state between the crime and the punishment, there is no question that the person who committed the crime is the “same” as the person who is punished for it. *Id.*

136. *Id.* at 1246, 1254–55 (arguing that the defendant’s ability to remember “truly” is inhibited, and thus the “psychological continuity” between the person who committed the crime and the person being punished is challenged).

137. *Id.* at 1246, 1255 (“Without such a fitting memory, the defendant is unable to grasp fully the horror of his own acts. This poses an obstacle to empathy, and thus remorse. This complicates the task of punishing in a way that tracks culpability.”).

138. See Birch, *supra* note 86, at 18 (describing existence as nothing more than “a chain of mental experiences” and a “sequence of mental states” that extends backward). This is known as the “reductive theory of mind,” which “claims that the existence of a person is merely a conventional way of identifying [the] patterns of human mental experience” that each human refers to as his “self.” *Id.* Thus, when a person forgets some of those experiences or previous mental states, the whole “notion of [the] person” is compromised. *Id.* at 18–19.

139. See Birch, *supra* note 86, at 18–19. Birch describes psychological experiments that involved severing the connection between the left and right hemispheres of epileptic patients’ brains. *Id.* at 19. This separation created “two separate spheres of consciousness, in effect two minds within the one brain,” such that the patients could no longer perform tasks that involved both hemispheres working together. *Id.* This experiment begs the question: if the experiment created a division of consciousness, “[w]hat happened to the personal identity of the patient that existed prior to the operation?” *Id.*

person's identity, at its core, is composed of the different memories and thoughts a person has, and the continuing "psychological connectedness" of those thoughts and ideas.¹⁴⁰ Thus, a loss of memory leads to psychological discontinuity, and therefore, a change in identity.¹⁴¹ Retribution is rooted in a particular individual receiving a punishment that he or she deserves for committing a wrong.¹⁴² Therefore, the punishment's retributive value disappears when a defendant suffers from memory loss because the person who the government punishes no longer has the same identity as the person who committed the crime.¹⁴³

The case law surrounding capital punishment emphasizes the importance of exacting punishment only on the person who committed the crime and, in the past, justified the central reason for identifying capital punishment as "cruel and unusual" in certain contexts.¹⁴⁴ In *Enmund*, for example, the Court refused to consider the culpability of an individual who committed felony murder when determining whether or not an individual who simply *assisted* in the felony should be sentenced to death.¹⁴⁵ Similarly, in determining that the execution of offenders under eighteen years of age violates the Eighth Amendment, the *Roper* Court focused on the changing

140. See Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U. L. REV. 395, 399 (1990) (describing the view that "a person's continued existence over time consists of two general relations, psychological connectedness and psychological continuity"). Psychological connectedness requires connections between a person's memory at one time and another. *Id.* "For example, today I remember the lilacs on a walk yesterday. A direct psychological connection exists between this experience and my present memory of it. . . . To be the same person today and yesterday, there must be enough direct connections." *Id.*

141. See 1 JOHN LOCKE, *Of Identity and Diversity*, in AN ESSAY CONCERNING HUMAN UNDERSTANDING 439, 449 (Alexander Campbell Fraser ed., 1959) (1689) ("[A]s far as [a particular] consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person.").

142. See Gale, *supra* note 121, at 999 ("Retribution focuses not on improvement of society but rather on just treatment of the individual.").

143. See Birch, *supra* note 86, at 20 ("If our concept of a person is a construction by which we bundle and label certain human experiences, but does not describe any additional or deep fact beyond those experiences, then we appear to lose any good reason for suggesting why this bundle of experiences here and now deserves to suffer punishment for something done by another bundle of experiences at a previous time.").

144. See *infra* notes 145–148 and accompanying text.

145. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) ("Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.").

identity of young adults and its effect on their moral culpability.¹⁴⁶ It emphasized that even the most heinous crimes, when committed by juveniles whose characters and identities are subject to change, may not be justified under the Eighth Amendment.¹⁴⁷ These cases demonstrate that the consistency of the offender's identity is an essential factor in determining the retributive value of capital punishment, and thus, when an offender's identity is shifted via memory loss, the retributive value of such an execution is greatly diminished.¹⁴⁸

Once the consistency of an offender's identity is called into question, the retributive justification for the death penalty begins to unravel because retribution occurs when a balance is struck between the offender and the injured party.¹⁴⁹ While an offender who does not remember committing a crime might be able, as the *Madison* Court recognized, to "rationally" understand the crime in the same way he might understand the events of the Civil War, he will likely never be able to connect his own identity to those acts.¹⁵⁰ Thus, the offender will not "recognize at last the gravity of his crime[s]," and society must then cope with another unjustified killing and an unfulfilled desire for retribution.¹⁵¹

146. *Roper v. Simmons*, 543 U.S. 551, 570–71 (2005) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)) (explaining that a difference between juveniles and adults "is that the character of a juvenile is not as well formed as that of an adult," and therefore "their irresponsible conduct is not as morally reprehensible as that of an adult").

147. *Id.* at 570 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.").

148. See *supra* notes 138–147 and accompanying text; see also Birch, *supra* note 86, at 27 ("By virtue of my character, personality, knowledge, dispositions, and memories of my life generally, I could have maintained a high level of qualitative connection with my earlier self at the time I committed an offense. Yet, if our intuitions are to be trusted, I ought not to deserve punishment for wrongs committed during the period of my life that I cannot now remember.").

149. See John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J. JURIS. 91, 101 (1999) (discussing retribution as an essential element of society that evenly distributes advantages and disadvantages within a society and viewing "punishment as retributive in aim by having the restoration of equality as its point: equality between the wrongdoer and the law-abiding").

150. See *Madison v. Alabama*, 139 S. Ct. 718, 727 (2019); Snead, *supra* note 125, at 1228–29 (explaining the possibility that a person who has forgotten parts of his life might be able to recall "autobiographical information" but be unable to maintain his self-identity, which is "defined (and disrupted) by the limits of his memory").

151. See *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007); see also Dresser, *supra* note 140, at 429 ("For desert-based punishment to be morally defensible, reductionism demands that the person

B. Moral Value: Balancing Crime and Punishment

The second tenet that the Court has considered when evaluating whether a class of defendants are competent to be executed is the moral value of that execution—whether it “offends humanity” to subject that group to capital punishment.¹⁵² Scholars have struggled to define the role for morality in capital punishment in general: some believe that death as a penalty for crime is morally sound in extremely limited circumstances,¹⁵³ while other scholars have surmised that punishment is not grounded in morality at all.¹⁵⁴ However, many seem to agree that the morality of punishment depends on the proportionality between the crime committed and the punishment society bestows.¹⁵⁵ As the Supreme Court has recognized, ensuring proportionality requires an individualized sentence for each defendant who commits a crime because of “[t]he nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence.”¹⁵⁶ In other words, the morality of punishment is grounded not only in the balance between the crime and the

punished be psychologically related enough to the person who chose to violate the law.”).

152. See *Panetti*, 551 U.S. at 958.

153. See Orvill C. Snyder, *Capital Punishment: The Moral Issue*, 63 W. VA. L. REV. 99, 116 (1961) (“[P]unishment of human beings by human beings cannot be morally justified on the ground of retribution; it can be morally justified only on the ground of the community’s moral-law right of self-defense.”).

154. See Finnis, *supra* note 149, at 92 (“Punishment itself, [Nietzsche] says, does not normally induce a sense of guilt or bad conscience. . . . Rather, it originated in notions of equivalence modelled on barter and sale. The criminal was debtor and the damaged creditor received compensation. . . .”).

155. See Dresser, *supra* note 140, at 420 (“By committing a crime, a person commits a wrong against society. Society is then justified in inflicting a proportionate amount of suffering on that person.”); Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 119 (2008) (“Punitive damages, to be morally justified and to conform to due process, must be limited and proportional to the wrong being punished.”); Snead, *supra* note 125, at 1251 (“In short, retributive justice requires that the punishment track culpability in a proportionate measure.”); Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 458 (2009) (“[S]omething in me recoils at the notion that the Constitution would permit death sentences for those not deserving death merely because the sentence served some utilitarian end.”).

156. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); see also Louis D. Billionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 286 (1991) (“Execution, the harshest punishment acceptable to our society, is legitimate only when it can be said with confidence that it is not only a permissible legal response but also the morally appropriate response to the particular crime and the particular offender.”) (emphasis omitted).

punishment, but also in the consistency between the person who committed the crime and the person being punished.¹⁵⁷

Because the morality of punishment depends on particularized proportionality assessments for various crimes, and because the Eighth Amendment's meaning changes with "evolving standards of decency,"¹⁵⁸ the Supreme Court has used a case-by-case approach to ascertain whether society deems execution of certain types of prisoners as cruel and unusual.¹⁵⁹ The Court historically looks to state laws and other objective indicia of contemporary moral values in making this determination.¹⁶⁰ The *Madison* Court, however, did not consider such evidence to gauge society's judgment concerning the moral appropriateness of executing offenders who have no memory of the crime they committed.¹⁶¹ Instead, the Court simply concluded that while it "offends humanity" to execute prisoners whose mental illness prevents them from understanding the purpose of their punishment, the "offense to morality must be much less when a person's mental disorder causes nothing more than an episodic memory loss."¹⁶² Nowhere in the opinion did the Court consider whether society agrees that this is a lesser moral offense.¹⁶³

157. See Jennifer Leto, *Extraordinary and Compelling: Madison v. Alabama and the Issue of Prison Reform for Elderly Prisoners*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 41, 57 (2019) ("It is important to keep in mind that just as much as the punishment must fit the crime, the punishment should also fit the person.").

158. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). But see Wilkins, *supra* note 155, at 459–83 (critiquing the "evolving standards" test for its failure to properly serve the proportionality requirement, and instead advocating a categorical approach to Eighth Amendment limitations on capital punishment).

159. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 417–18 (2008) (noting that while the Court had already decided capital punishment for the rape of an adult woman was unconstitutional, "it left open the question" of whether "other nonhomicide crimes can be punished by death consistent with the Eighth Amendment").

160. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)) ("[O]ur own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."); *Enmund v. Florida*, 458 U.S. 782, 789–94 (1982) ("Society's rejection of the death penalty for accomplice liability in felony murders is . . . indicated by the sentencing decisions that juries have made [and by legislative judgments.];"); *Coker*, 433 U.S. at 593 ("[W]e seek guidance in history and from the objective evidence of the country's present judgment concerning the acceptability of death as a penalty for rape of an adult woman.").

161. See *Madison v. Alabama*, 139 S. Ct. 718, 722–31 (2019) (limiting the analysis to a review of standards put forth in *Ford v. Wainwright* and *Panetti v. Quarterman*).

162. *Id.* at 727.

163. See *supra* notes 161–162 and accompanying text.

One possible explanation for the Court's decision to forgo such analysis is that objective indicia of states' judgments concerning execution of amnesiac prisoners simply does not exist—either because states have not explicitly addressed the issue, or because states that have addressed it have contradicted one another.¹⁶⁴ Another possibility is that the Court believed inquiry into objective factors was unnecessary, because the issue in this case only called for an interpretation of a standard already established under *Ford* and *Panetti*.¹⁶⁵ In any event, the Court was free to ignore state legislative judgments on the matter because the Court has discretion to disagree with those judgments if they conflict with the Court's interpretation of the Eighth Amendment.¹⁶⁶

Philosophers have consistently wrestled with the moral implications of punishing those who do not remember their crimes.¹⁶⁷ Much like the effect that memory loss has on the retributive value of punishment, a lack of memory about the details of a crime may affect the severity of the punishment in the eyes of the public.¹⁶⁸ Likewise, a penalty of death will feel disproportionate to an offender who does not remember his own actions and mental state at the time he committed the crime, even if he understands the factual details of the crime he once committed.¹⁶⁹ If a defendant does not

164. See *Harmelin v. Michigan*, 501 U.S. 957, 999, 1000 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980)) (explaining that “[s]tate sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise,” but “proportionality review by federal courts should be informed by ‘objective factors to the maximum possible extent’”).

165. See *Moore v. Texas*, 137 S. Ct. 1039, 1049 (2017) (declining to analyze objective indicia of societal norms concerning capital sentences for inmates with low IQ scores where the Court's precedent clearly indicated that capital punishment in that context was unconstitutional).

166. See *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (“Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.”); *Atkins v. Virginia*, 536 U.S. 304, 313 (2002) (“[W]e shall first review the judgment of legislatures that have addressed the suitability of imposing the death penalty on the mentally retarded and then consider reasons for agreeing or disagreeing with their judgment.”).

167. See, e.g., LOCKE, *supra* note 141, at 463–64 (“But in the Great Day, wherein the secrets of all hearts shall be laid open, it may be reasonable to think, no one shall be made to answer for what he knows nothing of . . .”).

168. See Snead, *supra* note 125, at 1263 (“Without such memory, the punishment will seem either too harsh or too lenient and will not resonate with the moral sensibilities of the polity.”).

169. Birch, *supra* note 86, at 29 (“If one tries to envisage oneself spending years in prison for having committed some crime that one is now unable to recall and where one has no internal knowledge or memory of one's motivations, reasons, character or life at the time, it is difficult to

remember the thoughts and feelings he was experiencing when he committed the crime, he likely does not associate the crime with his own identity.¹⁷⁰ Consequently, putting a defendant to death who feels disassociated from his crime in this way offends humanity for many of the same reasons that the Court reached such a conclusion in *Ford* and *Panetti*.¹⁷¹

The Court also emphasized the importance of a defendant's self-identity in *Enmund* and *Roper*, where it discussed the moral implications of executing a defendant whose identity is disconnected from the crime.¹⁷² In *Enmund*, the Court stated that the defendant's moral guilt is essential to his criminal culpability, and capital punishment would be unconstitutionally excessive in the absence of such guilt.¹⁷³ Even if the defendant's accomplice in the crime had possessed the intent to kill, the defendant's "punishment must be tailored to his personal responsibility and moral guilt," and therefore, sentencing him to death as punishment for a crime he did not intend would have been disproportionate to his moral guilt.¹⁷⁴ This reasoning applies to Madison because his loss of memory and consequential change in identity lessened his personal responsibility and moral guilt.¹⁷⁵

believe that one could acknowledge the punishment as deserved.”)

170. See Snead, *supra* note 125, at 1241 (“[B]y sustaining personal identity, memory makes it possible for others to fully hold us to account for our moral obligations.”).

171. See Leto, *supra* note 157, at 57 (“It is important to make sure that the identity of the offender and the identity of the inmate up for execution are the same. Madison is no longer the same man who committed his heinous crime.”); *supra* text accompanying note 162. In *Panetti v. Quarterman*, the Court emphasized the difference between an “awareness of the State’s rationale for an execution” and “a rational understanding of it.” 551 U.S. 930, 959 (2007). The Court concluded that a defendant should not be executed if he cannot comprehend “the meaning and purpose of the punishment to which he has been sentenced.” *Id.* at 960. A defendant who cannot remember his crime has no psychological connection to his criminal acts, and therefore his understanding of the “meaning and purpose” of punishment will not be the same as a defendant who remembers his crime. See Dresser, *supra* note 140, at 413, 421–22. Thus, a lack of memory calls this essential prerequisite for punishment into question. *Id.* at 413 (“The weaker the psychological connection, the less punishment is deserved . . .”).

172. See *infra* notes 173–180 and accompanying text.

173. *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

174. *Id.* at 801 (“Putting *Enmund* to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.”).

175. *Madison v. Alabama*, 139 S. Ct. 718, 723 (2019); see also Derek Parfit, *On “The Importance of Self-Identity”*, 68 J. PHIL. 683, 686 (1971) (“[A] person’s life can be divided into the lives of successive selves. This can be done where there is a marked change in character, or some other

Thus, Madison's sentence does not reflect his own criminal culpability, and like in *Enmund*, the proportionality between his crime and his punishment is necessarily called into question.¹⁷⁶

In *Roper*, the Court similarly emphasized that “[c]apital punishment must be limited to those offenders . . . whose extreme culpability makes them ‘the most deserving of execution.’”¹⁷⁷ The Court concluded that juveniles are unlikely to fall within this class of the worst-behaved individuals because their characters “[are] not as well formed as [those] of . . . adult[s],” and their personality traits are “more transitory.”¹⁷⁸ Just as juveniles’ identities are fragile and leave open the possibility for reformation of immorality, a defendant who forgets his former criminal behavior is presented with an opportunity to ameliorate his character.¹⁷⁹ Thus, extending the reasoning of *Roper* to *Madison* might have led to a different result, as there remained hope that Madison’s identity might be changed and his morality retrieved.¹⁸⁰

Another challenge to proportionality arises from the argument that dementia may itself be its own punishment, and therefore adding death as a

lessening in psychological connectedness.”).

176. See *Enmund*, 458 U.S. at 801.

177. *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

178. *Id.* at 570 (“From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”).

179. Dresser, *supra* note 140, at 446 (“Reductionism invites serious dialogue about what psychological connectedness and continuity qualify as a morally defensible basis for retributive, deterrent, and incapacitative punishment. It urges consideration as to what sorts of rehabilitative programs might be effective [for defendants who are psychologically disconnected from their crimes].”).

180. See *Roper*, 543 U.S. at 570, 573 (“An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”). This holds true in Madison’s case, where the facts of his past crime might interfere with a faithful application of the competency standard. See, e.g., Kelsey Stein, *Who is Vernon Madison? Alabama Cop-Killer Facing Execution Has Claimed Insanity, Incompetence*, AL.COM (JAN. 13, 2019), <https://www.al.com/news/2016/05/who-is-vernon-madison-alabama.html> (quoting Judge McRae, who described Madison as “a man whose life history is but one sequel after another of violent, assaultive acts against other human beings and total disregard for our laws” when sentencing Madison to death). Judge McRae sentenced Madison to death despite the jury’s recommendation of life without parole. *Id.* Judge McRae has overridden “six jury recommendations for life without parole to impose a death sentence, the most of any judge in Alabama.” *Id.*

penalty tips the scales of crime and punishment out of balance.¹⁸¹ The *Ford* Court briefly raised this issue, but *Panetti* offered no insight as to its validity; therefore, the *Madison* Court did not address it when deciding the constitutionality of executing a defendant with vascular dementia.¹⁸² However, scholars have since pondered over the effect that such mental illness has on punishments—particularly when a prisoner’s living conditions contribute to the illness.¹⁸³ Prison conditions are understandably harsh, but there is also an absence of corrective treatment when those conditions lead to cognitive decline.¹⁸⁴ While this argument may apply with less force when the punishment the defendant suffered is memory loss rather than a loss of all cognitive sense, it is nevertheless certain that: 1) the argument of cognitive decline as sufficient punishment was considered in *Ford*,¹⁸⁵ and 2) prison conditions do contribute to cognitive decline.¹⁸⁶ Therefore, because mental decline adds an additional layer of punishment onto a prison sentence, courts should at least address a defendant’s enduring cognitive decline—in any form—when weighing the severity of a crime against the

181. *Cf.* *Ford v. Wainwright*, 477 U.S. 399, 407 (1986) (“It is also said that execution serves no purpose in these cases because madness is its own punishment . . .”).

182. *See id.* *See generally* *Madison v. Alabama*, 139 S. Ct. 718, 722–31 (2019) (lacking any reference to insanity being a punishment on its own); *Panetti v. Quarterman*, 551 U.S. 930, 934–62 (2007) (acknowledging that *Ford* brought up the point as a factor but neglecting to expound on it).

183. *See, e.g.*, Patrick A. Dawson & J. David Putnal, *Ford v. Wainwright: Eighth Amendment Prohibits Execution of the Insane*, 38 MERCER L. REV. 949, 968 (1987) (discussing collateral issues raised by *Ford*, such as “how [the state will deal] with prison conditions that may be fostering poor mental health among inmates”). Similarly, the status of “death row inmate” often causes psychological torment and mental decline. *See* Douglas Mossman, *Assessing and Restoring Competency to be Executed: Should Psychiatrists Participate?*, 5 BEHAV. SCI. & L. 397, 398 (1987) (discussing how the “extreme physical and emotional stress” capital inmates experience from sitting on death row often causes psychosis in prisoners); Quinn Carlson, *Madison v. Alabama: The Unfulfilled Promise of Ford*, 97 DENV. L. REV. 597, 616–17 (2020).

184. James R. P. Ogloff et. al., *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues*, 18 LAW & PSYCHOL. REV. 109, 125, 134 (1994) (noting that correctional facilities have failed to effectively respond to mentally ill prisoners’ treatment needs, and discussing the “high prevalence of [mentally ill offenders] in jails and prisons of the United States,” who “face significant hurdles as they endure the routine challenges of dealing with mental illness while in prison” and are “more likely to be victimized by other offenders”).

185. *Ford*, 477 U.S. at 407.

186. *See* Ruthanne DeWolfe & Alan S. DeWolfe, *Impact of Prison Conditions on the Mental Health of Inmates*, 4 S. ILL. U. L.J. 497, 501 (1979) (“Courts have gradually recognized that there is some relationship between prison conditions, emotional and mental states, and destructive behavior.”).

severity of the punishment.¹⁸⁷

As the *Ford* Court acknowledged, scholars have long believed that humanity demands an execution be stayed if a defendant becomes of “nonsane memory.”¹⁸⁸ Contextually, the word “memory” may have been intended to refer to the mind generally rather than its modern understanding as the ability to store information,¹⁸⁹ but the connection between memory and the mind’s other faculties makes the sentiment applicable to memory loss as well.¹⁹⁰ The Eighth Amendment has at its core a “basic concept of human dignity,” and it demands that capital punishment be reserved for defendants with the most extreme culpability because execution is “unique in its severity and irrevocability.”¹⁹¹ A defendant who has lost his memory of the crime has lessened culpability because his psychological connection to the criminal act is diminished, and he can therefore only ever understand the crime and his punishment in the abstract.¹⁹² Thus, the moral principles of the Eighth Amendment cannot support a sentence of death for a defendant who has no memory of the crime he committed.¹⁹³

Madison’s holding fails to address how the change in identity caused by

187. See *Dunn v. Madison*, 138 S. Ct. 9, 13 (2017) (Breyer, J., concurring) (“[W]e may well have to consider the ways in which lengthy periods of imprisonment between death sentence and execution can deepen the cruelty of the death penalty while at the same time undermining its penological rationale.”); see also *Bilionis*, *supra* note 156, at 328 (“Nowhere is it written that a state has a right to be unwary of the Constitution’s demands, particularly when the state seeks to take the life of one of its citizens.”).

188. *Ford v. Wainwright*, 477 U.S. 399, 406–07 (1986) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25).

189. Jack C. Schoenholtz et al., *The “Legal” Abuse of Physicians in Deaths in the United States: The Erosion of Ethics and Morality in Medicine*, 42 WAYNE L. REV. 1505, 1596 (1996) (quoting *Memory*, BLACK’S LAW DICTIONARY 985 (6th ed. 1990)) (alteration in original) (“[T]he word [‘memory’] as used in Blackstone and other ancient authorities, appeared to be synonymous with ‘mind’, [sic] whereas the word ‘memory’, [sic] in modern times is used in a more restricted sense of recollection of past events rather than the general state of one’s mental power.”).

190. *Id.* at 1594–98 (discussing the interconnectedness between memory and the mind).

191. *Gregg v. Georgia*, 428 U.S. 153, 182–87 (1976) (first citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)); then citing *Furman v. Georgia*, 408 U.S. 238, 286–91 (Brennan, J., concurring); and then citing *Furman*, 408 U.S. at 306 (Stewart, J., concurring).

192. See *Parfit*, *supra* note 175, at 687 (“When we think about an earlier part of our lives, we can reflect upon the weakening, over time, in psychological connectedness. Such reflections may produce in us a kind of detachment. We can then say, ‘That was only my past self.’”).

193. Brief for Petitioner at 27, *Madison v. Alabama*, 139 S. Ct. 718 (2019) (No. 17-7505) (“For purposes of retribution, there is no moral or constitutional distinction between a person who cannot ‘recogni[ze] . . . the severity of the offense’ as a result of delusions and a person who is unable to do so as a result of dementia, cognitive decline, and memory deficits.”).

memory loss in turn affects a defendant's rational understanding of his crime.¹⁹⁴ Consequently, this oversight poses a threat to Eighth Amendment protections because the execution of a defendant who does not remember committing the crime cannot be justified by either retributive values¹⁹⁵ or moral arguments of proportionality.¹⁹⁶

V. LOOKING FORWARD: HOW WILL *MADISON* AFFECT COMPETENCY DETERMINATIONS?

The *Madison* Court applied the competency standard developed under *Panetti* to reach its conclusion, emphasizing that *Panetti* focused on cognitive inability—specifically, inability to rationally understand a state's reason for execution—rather than which mental conditions may cause that inability.¹⁹⁷ The Court in *Madison* held that “simpl[e] forgetful[ness]” alone is insufficient to render a defendant incompetent, but it also acknowledged that forgetfulness might be enough if it causes a lack of rational understanding of the death sentence.¹⁹⁸ But, as the *Panetti* Court recognized, “a concept like rational understanding is difficult to define.”¹⁹⁹ *Madison*'s proposition—that a defendant can rationally understand the connection between his crime and the punishment imposed even when the defendant has

194. See *Madison*, 139 S. Ct. at 726–27 (explaining the Court's reasoning without examination of the identity question described).

195. See *supra* Section IV.A.

196. See *supra* Section IV.B.

197. *Madison*, 139 S. Ct. at 728 (“[*Panetti*'s] standard focuses on whether a mental disorder has had a particular effect: an inability to rationally understand why the State is seeking execution.”).

198. *Id.* at 727–29. The Court provided examples for when dementia may be sufficient to cause a lack of rational understanding, such as “when a person has difficulty preserving any memories, so that even newly gained knowledge (about, say, the crime and punishment) will be quickly forgotten. Or . . . when cognitive deficits prevent the acquisition of such knowledge at all, so that memory gaps go forever uncompensated.” *Id.* at 728.

199. *Panetti v. Quartman*, 551 U.S. 930, 959 (2007). The Court then noted that the “lack of rational understanding” standard is not satisfied when any defendant is “so callous as to be unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality.” *Id.* at 960. Rather, a “severe, documented mental illness” will mark “[t]he beginning of doubt about competence in a case.” *Id.*; see also Terry A. Maroney, *Emotional Competence, Rational Understanding, and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1375 (2006) (“Though it is well established that, to be competent, a criminal defendant must have a ‘rational’ as well as ‘factual’ understanding of her situation, the meaning of such ‘rational understanding’ has gone largely undefined.”).

no memory of committing the crime—makes the term even more elusive, and it is likely that courts will have difficulty applying *Madison*'s holding.²⁰⁰

Although *Madison* attempted to simplify *Panetti*'s solution to determining competency to be executed, scholars have often criticized *Panetti*'s vague use of the term “rational understanding” because it has allowed courts to virtually ignore the requirement altogether, so long as a capital defendant is aware of the State's reason for execution.²⁰¹ Some scholars propose a categorical ban of execution in all cases involving mentally ill defendants.²⁰² However, the primary objection to *Panetti*'s elusive standard is its failure to offer any real solution for how to proceed when the psychological complexity of mental illness, the philosophical complexity and importance of capital punishment, and the difficulty of defining “rational understanding” intersect, despite the opinion's acknowledgment of these issues.²⁰³

After *Madison*, the competency determination has become even more complicated; now, psychological experts must distinguish between defendants with memory loss who can “rationally” conceptualize the connection between a crime they committed and the State's death sentence from those who cannot.²⁰⁴ It is true that some ethical dilemmas may be more

200. Cf. Steiker, *supra* note 14, at 290 (discussing the “tensions and uncertainties” that the *Panetti* standard creates and arguing that it raises “global questions about the proper scope of Eighth Amendment constraints on punishment and the methodology for determining that scope”).

201. See Blume, *supra* note 11, at 341 (footnote omitted) (“Some courts have interpreted *Panetti* as imposing an additional requirement of a rational understanding of death and the reasons for execution in determining competency to be executed, but for the most part, courts have held that *Panetti* only reiterated *Ford*'s requirements.”).

202. See, e.g., Wilkins, *supra* note 155, at 476–79 (describing a categorical ban on capital punishment for prisoners with psychotic disorders). Of course, there are also scholars who have suggested the possibility of a categorical approach in the other direction, in opposition to the holdings of *Ford* and *Panetti*. See Steiker, *supra* note 14, at 296 (“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)?”).

203. Michael Mello, *Executing the Mentally Ill—When Is Someone Sane Enough to Die?*, 22 CRIM. JUST. 30, 31 (2007) (“If the mentally ill shouldn't be put to death, what is the correct standard for measuring execution competency; what kinds of mental illness ‘count’? Who should set that standard? Who—employing what procedural vehicles—should decide whether a particular prisoner is sane enough to die? . . . The problem of the intersection between mental illness and capital punishment isn't rocket science. It's much harder than that.”).

204. *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019) (citing *Panetti*, 551 U.S. at 962) (emphasizing that “neurologists, psychologists, and other experts can contribute to a court's understanding” of issues involving mental competency and rational understanding).

easily avoided when a defendant's competency evaluation concerns loss of memory rather than psychotic delusions, such as his ability to consent to the evaluation.²⁰⁵ However, other issues at the heart of the rational understanding requirement become significantly more difficult to evaluate.²⁰⁶ One scholar, for example, argues that a defendant's emotional appreciation of a criminal act and its consequences are essential for rational understanding.²⁰⁷ As previously discussed, emotional appreciation of these concepts is called into question when a defendant has lost his memory of the crime because the defendant no longer psychologically identifies with the person he was when he committed the crime.²⁰⁸

Madison itself reflects the obstacles its opinion creates through its reasoning for remanding the case back to state court to determine whether Madison is currently competent to be executed.²⁰⁹ The Court acknowledged that the state court's original ruling in 2016 stated the correct standard—that Madison had a rational understanding under *Panetti*—but it worried that the state court reached this determination by simply concluding that Madison was not delusional.²¹⁰ It directed the state court to reassess whether Madison's dementia prevents him from rationally understanding why he is to be executed, assuring that the state court could “evaluate such matters better.”²¹¹ While the Court suggested earlier in its opinion that dementia may cause incompetency where newly gained information is “quickly forgotten” or where “memory gaps go forever uncompensated,”²¹² it failed to expand upon *what kind* of memory retention is necessary for a defendant to satisfy the rational understanding requirement.²¹³

What if a defendant retains only a semantic memory of the crime, such

205. Mark A. Small & Randy K. Otto, *Evaluations of Competency to Be Executed: Legal Contours and Implications for Assessment*, 18 CRIM. JUST. & BEHAV. 146, 152 (1991) (“[I]t may be that the difficulties which led someone to question the prisoner's competency to be executed may also compromise his competency to consent to the psychological evaluation.”).

206. See *infra* notes 207–208 and accompanying text.

207. Maroney, *supra* note 199, at 1405–06.

208. Dresser, *supra* note 135140, at 426 (“The person punished must be psychologically related to the offender, and must continue to have enough of the culpable mental state to justify attribution of responsibility and the infliction of punishment.”).

209. See *Madison*, 139 S. Ct. at 729–31.

210. *Id.* at 730.

211. *Id.* at 731.

212. See *id.* at 727–28 (discussing how memory loss affects a *Panetti* analysis).

213. *Id.* at 731 (stating that the Court “express[es] no view” on whether the defendant reached a “rational understanding”).

that he can remember factually that he committed a crime when shown pictures of the scene or of the weapon he used, but cannot remember the experience of committing the crime?²¹⁴ What if a defendant's memory is damaged such that he can only remember information for a week at a time—is this what the Court considers to be information that is “quickly forgotten?”²¹⁵ *Madison* left the resolution of these difficult issues largely in the hands of experts before the lower courts and the findings they choose to emphasize, which raises ethical concerns for psychiatrists as to the extent of their participation in execution proceedings.²¹⁶ It is also likely that lower courts may avoid addressing these issues involving the relationship between memory and rational understanding altogether, as they have avoided undergoing a general rational understanding analysis up to this point by simply adopting the psychological findings and interpretations of either party's expert.²¹⁷

Rather than further complicate the competency standard by asking

214. See Snead, *supra* note 125, at 1207–08 (describing a patient whose semantic memory was intact and who could remember his address and the location of his parents' vacation home, but whose damaged episodic memory prevented him from remembering any experiences of his own life).

215. See *Madison*, 139 S. Ct. at 728 (neglecting to define “quickly forgotten”); see also Snead, *supra* note 125, at 1226 (footnote omitted) (“Memory—including the activities of encoding, remembering, and forgetting—is indispensable to the essential and distinctive activities of human life . . .”).

216. See Loren H. Roth, *The Council on Psychiatry and Law*, 144 AM. J. PSYCHIATRY. 411, 412 (1987) (“There is uncertainty about whether it is ethical for psychiatrists to participate in death row evaluations After much discussion, the council was unable to agree, on the basis of principle, whether psychiatric participation in the evaluation and treatment of persons sentenced to execution is consistent with ethical standards.”). But see Douglas Mossman, *supra* note 183, at 407 (“Psychiatrists . . . need not feel that pragmatic solutions to fulfilling the tasks assigned to them by execution competency statutes will necessarily involve compromising professional standards.”).

While professional psychological evaluations are necessary in order to determine competency to be executed, the problem seems to be that courts have come to rely too heavily on these evaluations, and have abandoned their independent duty to apply legal standards to the psychological findings. See Melissa L. Cox & Patricia A. Zapf, *An Investigation of Discrepancies Between Mental Health Professionals and the Courts in Decisions About Competency*, 28 LAW & PSYCHOL. REV. 109, 131 (2004) (proposing greater education for judges on the interplay between psychology and legal competency standards).

217. See *supra* note 216 and accompanying text; see also *Wood v. Thaler*, 787 F. Supp. 2d 458, 496–97 (W.D. Tex. 2011) (adopting the opinions of the respondent's expert that the petitioner's belief that the prosecutor and the sentencing court were conspiring against him was “simply a means of ‘rationalizing’ [his] current situation[.]”), *aff'd*, 619 F. App'x. 304 (5th Cir. 2015). This is particularly likely in light of the fact that *Madison* failed to provide a concrete standard for evaluating memory's effect on rational understanding. See *Madison*, 139 S. Ct. at 731.

psychiatrists and other experts to determine whether a defendant who has no memory of his crime can still have a rational understanding of the connection between the crime and punishment, the Court should have adopted a categorical prohibition of capital punishment for defendants who cannot remember their crimes.²¹⁸ In University of Detroit Professor Pamela Wilkins's assessment of current Eighth Amendment and capital punishment jurisprudence, she recognizes a "double bind" that makes it difficult for the Court to implement categorical bans on executing certain classes of individuals.²¹⁹ Specifically, she recognizes that certain conditions that make defendants less culpable also make defendants (at least appear) to be more dangerous, and juries often give more weight to the future dangerousness of defendants than to the defendant's reduced culpability.²²⁰ While this phenomenon might not be problematic when focusing on retributive values of punishment in isolation, it becomes problematic when considering whether it leads to a punishment that is greater than what the defendant actually deserves.²²¹

To address this bind, Wilkins proposes a new test for determining when a categorical prohibition is appropriate for a certain class of individuals.²²² The test has four conditions that must be met: 1) the class members must have a particular condition that is not chosen by the class members or defined by their past experiences; 2) the condition must be significantly mitigating (meaning it substantially reduces the individual's culpability); 3) the mitigating condition must indicate (or could be understood by a jury to indicate) an enhanced possibility of future dangerousness; and 4) there must be a substantial risk that the jury will weigh the possibility of future

218. See Wilkins, *supra* note 155, at 483 ("Contrary to what some might claim, the incoherence of the Supreme Court's jurisprudence on categorical prohibitions is not a good or sufficient reason to eliminate such prohibitions altogether.").

219. *Id.* at 426.

220. *Id.* at 426–27 (describing the difficulties defendants face when juries perceive them as dangerous).

221. *Id.* at 430 ("A deserts-limitation view of the Eighth Amendment insists upon the primacy of retribution: utilitarian arguments about deterrence and incapacitation must yield in the face of deserts-based arguments.").

222. *Id.* at 470. Wilkins' test intends to counteract juries' tendency to weigh the potential future dangerousness of a defendant more heavily than the defendant's reduced culpability. *Id.* (footnote omitted) ("[I]s there a substantial risk that when the characteristics of a condition point simultaneously to significantly reduced culpability and to future dangerousness, the jury will give more weight to the future dangerousness issue than to the moral deserts issue?").

dangerousness more heavily than the defendant's reduced culpability.²²³ If all of these conditions are met, then a categorical exclusion is appropriate.²²⁴

Applying this test to Madison's case, a categorical prohibition on executing defendants who cannot remember their crime should be implemented because these defendants have significantly reduced culpability,²²⁵ yet juries could interpret their memory loss as enhancing the possibility of their future dangerousness.²²⁶ The risk that juries might give more weight to the potential for future dangerousness than to the defendant's lessened culpability is substantiated by Madison's case itself.²²⁷ The Court should therefore implement a categorical ban to protect defendants who completely lose memory of their crime, to prevent courts—and juries—from levying the ultimate punishment against defendants who do not deserve it.²²⁸

As the Justices recognized during oral argument in *Madison*, some commentators argue that allowing memory loss to prevent execution would cause a substantial increase in defendants who falsely claim that they cannot

223. *Id.* at 470–71.

224. *See id.* at 471. As Wilkins notes, this test for categorical bans is more constitutionally sound than having no categorical bans because without them, the defendant bears the risk that he may be sentenced to death due to a condition that seems dangerous, even though the condition makes him less deserving of death. *Id.* at 476. While the Constitution prohibits excessive punishments, it is ambivalent towards potential under-punishment of defendants protected by the categorical ban. *Id.*

225. *See supra* Section IV.A.

226. *See* Snead, *supra* note 125, at 1261 (explaining that because memory loss causes a disruption in personal identity, predicting how a previously violent person will act in the future after suffering from memory loss becomes very difficult). While a defendant whose identity is altered by memory loss “may very well refrain from repeating prior bad acts,” *id.*, it is easy to envision how a jury might interpret a capital defendant's loss of memory—as making him more unpredictable or indifferent towards his previous crimes. *See* JOEL NORRIS, SERIAL KILLERS 239–40 (1989) (explaining how memory loss and head trauma are frequently associated with “individuals who are at risk of becoming episodically violent, even if there is no diagnosed brain malfunction”).

227. *Madison v. Alabama*, 139 S. Ct. 718, 724 (2019). After a competency hearing, the trial court had found Madison competent to be executed despite his argument that he could no longer remember his crime. *Id.*

228. *See* Wilkins, *supra* note 155, at 483 (concluding that the Supreme Court should shift its currently inconsistent Eighth Amendment inquiry to a standard that focuses primarily on deserts).

In response to the outcome of *Madison*, Quinn Carlson similarly proposes a categorical ban on the execution of a class of defendants that would include Madison. *See* Carlson, *supra* note 183, at 618. That proposal, however, focuses on defendants who have been “diagnosed with a mental illness that, by definition, impairs [their] cognitive capacity.” *Id.* Because this Note concludes, however, that the relationship between memory loss and self-identity is the precise trigger that lessens a defendant's culpability, its proposal applies to all defendants who lose memory of their crimes, rather than defendants who are diagnosed with a mental illness that impairs cognitive capacity. *See supra* notes 225–226 and accompanying text.

remember their crimes.²²⁹ However, this outcome is unlikely for two reasons: First, a similar fear of frivolous claims arose when *Ford* created a claim for incompetency due to mental illness, but the number of inmates who filed claims of incompetency after *Ford* was close to the number of inmates found to have a severe mental illness.²³⁰ Second, true memory loss, whether brought on by dementia or amnesia or some other mental illness, is a measurable affliction that defendants can prove in court.²³¹ Thus, while it may be easy for defendants to file frivolous claims of incompetency based on memory loss, an influx of frivolous claims seems unlikely, and any frivolous claim filed will have a low chance of success.²³²

Around 2,500 prisoners are currently sitting on death row.²³³ In 2019, “at least 19 of the 22 executed prisoners” suffered from either mental illness, intellectual disability, or severe trauma.²³⁴ The use of capital punishment in America “continue[s] to wither,”²³⁵ but for those whose execution dates

229. See *supra* note 99 (discussing oral argument in *Madison*). This fear parallels the fear felt by many when the Court developed a standard for mental competency in the first place. See *Ford v. Wainwright*, 477 U.S. 399, 435 (1986) (Rehnquist, J., dissenting) (“The defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still a third adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims of insanity.”).

230. See Blume, *supra* note 11, at 353–56 (examining “the assumption of a floodgate of claims” based on mental incompetency and finding that the number of *Ford* claims filed reflected the number of inmates with severe mental illness, that those inmates who did file a *Ford* claim had a relatively high success rate, and that a large percentage of *Ford* claimants had a history of mental illness). The same result occurred after *Atkins* created a claim for incompetency due to mental retardation, as only 7% of inmates subsequently filed *Atkins* claims, and 40% of those claims were successful. See *id.* at 353.

231. See, e.g., Andrea Schaffner, *Understanding Dementia*, 23 QUINNIAC PROB. L.J. 372, 375–76 (2010) (discussing the various stages of dementia and comparing subjective complaints of memory deficit with objective evidence of memory decline through clinical examination); see also O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*, 82 N.Y.U. L. REV. 1265, 1290 (2007) (discussing the eventual use of neuroimaging in the courtroom to evaluate memory).

232. See Blume, *supra* note 11, at 353–56 (“If the old adage that you can indict a ham sandwich is true (and it is), that same ham sandwich would also almost certainly be found competent to stand trial.”).

233. *Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Sept. 25, 2020).

234. *The Death Penalty in 2019: Year End Report*, DEATH PENALTY INFO. CTR. 16, <https://files.deathpenaltyinfo.org/reports/year-end/YearEndReport2019.pdf> (last visited Sept. 25, 2020).

235. *Id.* at 2. According to this report, the use of the death penalty in 2019 remained “near historic lows,” with the imposition of only 34 new death sentences. *Id.* This marks “the second-

approach, a clarification of the rational understanding test could mean the difference between life and death.²³⁶ The Court should revisit the competency standard before another life is taken in vain.²³⁷

VI. CONCLUSION

Society reserves capital punishment for offenders with the highest level of culpability, when retribution can be best accomplished with their deaths and moral values cannot justify preserving their lives.²³⁸ When a defendant retains no memory of the crime for which he has been sentenced at the time of his execution, however, the defendant will never have the last minute recognition of “the gravity of his crime[s]” that society desires when seeking punishment.²³⁹ Similarly, a defendant who lacks the requisite level of psychological connectedness to the crime inherently carries less culpability, which makes execution a disproportionately severe punishment.²⁴⁰ Moreover, the Court’s imprecise distinction between memory loss alone and memory loss that prevents a rational understanding of the crime makes the phrase even more elusive and causes increasing difficulty for lower courts in

lowest number [of death sentences issued] in the modern era of capital punishment.” *Id.*

236. *See* Leto, *supra* note 157, at 46 (“The implications of the *Madison* decision will have a lasting impact on the criminal justice system. This opinion will echo throughout prisons all over the country.”).

237. *See id.* at 59 (“To kill a man, who does not remember his crime, his trial, the victim, and maybe even himself, is a merciless killing.”).

238. *Miller v. Alabama*, 567 U.S. 460, 476 (2012) (“[T]he death penalty is reserved only for the most culpable defendants committing the most serious offenses.”); *see also Panetti v. Quarterman*, 551 U.S. 930, 958 (2007) (explaining that capital punishment is used to help the offender recognize the wrongness of his crime and to impose the penalty society views as justified).

239. *Panetti*, 551 U.S. at 958; *see also Birch, supra* note 86, at 28 (“A person who is unable to recollect the moral attitudes and beliefs she held at the time of the offense and the decisional process by which she came to commit it . . . is not capable of contrition or repentance.”). Professor Birch also compares the relationship between memory of a crime and deservedness of a punishment to the relationship between memory of a good deed and deservedness of a reward. *See id.* at 25. He argues that just as people would gain less satisfaction from public praise for a good deed that they completed but cannot remember, they would feel less regret from punishment for a crime for which they have no recollection. *Id.*

240. *Dresser, supra* note 140, at 432 (“In at least some cases, the customary punishment for a past offense is inappropriate because the person now lacks some or all of the psychological features which formerly justified punishment.”); *see Romero, supra* note 155, at 129–30 (stating that when evaluating the proportionality between crime and punishment, courts focus on the culpability and mental state of the defendant rather than the harm caused).

applying the correct competency standard.²⁴¹

The Eighth Amendment was created to ensure not only that society has a say in how criminals are treated, but also to serve as a check on society when its penological desires overstep the limits of morality.²⁴² In *Madison*, the Court failed to address any objective indicia of whether society agrees with capital punishment for defendants who cannot remember their crimes.²⁴³ More importantly, however, the Court refused to consider the intricacies of the connection between memory and psychological continuity and how that connection affects the retributive and moral values sought through capital punishment.²⁴⁴ *Madison* instead left us with an elusive standard that places the ever-ambiguous “rational understanding” test at its core.²⁴⁵ Unfortunately, until the Court recognizes the inseverable bond between memory and identity, communities will continue to hand out death sentences that leave their retributive desires unsatisfied, and defendants will continue to die without the subjective understanding of crime and punishment that the Eighth Amendment requires.²⁴⁶

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241. See, e.g., *Malone*, *supra* note 18, at 158 (“According to the Alabama Attorney General . . . Madison’s conviction was justified because he ‘understood what he was accused of and how the state planned to punish him.’ Is that a ‘rational understanding’ of the execution?” (internal footnote omitted)).

242. *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)) (“As we have seen . . . the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment.”).

243. See *supra* notes 158–163 and accompanying text.

244. See *supra* Sections IV.A, IV.B.

245. See *Madison v. Alabama*, 139 S. Ct. 718, 731 (2019) (quoting *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007)); see also *Steiker*, *supra* note 14, at 300 (“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.”).

246. See *Dresser*, *supra* note 140, at 446 (discussing the need for “serious dialogue about what psychological connectedness and continuity qualify as a morally defensible basis for retributive, deterrent, and incapacitative punishment,” and concluding that “[i]t is up to us as persons to decide” how to incorporate our enhanced understanding of persons over time into our rules and practices).

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