its face, might suggest otherwise,[94] and the Court's endorsement of a principle consistent with *Penry* but inconsistent with *Graham* and *Johnson* suggests that the Court's ultimate allegiance was to *Penry*.[95]

The Court was able to invoke *Penry* as the applicable "clearly established law" only by finding that the mitigating evidence at issue in *Abdul-Kabir* and *Brewer* was materially equivalent to that at issue in *Penry*.[96] Whether the Court correctly equated the evidence in *Abdul-Kabir* and *Brewer* with the evidence in *Penry* is debatable. Faced with the *Johnson* Court's finding that a jury had been able to meaningfully consider the defendant's mitigating evidence of youth, the majority went to great lengths to distinguish the mitigating evidence in *Abdul-Kabir* and *Brewer* from that in *Johnson* and to suggest that it was "closer in nature" to that in *Penry*.[97] As the dissent pointed out, however, the mitigating features at issue in *Abdul-Kabir* and *Brewer* were not necessarily as permanent in effect as those in *Penry*, and a state court following the case-by-case approach mandated by *Graham* and *Johnson* could reasonably have found that the evidence had indeed been meaningfully considered.[98] Whether or not the Court correctly concluded that the evidence was materially the same as that in *Penry*, on the basis of that conclusion, the Court acted naturally when it evaluated the CCA's decisions based not on the broadly applicable but discretionary *Lockett* rule, but rather on the narrowly applicable but highly determinative *Penry* holding.[99] The factual predicates for the *Penry* holding had, in the Court's view, been met. Applying a "clearly established" legal principle that was narrower than it at first appeared, the Court let the two petitioners here pass through the habeas door — while giving little cause for other petitioners to hope that the Court's approach to AEDPA review had, as a general matter, changed.

2. Eighth Amendment — Death Penalty — Execution of the Presently Incompetent. — The Supreme Court's capital punishment jurisprudence might be characterized as a struggle for coherence.[1] Since its

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[94] *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) ("[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give '"a reasoned moral response to the defendant's background, character, and crime."'" (emphasis omitted) (quoting Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment))).

[95] *See Abdul-Kabir*, 127 S. Ct. at 1672 (adopting the standard that "the jury must be permitted to 'consider fully'" a defendant's mitigating evidence (quoting *Penry*, 492 U.S. at 323)).

[96] *See id.* at 1670. This was itself a violation of the *Lockett* rule, which, as *Graham* and *Johnson* made clear, emphasized case-by-case application.

[97] *See id.* at 1673.

[98] *See id.* at 1681–82 (Roberts, C.J., dissenting).

[99] *See id.* at 1670 (majority opinion).

[1] *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop . . . rules that would lend more than the mere appear-

fractured ruling in *Furman v. Georgia*,[2] however, the Court has achieved relative clarity at least on the proposition that capital punishment is intended to promote retribution and deterrence.[3] In *Ford v. Wainwright*,[4] the Court found that neither of these purposes is served by the execution of a prisoner who has become incapable of comprehending the connection between his crime and his impending execution and that such executions are barred by the Eighth Amendment.[5] Last Term, in *Panetti v. Quarterman*,[6] the Court held that the same logic applies to prisoners who can articulate this connection, but are so delusional that they are incapable of "rational[ly] understanding" it.[7] This conclusion is not surprising, but in reiterating the arguments made in *Ford*, the *Panetti* Court revealed a troubling incoherence: the treatment of retribution and deterrence in *Ford* and *Panetti* is inconsistent with the Court's prior treatment of these theories of punishment. Indeed, under a consistent interpretation of the Court's accepted rationales for capital punishment, there may be no coherent way to distinguish between the execution of one who is competent and the execution of one who has lost his sanity. As such, *Panetti* highlights the possibility that the logical conclusion of our death penalty system is a result that, in the Court's own words, "offends humanity."[8]

On September 8, 1992, Scott Louis Panetti shot and killed Joe and Amanda Alvarado, the parents of his estranged wife.[9] Panetti woke up before dawn that morning and dressed in camouflage.[10] He drove to the Alvarados' house, broke in through the front door, and committed the murders in front of his wife and daughter, whom he took hostage before surrendering to the police.[11]

As the trial for the murders commenced, a psychiatric evaluation ordered by the Texas trial court revealed that Panetti "suffered from a fragmented personality, delusions, and hallucinations."[12] He had been hospitalized for various psychiatric disorders on numerous occasions

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ance of fairness to the death penalty endeavor."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts*, 109 HARV. L. REV. 355, 359 (1995) (summarizing the Court's capital punishment jurisprudence as "twenty-odd years of doctrinal head-banging").

2 408 U.S. 238 (1972).

3 *See* Roper v. Simmons, 543 U.S. 551, 571 (2005); Atkins v. Virginia, 536 U.S. 304, 318–19 (2002); *see also* Robert F. Schopp, *Two-Edged Swords, Dangerousness, and Expert Testimony in Capital Sentencing*, 30 LAW & PSYCHOL. REV. 57, 62 (2006).

4 477 U.S. 399 (1986).

5 *See id.* at 405–10.

6 127 S. Ct. 2842 (2007).

7 *Id.* at 2862.

8 *Id.* at 2861 (quoting *Ford*, 477 U.S. at 407) (internal quotation mark omitted).

9 *Id.* at 2848; State v. Panetti, 891 S.W.2d 281, 282 (Tex. Ct. App. 1994).

10 *Panetti*, 127 S. Ct. at 2848.

11 *Id.*

12 *Id.*

and had been prescribed medications that could knock out an ordinary person for days on end.[13] In spite of this, the court found him competent to stand trial and to waive counsel.[14] What followed was a "judicial farce."[15] Panetti's behavior during the trial, in which he represented himself and pled insanity, was "'bizarre,' 'scary,' and 'trance-like.'"[16] Panetti presented his case dressed as a cowboy and attempted to subpoena John F. Kennedy, the Pope, and Jesus Christ.[17] Unimpressed, the jury returned a guilty verdict and a sentence of death.[18] The Texas appeals court upheld the decision, both on direct appeal and through the state's habeas proceedings.[19] Notably, Panetti was found to be incompetent to waive the state-appointed habeas counsel during this process, less than two months after the conclusion of his trial.[20]

Panetti filed a petition for habeas corpus under 28 U.S.C. § 2254, arguing that he had not been competent to stand trial or to waive counsel.[21] The U.S. District Court for the Western District of Texas and the Fifth Circuit both rejected his claims, and a state trial court then set the date for Panetti's execution.[22] Panetti responded with a new claim: he was not presently competent and therefore could not be executed under a Texas statute that bars the execution of a prisoner who does not understand that he is to be executed, that the execution is imminent, or the reason for the execution.[23] The state court denied the motion without a hearing, and the appeal was dismissed on technical grounds.[24] Panetti filed a renewed motion to determine competency with the trial court, along with declarations from two experts that indicated Panetti might not understand the reasons for his impending execution.[25] Concurrently, Panetti returned to federal court to file a new petition for habeas corpus. The district court granted a stay of execution in order to allow the state court to consider the renewed motion.[26] Shortly thereafter, the state trial court asked counsel to submit a list of mental health experts it should consider appointing,

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[13] *Id.* Years before, according to his wife, Panetti decided that their house was possessed by the devil and proceeded to engage in a variety of curious cleansing rituals. *Id.*

[14] *Id.*

[15] *Id.* at 2849 (quoting Panetti's standby counsel).

[16] *Id.*

[17] Brief for Petitioner at 11, *Panetti*, 127 S. Ct. 2842 (No. 06-6407), 2007 WL 609763.

[18] *Panetti*, 127 S. Ct. at 2848–49.

[19] *Id.* at 2849. The Supreme Court twice denied certiorari. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* Again, the Supreme Court denied certiorari. *Id.*

[23] TEX. CODE CRIM. PROC. ANN. art. 46.05(h) (Vernon 2006).

[24] *Panetti*, 127 S. Ct. at 2849.

[25] *Id.* at 2850.

[26] *Id.* at 2849–50.

along with any other motions concerning the competency procedures, for consideration in an upcoming status conference.[27] Panetti filed ten motions in response, but the court never held the scheduled conference.[28] Instead, Panetti's counsel learned from the district attorney that the judge had decided to appoint the experts without input from the parties (and that he had informed the state of his decision earlier that week).[29] Two months later, the court's experts returned with their conclusions: Panetti was faking it. The prisoner, they reported, was perfectly aware both of his pending execution and the reasons therefor; his bizarre behavior was nothing more than an attempt to manipulate the system[30] — a sort of "antic disposition."[31] Panetti objected to the findings and pleaded with the court to rule on his outstanding motions, without which his ability to challenge the reports was necessarily limited.[32] The court responded by closing the case.[33]

The federal district court then set out to resolve the pending habeas petition. It granted Panetti's motions to further stay the execution, to appoint counsel, and to provide funds, and it scheduled an evidentiary hearing with multiple psychological experts called by each side.[34] At the hearing, one expert testified that Panetti suffered from a genuine if somewhat unusual delusion: although the prisoner claimed to understand that he was going to be executed for his murders, he actually believed that the state was going to execute him in order to "stop him from preaching," as part of an ongoing battle between "the demons and the forces of darkness and God and the angels and the forces of light."[35] The district court found that the state court had failed to comply with the Texas statute and that the proceedings had been constitutionally inadequate under *Ford*; nonetheless, it denied Panetti's petition on the merits.[36] The Fifth Circuit affirmed.[37]

The Supreme Court reversed and remanded.[38] Writing for the Court, Justice Kennedy[39] found, first, that the Court had jurisdiction to hear the case,[40] notwithstanding the statutory "gatekeeping" provi-

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[27] *Id.* at 2850.
[28] *Id.*
[29] *Id.*
[30] *See id.* at 2851.
[31] WILLIAM SHAKESPEARE, HAMLET act 1, sc. 5, l. 180 (Harold Jenkins ed., Methuen 1982).
[32] *Panetti*, 127 S. Ct. at 2851. Panetti had sought funds to hire an independent expert. *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 2859 (internal quotation mark omitted).
[36] *Id.* at 2851–52.
[37] Panetti v. Dretke, 448 F.3d 815 (5th Cir. 2006).
[38] *Panetti*, 127 S. Ct. at 2848.
[39] Justice Kennedy was joined by Justices Stevens, Souter, Ginsburg, and Breyer.
[40] *Panetti*, 127 S. Ct. at 2855.

sion[41] that bars most "second or successive habeas corpus application."[42] Although Panetti's habeas petition was his second, it was not "successive" because the question of Panetti's competence to be executed was not raised in his prior petitions, and in fact could not have been because it was not yet ripe from an evidentiary perspective.[43] Justice Kennedy rejected the state's contention that a prisoner who later became incompetent would have had to preserve a *Ford* claim by including it in his first habeas petition, even if he was competent at that point.[44] Prisoners often succumb to mental illness during incarceration, and a rule that would force every prisoner to file an unripe *Ford* claim in anticipation of this possibility would be an "empty formality,"[45] contrary to the purposes of the Antiterrorism and Effective Death Penalty Act of 1996[46] (AEDPA).

Next, the Court held that the state court's proceedings were constitutionally inadequate: Panetti was entitled to certain procedures under *Ford*, and "the failure to provide these procedures constituted an unreasonable application of clearly established Supreme Court law" that "allows federal-court review of his incompetency claim without deference to the state court's decision."[47] Panetti had clearly made a substantial showing of incompetency, so due process required at least "adequate means by which to submit expert psychiatric evidence in response to the evidence" solicited by the court.[48] Justice Kennedy criticized the trial court for failing to communicate properly with Panetti's counsel and concluded that the state's procedure deprived Panetti of "a constitutionally adequate opportunity to be heard."[49]

Finally, the Court struck down the Fifth Circuit's test for competency as overly restrictive and contrary to the logic of *Ford*.[50] The court of appeals had declared that a prisoner is competent to be executed under *Ford* as long as he is aware "that he [is] going to be executed and why he [is] going to be executed."[51] Under this standard, the fact that Panetti recognized the state was going to execute him for his crimes foreclosed further inquiry into whether a profound set of de-

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41 *Id.* at 2852.

42 28 U.S.C. § 2244(b)(2) (2000).

43 *Panetti*, 127 S. Ct. at 2852–53.

44 *See id.*

45 *See id.* at 2852, 2854.

46 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

47 *Panetti*, 127 S. Ct. at 2855.

48 *Id.* at 2855–56.

49 *Id.* at 2857–58.

50 *See id.* at 2860, 2862.

51 *Id.* at 2860 (alterations in original) (quoting Panetti v. Dretke, 448 F.3d 815, 819 (5th Cir. 2006)) (internal quotation marks omitted).

lusions in fact prevented him from grasping this reality.[52] The Court acknowledged that no "precise standard for competency" could be found in *Ford*,[53] which specified only that the Eighth Amendment bars the execution of those "whose mental illness prevents [them] from comprehending the reasons for the penalty or its implications"[54] or "those who are unaware of the punishment they are about to suffer and why they are to suffer it."[55] However, nothing in *Ford* indicates that "delusions are irrelevant to 'comprehen[sion]' or 'aware[ness]' if they so impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution."[56] To reach this conclusion, Justice Kennedy rehearsed the reasons given by *Ford* for the "prohibition against executing a prisoner who has lost his sanity"[57]: first, executing someone who is no longer sane "simply offends humanity";[58] and second, such a punishment would "serve no proper purpose"[59] because it would neither provide an example to others nor offer any meaningful retribution.[60] By this logic, even if a prisoner ostensibly identifies the link between his crime and execution, "[g]ross delusions stemming from a severe mental disorder may put an awareness of [the] link . . . in a context so far removed from reality that the punishment can serve no proper purpose."[61] A test that ignores evidence of such delusions is thus improper under *Ford*.[62]

Justice Thomas dissented.[63] Focusing first on the issue of jurisdiction, he argued that although some courts had previously allowed *Ford* claims raised in subsequent habeas petitions to proceed, such claims were always considered "second or successive."[64] AEDPA was intended to eliminate the discretion of federal courts to hear such cases, except under the limited circumstances provided in § 2244(b)(2), none of which applied to Panetti's claim.[65] Second, Justice Thomas argued that the evidence presented by Panetti fell well short of the substantial

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[52] *See id.* at 2860–61.

[53] *Id.* at 2860.

[54] *Id.* at 2861 (quoting Ford v. Wainwright, 477 U.S. 399, 417 (1986) (opinion of Marshall, J.)) (internal quotation mark omitted).

[55] *Id.* (quoting *Ford*, 477 U.S. at 422 (Powell, J., concurring in part and concurring in the judgment)) (internal quotation mark omitted).

[56] *Id.* (alterations in original).

[57] *Id.*

[58] *Id.* (quoting *Ford*, 477 U.S. at 407) (internal quotation mark omitted).

[59] *Id.* at 2862.

[60] *See id.* at 2861 (citing *Ford*, 477 U.S. at 407–08).

[61] *Id.* at 2862.

[62] *Id.*

[63] Justice Thomas was joined by Chief Justice Roberts and Justices Scalia and Alito.

[64] *See Panetti*, 127 S. Ct. at 2865, 2867 (Thomas, J., dissenting).

[65] *See id.* at 2864–65.

initial showing required to trigger the procedural protections of *Ford*.[66] As such, the state court's procedures were not an "unreasonable application of[] clearly established Federal law,"[67] so deference was due to its finding of competency.[68] Finally, Justice Thomas stated that "nothing in any of the *Ford* opinions addresses what to do when a prisoner knows the reasons for his execution but does not 'rationally understand' it."[69] Thus, he concluded, the majority had essentially created a new substantive Eighth Amendment requirement without applying the accepted analytical framework.[70]

The Court's decision to strike down the Fifth Circuit's rule for determining competency to be executed follows closely from *Ford*. On the most basic level, *Ford* establishes that there is some set of prisoners for whom, on account of their mental incapacity, execution would serve no penological purpose and is thus barred by the Eighth Amendment.[71] The *Ford* opinions did not define exactly what sort of mental incapacity is required, using only vague terms such as "awareness" and "comprehension."[72] But if one accepts the logic of *Ford* — which, notably, is not challenged by the dissent in *Panetti* — then it is difficult to see why the line should be drawn to include the sort of prisoner discussed in *Ford* while excluding the sort discussed in *Panetti*. That is, if executing a prisoner who is incapable of drawing a connection between his crime and his impending execution furthers neither retribution nor deterrence, why would the result be different if the prisoner can verbalize this connection but is so severely delusional that he cannot in any way understand it?[73]

The problem is that the interpretations of retribution and deterrence introduced in *Ford* and echoed in *Panetti* are inapposite to the Court's prior treatment of these theories of punishment and seem to rely on notions that are anachronistic or otherwise out of place in modern jurisprudence. That the Court in *Panetti* is forced to rely on these odd interpretations of retribution and deterrence reveals a disturbing prospect: under a consistent understanding of the justifications for capital punishment given by the Court, there may in fact be no coherent way to distinguish the execution of a competent prisoner and the execution of a prisoner who is no longer competent — a result that the Court admits would "offend[] humanity."[74]

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66 *See id.* at 2867–68.
67 *Id.* at 2872 (internal quotation mark omitted) (quoting 28 U.S.C. § 2254(d)(1) (2000)).
68 *Id.*
69 *Id.* at 2873.
70 *See id.* at 2873–74.
71 *See* Ford v. Wainwright, 477 U.S. 399, 406–08 (1986).
72 *See Panetti*, 127 S. Ct. at 2860.
73 *See id.* at 2861.
74 *Id.* (quoting *Ford*, 477 U.S. at 407); *accord Ford*, 477 U.S. at 417 (opinion of Marshall, J.).

The *Panetti* Court relied primarily on the assertion, taken from *Ford*, that the execution of the presently incompetent serves no retributive purpose.[75] The Court has previously defined retribution as "the interest in seeing that the offender gets his 'just deserts.'"[76] The focus of this theory of punishment has always been society: the essence of retribution is that society punishes the criminal in order to express its moral outrage over his crime.[77] Under a retributive theory, punishment is determined externally and retrospectively: a criminal gets his "just deserts" when he is punished in accordance with society's reaction to his offense.[78] In *Panetti*, Justice Kennedy reaffirmed the basic notion that punishment is intended "to allow the community as a whole . . . to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be . . . imposed."[79] But the opinion gives no explanation of how the fact that a prisoner lost his sanity *after* committing his crime would have any relevance in this retributive model. If a person suffered from a mental incapacity at the time he committed a crime, he may be seen by society as less culpable, and therefore deserving of a lesser punishment.[80] But the judgment of the community as to the severity of an offense — what the Court calls "community vindication"[81] — should be unaffected by what subsequently happens to the mental state of the offender.[82] Indeed, if the problem is that the execution of a prisoner who lost his sanity has a diminished retributive value,[83] creating a gap between the community's need for vindication and the value of the punishment imposed, then this would only be made worse if an incompetent prisoner is given a *lesser* sentence.

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[75] *See Panetti*, 127 S. Ct. at 2861.

[76] Atkins v. Virginia, 536 U.S. 304, 319 (2002); *accord Ford*, 477 U.S. at 408.

[77] *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Furman v. Georgia, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); *see also* Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting); South Carolina v. Gathers, 490 U.S. 805, 818 (1989) (O'Connor, J., dissenting); Sumner v. Shuman, 483 U.S. 66, 83–84 (1987); Tison v. Arizona, 481 U.S. 137, 180–81 (1987) (Brennan, J., dissenting); *Ford*, 477 U.S. at 408; United States v. Harris, 347 U.S. 612, 634 (1954) (Jackson, J., dissenting); Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 23 (2003).

[78] *See Atkins*, 536 U.S. at 319; *Furman*, 408 U.S. at 308 (Stewart, J., concurring); *see also* Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL'Y 51, 61 (2003).

[79] *Panetti*, 127 S. Ct. at 2861.

[80] *See Atkins*, 536 U.S. at 317; Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1185–86 (2003); *see also* Morse, *supra* note 78, at 61.

[81] *Panetti*, 127 S. Ct. at 2861.

[82] *See* Sigler, *supra* note 80, at 1159–60; *see also* Brief for the Criminal Justice Legal Foundation as Amicus Curiae Supporting Respondent at 7, *Panetti*, 127 S. Ct. 2842 (No. 06-6407), 2007 WL 1022680.

[83] *See* Ford v. Wainwright, 477 U.S. 399, 408 (1986).

The Court instead focused on a second argument for why executing an incompetent prisoner is problematic from a retributivist perspective: capital punishment serves a retributive purpose "because it has the potential to make the offender recognize at last the gravity of his crime," but "the potential for a prisoner's recognition of the severity of the offense" is "called in question . . . if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole."[84] Beyond being eerily Kafkaesque,[85] this proposition is unrelated to retribution as the Court has defined it: whether or not society has been able to express sufficiently its moral judgment of an offense has little to do with whether or not the offender chooses to listen to or accept the judgment.[86] Because it focuses on the effect of the punishment on the offender, this argument is essentially rehabilitative — and in a manner that relies on religious assumptions that seem out of place in twenty-first-century American jurisprudence. In *Ford*, the Court tied this argument to the notion that "it is uncharitable to dispatch an offender 'into another world[] when he is not of a capacity to fit himself for it,'"[87] and that one who is about to be executed must have "the capacity to come to grips with his conscience or deity."[88] In the past, deeply religious societies have seen capital punishment as a means of securing repentance from — and therefore salvation for — an offender.[89] But there is no indication that the modern American justice system, or the Supreme Court, has ever been (or should be) concerned with the fate of an offender's eternal soul.

The deterrence-based argument in *Panetti* is similarly disjointed. Again quoting *Ford*, Justice Kennedy proposed that "the prohibition against executing a prisoner who has lost his sanity"[90] can be explained by the fact that such an execution "provides no example to

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[84] *Panetti*, 127 S. Ct. at 2861.

[85] *See* FRANZ KAFKA, *In the Penal Colony*, *in* THE COMPLETE STORIES 140 (Willa Muir & Edwin Muir trans., 1983) (describing a method of execution that writes the offense into the flesh of the condemned so that he comes to understand, before he dies, the community's judgment of his crime).

[86] *Cf. Panetti*, 127 S. Ct. at 2862 (noting that the penological purposes of the death penalty would be met in the case of "[s]omeone who is condemned to death for an atrocious murder . . . [but is] so callous as to be unrepentant; so self-centered and devoid of compassion as to lack a sense of guilt").

[87] *Ford*, 477 U.S. at 407 (quoting JOHN HAWLES, REMARKS UPON THE TRYALS (London, Tonson 1685)).

[88] *Id.* at 409.

[89] *See, e.g.*, THOMAS G. BLOMBERG & KAROL LUCKEN, AMERICAN PENOLOGY 31 (2000); John E. Witte, Jr. & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J. L. & RELIGION 433, 437–38, 455 (1994).

[90] *Panetti*, 127 S. Ct. at 2861.

others."[91] The Court has previously defined deterrence as "the interest in preventing . . . crimes by prospective offenders."[92] Deterrence operates by injecting the prospect of punishment into the "'cold calculus that precedes the decision' of [a] potential murderer[]."[93] It follows that the prospect of execution would have no deterrent effect on someone who is incompetent before he commits his crime and is therefore incapable of weighing the potential consequences.[94] Thus, the execution of such an offender would not provide an "example." But the same is not true for an offender who only loses his sanity after committing his crime; the "cold calculus" of such an offender occurs while he is still competent and would thus be affected by the threat of capital punishment. In fact, to the extent that this offender knows that he might eventually be spared the death penalty if he becomes mentally ill while in prison, the rule in *Ford* and *Panetti* might actually have an anti-deterrent effect.

What then explains the Court's assertion that executing the presently incompetent "provides no example to others"? The argument is taken from an essay by Sir Edward Coke, in which he discusses a law mandating the execution of prisoners who had gone insane after their conviction. Coke reasoned that this law was "cruell and inhuman" because "by intendment of law the execution of the offender is for example . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others."[95] Coke's argument is superficially similar to modern deterrence theory, but it arises from a set of very different historical circumstances and therefore operates in a fundamentally different manner. In Coke's time, and well into the nineteenth century, the law enforcement capability of the state was considerably more limited than it is today.[96] Thus, it was not believed as strongly then that the threat of punishment could actually affect the "cold calculus" of the individual offender.[97] Punishment was carried out in public and was intended to reduce crime not by scaring the in-

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[91] *Id.* (quoting *Ford*, 477 U.S. at 407 (citing EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 6 (London, W. Clarke & Sons 1817) (1644))).

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

[93] *Id.* (quoting Gregg v. Georgia, 428 U.S. 187, 186 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

[94] *See id.* at 319–20.

[95] COKE, *supra* note 91, at 6.

[96] *See* WILLIAM ROSCOE, OBSERVATIONS ON PENAL JURISPRUDENCE, AND THE REFORMATION OF CRIMINALS 14 (1819), *reprinted in* REFORM OF CRIMINAL LAW IN PENNSYLVANIA (Arno Press 1972).

[97] As one early nineteenth-century commentator explained: "No person commits a crime, but under such circumstances . . . as he thinks sufficient to secure him from discovery. The greater or less degree of the punishment is therefore a matter of inferior account; and it would be much more advisable to endeavour to *diminish the inducement to the crime* . . . ." *Id.* at 13–14.

dividual offender but by impressing upon, and inculcating within, the public as a whole the moral values of the penal system.[98] But a consistent concern was that if the punishment was too cruel, it might have the opposite effect.[99] Benjamin Rush, who helped spur the creation of the modern American penal system, wrote in 1787 that seeing criminals being cruelly punished increases the propensity for crime among the public by destroying human sympathy and producing a "familiarity" with violence.[100] Rather than creating respect for the law and its values, cruel spectacles made the public pity the offender; and "[w]hile we pity, we secretly condemn the law which inflicts the punishment — hence arises a want of respect for laws in general."[101] The argument in *Panetti* makes sense in this anachronistic context, but not in the context of modern deterrence, which, as the Court has defined it, is intended to affect the decisionmaking of the potential criminal, rather than to instill the values of the law in the general population.

The Court's incoherent treatment of these theories of punishment does not affect the validity of *Panetti*'s conclusion, which rests comfortably on another reason given by the Court: the execution of the presently incompetent "simply offends humanity."[102] The uncontroverted fact that the such executions have been "branded 'savage and inhuman'"[103] since the time of Blackstone, and that the practice is now banned in every state,[104] speaks powerfully to the proposition that executing a prisoner such as Panetti would be improper under the Eighth Amendment — no less than the execution of the prisoner in *Ford*. But the Supreme Court's repeated inability to square this result with its prior understandings of the penological purposes of the death penalty is disturbing in its own right. If, under the treatment of retribution and deterrence that the Court has generally accepted, there is no consistent or coherent way to differentiate between the execution of the competent and the execution of the presently incompetent, then it may be that our system of capital punishment, taken to its logical conclusion, will necessarily produce results offensive to our humanity.

3. Fourth Amendment — Reasonableness of Forcible Seizure. — The Supreme Court has long struggled to determine the circumstances

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98 *See id.* at 15; Witte & Arthur, *supra* note 89, at 438.

99 *See* ROSCOE, *supra* note 96, at 16–17.

100 BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENT UPON CRIMINALS AND UPON SOCIETY 6–9 (1787), *reprinted in* REFORM OF CRIMINAL LAW IN PENNSYLVANIA, *supra* note 96.

101 *Id.* at 7.

102 *Panetti*, 127 S. Ct. at 2861 (quoting Ford v. Wainwright, 477 U.S. 399, 407 (1986)) (internal quotation mark omitted).

103 *Ford*, 477 U.S. at 406 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *24–25).

104 *See id.* at 408 & n.2.