

## EXECUTING RETRIBUTIVISM: *PANETTI* AND THE FUTURE OF THE EIGHTH AMENDMENT

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### INTRODUCTION

Whom may a state execute? In a recent case, *Panetti v. Quarterman*, the United States Supreme Court decided that only those defendants who rationally understand why they are being executed are in fact fit for capital

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punishment.<sup>1</sup> This Article argues that this purportedly narrow holding lays the groundwork for a new beginning: not only to the Court's death penalty jurisprudence, but also to its review of punishments more generally.

If this is true, then one can reasonably wonder why there hasn't been more fuss over *Panetti*.<sup>2</sup> It's a good question. But as I will illustrate, Panetti's reasoning, if taken seriously, augurs the possibility of substantial constitutional change. Specifically, this Article argues that *Panetti* understands retributive punishment as a form of humane *communicative* state action directed at the offender. What makes action communicative is that it is directed to a designated recipient, in a way "meant to convey thoughts done through means reasonably recognizable as serving that end."<sup>3</sup> The action is undertaken in a way the *sender* of the message *thinks* will make sense to the recipient, and is performed in a way that the thought conveyed can be made sense of, or effectuated, through the free will of the recipient.<sup>4</sup> This communicative goal stands in contrast to more familiar instrumental approaches to punishment under which the defendant's punishment serves as a vehicle through which it achieves the state's other goals including, but not limited to, the *expression* of messages to an undefined public at large.<sup>5</sup>

The communicative account of retribution gestured at in *Panetti* triggered a remand for the defendant in that particular case. The Supreme Court, however, abjured from developing the communicative action theory or its implications beyond the needs of the case. Interestingly, Panetti's counsel quoted three sentences from an earlier article advancing a view of

<sup>1</sup> 127 S. Ct. 2842, 2859 (2007).

<sup>2</sup> As Professor Bonnie observes, the case "has all the earmarks of a one-off end-of-term decision with little significance for anyone other than a few very ill condemned prisoners: it deals with an issue that arises rarely, is doctrinally narrow, and has little connection with other domains of criminal or constitutional jurisprudence." Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 257 (2007).

<sup>3</sup> John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1341 (2008).

<sup>4</sup> *Id.* at 1344–45.

<sup>5</sup> Thus, with expression, certain views or attitudes may be emitted by an actor's action or speech but it is not critical that a particular member of that audience of that action or speech understand the basis for or purpose behind that action or speech. The expression may be purely for the benefit of the speaker/actor or for other nonspecified persons. For example, when I call my brother at home and speak in a language he can understand to tell him, "Dad is coming home for dinner at 8 p.m. tonight," that is a communication. When I write an entry in my private diary, by contrast, I can be understood as *expressing* my opinions without *communicating* them to someone. Similarly, under this view, when the Blues Brothers drive around a neighborhood with a giant speaker strapped to their car rooftop, broadcasting details of their upcoming show to all and sundry, that too is *expression*. State punishment can communicate messages to offenders and express messages to the public too. The message to the public may be "do not do X," or "we are keeping our promise to punish X." But when punishments emit messages to the public, the messages have an unspecified target; it is not important that one person in particular have a rational understanding of that message. For that reason, I call those signaling goals to the public "expressive" goals instead of "communicative" goals.

retributive punishment as communicative action.<sup>6</sup> Thus, as it addressed Panetti's claims, it is indeed possible that the Court was vaguely influenced by this notion while at the same time it understandably did not engage the more general and negative implications of the communicative account of retributive punishment for the death penalty.<sup>7</sup> In other words, by failing to dig deeper, the Court did not see—or did see and did not want to discuss—how such an account might reverberate across the landscape of criminal justice.

For death penalty skeptics, it should be significant that the *Panetti* majority gave reason to think that the defendant could be spared from execution.<sup>8</sup> Indeed, the five Justices forming the majority in *Panetti* have in recent years repeatedly placed new limits on who may be constitutionally eligible for execution.<sup>9</sup> Importantly, some of them have not only restricted the classes of offenders eligible for execution, but also expressed doubts about whether anyone should be executed.<sup>10</sup>

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<sup>6</sup> See Reply Brief for Petitioner at 17–18, *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (No. 06-6407) (quoting Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2195 (2001) [hereinafter Markel, *Shaming Punishments*]). Over the last ten years, I have tried to chart the topography of the implications of this view of retributive punishment as communicative action for our criminal justice system. See also Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005) [hereinafter Markel, *State, Be Not Proud*]; Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004); Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389 (1999). More recently, I have tried to extend this thinking to the context of punitive damages and the correct role of family status in the criminal justice system. See Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009) [hereinafter Markel, *Retributive Damages*]; Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009); DAN MARKEL, JENNIFER M. COLLINS, ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES (2009).

<sup>7</sup> That inconsistency is not surprising; Panetti's counsel quoted from a 2001 article of mine, see Markel, *Shaming Punishments*, *supra* note 6, but not the 2005 article, see Markel, *State, Be Not Proud*, *supra* note 6, that addresses the implications of this account of retributive theory for the death penalty. That choice by Panetti's counsel might have been strategically motivated, since the goal of counsel for Panetti was simply to persuade the Court that the death penalty violated retributivism as applied to this particular defendant, not generally.

<sup>8</sup> As it turns out, upon remand, the federal district court in Texas found that Panetti in fact had a rational understanding “of his crime, his impending execution and death, and the retributive connection between the two.” *Panetti v. Quarterman*, No. A-04-CA-042-SS, 2008 WL 2338498, at \*34 (W.D. Tex. Mar. 26, 2008). At the time of this writing, the execution was stayed pending appeal of the court's denial of the habeas corpus writ.

<sup>9</sup> See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (prohibiting execution of child rapists); *Roper v. Simmons*, 543 U.S. 551 (2005) (precluding execution of juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (precluding execution of mentally retarded defendants).

<sup>10</sup> See *Baze v. Rees*, 128 S. Ct. 1520, 1549–51 (2008) (Stevens, J., concurring in the judgment); *Kansas v. Marsh*, 548 U.S. 163, 203–11 (2006) (Souter, J., dissenting, joined by Stevens, Breyer & Ginsburg, JJ.); *cf.* *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“[T]he death penalty experiment has failed.”).

As I will argue here, once properly understood and embraced, the Court's commitment to communicative retributivism in *Panetti* should trigger two dramatic changes. First, adhering to communicative retributivism necessitates rethinking the permissibility of the death penalty. That's because communicative retributivism requires a punishment strategy that ensures the defendant has the opportunity to both internalize the values that animate retributive punishment and to demonstrate that internalization over the course of his life. The logic of communicative retributivism, in other words, cannot be limited to capital cases only involving those who are presently incompetent. Nor is it enough to serve simply as a mild restraint on killing certain categories of offenders, as the Court held recently in *Kennedy v. Louisiana*,<sup>11</sup> and *Roper v. Simmons*.<sup>12</sup> Rather, a communicative account of retribution should engender leering about the use of the death penalty generally.<sup>13</sup>

Second, the rationale of *Panetti* has implications that reach well beyond death penalty cases. As I will show, *Panetti* implicitly requires that punishment be imposed only if the offender is both proven guilty and he is mentally competent during the punitive experience. Together these conditions form a "negative retributivist" screen that must be applied to constitutional review of all criminal punishments. *Importantly, the negative retributivist screen does not serve as a freestanding justification itself for punishment; instead it serves as a set of limits placed on the government's pursuit of punishment.* Once the negative retributivism filter is applied, at least three major issues of constitutional criminal justice will be affected: the use of prisons to warehouse the mentally incompetent; the treatment of defendants' postconviction claims of actual innocence; and proportionality review of noncapital sentences. Furthermore, the Court's elevation of negative retributivism logically prohibits the use of deterrence or other utilitarian theories of punishment as a primary or independent justification for the use of capital punishment, or even punishment more broadly. In short, *Panetti* creates the conditions for state and federal courts at all levels to im-

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<sup>11</sup> 128 S. Ct. 2641 (2008) (drawing on retributivist arguments to invalidate a statute permitting the death penalty for the crime of child rape).

<sup>12</sup> 543 U.S. 551 (2005) (drawing on retributivist arguments to invalidate use of death penalty against persons who were minors at the time of the crime).

<sup>13</sup> Just before this Article went to press, I came across another work embracing the claim that *Panetti's* reasoning reflects a communicative conception of retributive punishment. See Pamela A. Wilkins, *Competency for Execution: The Implications of a Communicative Model of Retribution*, 76 TENN. L. REV. (forthcoming 2009), available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=pamela\\_wilkins](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=pamela_wilkins). In that paper, Professor Wilkins draws substantially on my 2005 article, Markel, *State, Be Not Proud*, *supra* note 6; however, Professor Wilkins focuses her normative argument primarily on the development of an adequate test for ascertaining someone's competence to be executed, not on the larger policy issues about the death penalty writ large, or the implications for noncapital issues in the criminal justice issue. Inasmuch as that piece reflects the Court's view that the death penalty can be compatible with (communicative) retributivism under some circumstances, I think it's wrong, for reasons addressed *infra* Part IV.

plement certain retributivist ideals that would conduce to a fair, accurate, modest, and humane set of principles for reviewing the constitutionality of punishment.

The Article's argument unfolds in four Parts. Part I begins by providing some background and analysis of the Supreme Court's decision in *Panetti*. It then turns to how the *Panetti* Court relied on specifically retributivist reasoning to justify the "rational understanding" standard of competence. By selecting this course of reasoning, the Court committed itself, albeit implicitly, and perhaps unwittingly, to a communicative conception of retribution. The Part next demonstrates how this communicative conception of retributive punishment stands in contrast with the Court's earlier pronouncements on retribution, where the Justices often conflated retribution with vengeance, social denunciation, or the minimization of private revenge. Importantly, this friction between competing views of retribution helps illuminate how the *Panetti* holding is possible only through adoption of a communicative conception of retribution.<sup>14</sup>

To comprehend the effects of the Court's communicative conception of retributivism, we need a clear understanding of the key components of such an account. Part II provides a detailed but not comprehensive sketch of that account. Part III then explains how that account of retributive punishment is inconsistent with the death penalty for a number of both contingent and categorical reasons, after which it addresses a few possible objections.

Drawing on the analysis in Parts II and III, Part IV fleshes out the two major interpretive claims of this Article. The first claim shows how the reasoning in *Panetti* and the continuation of capital punishment are broadly inconsistent with each other. Specifically, *Panetti*'s embrace of communicative retributivism cannot be persuasively restricted to serve simply as a restraint on executing the mentally incompetent. Rather, the logic of communicative retributive punishment requires that the state adopt a "modest" punishment strategy—one that permits the defendant the opportunity to internalize the values that animate and justify retributive punishment and the opportunity to evidence that internalization during and after the defendant's punitive encounter with the state. That posture of punitive modesty is also important because it preserves an avenue of state contrition for those instances of mistaken accusations.

Part IV then turns to the second interpretive claim of the Article: *Panetti*, by embracing and ultimately constitutionalizing a communicative justification for punishment and a "negative retributive" set of limits on punishment, subverts a conventional trope in the Court's Eighth Amendment jurisprudence—that the Constitution is agnostic among sentencing purposes. By implicitly adopting requirements that prohibit punishment in

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<sup>14</sup> Throughout this Article, I use words like retribution and retributive punishment to mean the same thing, and I use terms like retributive justice and retributivism somewhat interchangeably. These words have a referent in mind that is explicated in detail in Part II.

the absence of guilt and present competence, the Court in *Panetti* reveals itself to be substantially less agnostic than it has earlier professed. This abandonment of agnosticism generates significant implications for ongoing disputes over the constitutional regulation of claims of actual innocence, noncapital punishment of the presently incompetent, and excessive sentences.

Before proceeding further, I want to make one prefatory note about the method and approach here. This Article is largely working in an *interpretive* vein in that it tries to make sense of the conceptual action in *Panetti*. To be clear, the Court didn't abolish the death penalty in *Panetti* itself, and if the challenge I am raising here were squarely presented to the Court now, it's likely that some Justices might disavow the decisional relevance of the *Panetti* precedent. That said, there is no reason not to expose both its *ratio decidendi*—the rationale upon which its outcome makes sense—and how that rationale reveals a fundamental tension with the broader application of the death penalty and with the Court's current treatment of the other non-capital issues adverted to earlier. Indeed, while lower courts might be tempted to read *Panetti* restrictively by confining the rationale to its facts and the specific question of whether it violates the Eighth Amendment to execute the presently incompetent, a proper understanding of *Panetti*'s rationale compels, I believe, the inferences I draw for cases outside that context.<sup>15</sup> The goal of this Article, then, is to expose those possibilities and to help us see that embedded within *Panetti* lies the basis for refashioning the future of constitutional punishment.

## I. UNDERSTANDING *PANETTI*

As mentioned at the outset, in *Panetti v. Quarterman*, the Supreme Court addressed the competency threshold a defendant must meet before his execution. Specifically, the Court considered “whether the Eighth Amendment permits the execution of a prisoner whose mental illness deprives him of the mental capacity to understand that [he] is being executed as a punishment for a crime.”<sup>16</sup> This question stands apart from other inquiries, such as whether the defendant was insane at the time he committed the crime,<sup>17</sup>

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<sup>15</sup> In other words, by helping situate the Court's ruling in *Panetti* in terms of punishment theory, we can better understand the implications of the Court's analysis. To do this effectively, I incorporate much of the apparatus of earlier normative work that I have done because it manifests many of the features of a punishment theory that the Court might need to pursue in order to remain faithful to its recent statements in *Panetti*. Along this vein, Parts II and III draw on, and revise in part, materials from Markel, *State, Be Not Proud*, *supra* note 6.

<sup>16</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2859 (2007) (internal quotation marks omitted).

<sup>17</sup> *See, e.g.*, 18 U.S.C. § 17(a) (2000) (“It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.”).

whether the defendant was sufficiently competent to stand trial,<sup>18</sup> or whether the defendant was sufficiently competent to represent himself.<sup>19</sup> In other words, at stake in *Panetti* was a fundamental question of how society views defendants at the time of punishment: are they persons with whom we, through the state, engage for purposes of communication? Or are they simply instruments by which we advance other goals such as crime prevention and the minimization of vigilantism?

#### A. *Panetti and Its Roots*

In reviewing the habeas petition lodged on Scott Panetti's behalf, the United States Court of Appeals for the Fifth Circuit decided that Panetti's request had to be examined under the "awareness" test drawn from Justice Powell's concurring opinion in *Ford v. Wainwright*.<sup>20</sup> The Fifth Circuit's opinion stated that a defendant's mental competency threshold was established when the facts showed the defendant was *aware* "that he [is] going to be executed and why he [is] going to be executed."<sup>21</sup> Using this test, the Fifth Circuit held that, because the trial court had established that the defendant was *aware* of his crimes, *aware* of his pending execution, and *aware* that the state had predicated its reason for executing the defendant upon his past crimes, the defendant passed the competency threshold.<sup>22</sup> In other words, Panetti was deemed fit for execution.

Writing for a narrow 5–4 majority on the Supreme Court, Justice Kennedy rejected the "awareness" standard used to assess Panetti's competence. Instead, the Court agreed with Panetti's claim that the proper test is whether the defendant's "mental illness obstructs a *rational understanding* of the State's reason for his execution."<sup>23</sup> A defendant, in other words, must have more than awareness; he must have a "rational understanding" of why the state is executing him. How does this distinction between "rational understanding" and "awareness" make a difference?

While both tests stand close together, the distinction between the two tests mattered in the precise context before the Supreme Court. Panetti believed that, notwithstanding the state's claim that it was going to execute him for the murders of his in-laws, the true reason the state wanted to kill

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<sup>18</sup> See *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); *Dusky v. United States*, 362 U.S. 402 (1960).

<sup>19</sup> See *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

<sup>20</sup> *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring) (stating that the Eighth Amendment "forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it").

<sup>21</sup> *Panetti v. Dretke*, 448 F.3d 815, 819 (5th Cir. 2006) (quoting *Barnard v. Collins*, 13 F.3d 871, 877 (5th Cir. 1994)).

<sup>22</sup> *Id.* at 817.

<sup>23</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2860 (emphasis added).

him was “to stop him from preaching” about the “forces of darkness” and the “forces of light.”<sup>24</sup> Hence, because Panetti may have lacked a rational understanding of the reasons proffered for his execution, the Supreme Court reversed the decision of the intermediate court of appeals, and remanded the matter to ensure that these delusions were properly considered when determining whether Panetti was competent to be executed.<sup>25</sup>

The roots of the *Panetti* holding can be partly discerned from *Ford v. Wainwright*, the Court’s earlier decision addressing the punishment of the mentally incompetent.<sup>26</sup> In *Ford*, a plurality of four Justices led by Justice Thurgood Marshall made clear that the prohibition on executing the mentally incompetent was a rule long observed at common law and around the world. Although the plurality in *Ford* offered a number of reasons against the execution of the presently incompetent, it did not dwell too long on its underpinnings, instead opting for what looks like an incompletely theorized agreement on the appropriate outcome.<sup>27</sup>

Despite its difficulty in choosing a particular justification for the rule, the plurality in *Ford* proposed the following explanations for the prohibition on executing the insane: first, it “simply offends humanity,” second, it “provides no example to others,” third, that “madness is its own punishment,” fourth, that “it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it,” and fifth, that no retributive purpose is satisfied when a person “has no comprehension of why he has been singled out and stripped of his fundamental right to life.”<sup>28</sup> Careful examination of these reasons is warranted because the *Panetti* Court also adverted to them in its analysis.<sup>29</sup>

<sup>24</sup> *Id.* at 2859.

<sup>25</sup> *Id.* at 2862–63.

<sup>26</sup> 477 U.S. 399 (1986). The *Panetti* holding can only be partly predicated on *Ford*, because, as the dissent in *Panetti* pointed out, Justice Powell’s concurring opinion in *Ford* is the opinion that controls, and neither Justice Powell’s opinion nor Justice Marshall’s plurality opinion squarely addressed the situation where a prisoner “knows the reason for his execution but does not ‘rationally understand’ it.” *Panetti*, 127 S. Ct. at 2873 (Thomas, J., dissenting).

<sup>27</sup> See *Ford*, 477 U.S. at 410; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

<sup>28</sup> *Ford*, 477 U.S. at 407–09 (internal quotation marks and citations omitted).

<sup>29</sup> The *Ford* Court also mentioned another explanation: the difficulty an incompetent defendant would have in assisting counsel with eleventh-hour appeals. But this argument was not taken up by the *Panetti* Court, and was dismissed as lacking merit by Justice Powell, see 477 U.S. at 420, in his concurring opinion. Unfortunately, Justice Powell’s concurring opinion, which led courts to adopt the “awareness” standard, didn’t much address the specific rationale for the rule against executing the presently incompetent beyond asserting the intuition of the cruelty of the practice and noting that execution of the insane is inconsistent with retributive purposes. *Id.* at 421–22 (“The more general concern of the common law—that executions of the insane are simply cruel—retains its vitality. It is as true today as when Coke lived that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty’s critical justifications, its retributive force, depends on the defendant’s awareness of the penalty’s existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with

The first argument—a blanket statement that “*X* practice offends humanity”—is hard to rebut but also hard to accept. The Court is simply stating a conclusion without much evidence and justification.<sup>30</sup> But insofar as such a statement is meant to evoke further argumentation that is separable from the later claims about retributive purpose, it is worth noting that the execution of an insane and dangerous person may not be so offensive to humanity when the measure is performed not as punishment for a past action but as a tactic of social self-defense—i.e., when no alternative measures of restraint are presently and feasibly available. Although this claim may seem plausible, its force is weakened in a society like ours, where we have alternatives such as confinement. Thus, while this argument might conceivably have some resonance, it needs to be unpacked further before it can reasonably be credited.

The second suggested justification for the rule against executing the presently incompetent—that the execution of such persons might not “prove an example”—fails more clearly. Although it might be true that some mentally incompetent people are incapable of internalizing messages of deterrence, the execution of such persons might nonetheless provide an “example” to four kinds of competent persons. First, it may prove a flat deterrent signal to those competent individuals who may consider that society condemns misconduct *X* so much that *any* kind of perpetrator of *X* is subject to execution. Admittedly executions of mentally incompetent offenders probably do not provide *marginal* deterrence signals to competent offenders—after all, if that’s the goal, it would likely suffice to execute only competent offenders to create that signal. But, as Professor Kadish once suggested, the execution of an insane person may also deter those competent offenders who are contemplating faking insanity to escape punishment.<sup>31</sup> Moreover, this general deterrence signal might also work with respect to someone with sufficient foresight to recognize that though he is competent when he commits a crime at  $T_1$ , he might subsequently become incompetent at  $T_2$ , after adjudication but while awaiting execution. Knowing that he might still be executed even when incompetent might have prevented him from committing the crime at the outset.<sup>32</sup>

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one of the chief purposes of executions generally. . . . If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing.”)

<sup>30</sup> Justice Marshall later observed, without providing substantial evidence, that “the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation.” *Ford*, 477 U.S. at 409. Importantly, this particular intuition-based cruelty argument is not an argument the *Panetti* Court explicitly embraced.

<sup>31</sup> See Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 263–65 (1987) (discussing a possible offender who thinks he can persuade a jury that “he was among the nondeterreable”); see also Christopher Slobogin, *Mental Illness and the Death Penalty*, 1 CAL. CRIM. L. REV. 3, 32 (2000).

<sup>32</sup> Case Comment, *Eighth Amendment—Death Penalty—Execution of the Presently Incompetent*, 121 HARV. L. REV. 204, 213 (2007).

Finally, executing mentally incompetent persons might provide an instructive caution to persons providing care to those mentally incompetent persons capable of being a potential offender. If one suspects a loved one could be dangerous to others, then the prospect of that loved one's untimely death will motivate caregivers to reduce the dangerous person's access to dangerous weapons or even other people. The mentally incompetent person, from this vantage, is a source of risk to be regulated and controlled the same way other risks in life are regulated and controlled. Of course, whether executions of such persons provide *marginal* incentive to care compared to other punishments or nonpunitive responses is an empirical question; it may be that the family or other caregivers would still take the same precautions in the absence of a threat of execution. Nonetheless, the foregoing examples sufficiently undermine the Court's rather general assertion that executions of the mentally incompetent would "prove no example."

The *Ford* plurality's third rationale—that "madness is its own punishment"<sup>33</sup>—is similarly weak. First, from the subjective viewpoint of a mentally insane person, there is no reason to think that all kinds of mental incompetence are regarded by the person to be an affliction—some kinds of mental disease may feel subjectively empowering, at least sometimes to some persons.<sup>34</sup> More importantly, the claim that "madness is its own punishment" is peculiar in several respects. For those mentally incompetent persons who have committed a crime, we would never think that imposing a "madness" on a person constitutes condign punishment, especially upon someone without the moral capacity for justifiably being held responsible for the crime.<sup>35</sup> And for those mentally incompetent persons who have committed no crime, there is no reason to think that such persons should be subject to the "punishment" of madness.

What the *Ford* plurality may mean here is that madness is a substantially sufficient form of suffering such that a person subject to madness should not experience any further hardships imposed at the hands of the state. But, as I have argued before, the coercion imposed upon a defendant enduring state punishment is not the same as any kind of unvariegated suffering a person might endure.<sup>36</sup> When a defendant suffers at his own hand (self-inflicted wound), or because of a third party (a jilted boyfriend or a car accident), we ought not conflate that suffering with the experience of punishment at the hands of the state, which is designed to be a coercive condemnatory setback to the defendant's interests on account of a prior offense.

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<sup>33</sup> *Ford*, 477 U.S. at 407.

<sup>34</sup> See, e.g., AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 335–38 (4th ed. 1994) (describing symptoms of mania associated with bipolar disorder).

<sup>35</sup> See Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171 (2007) (discussing the conditions of being held responsible in the context of punishment).

<sup>36</sup> See Markel, *Against Mercy*, *supra* note 6, at 1449 n.84.

We need a set of reasons independent from the suffering associated with madness to warrant a decision to stay the hand of state punishment.

The fourth argument—“it is uncharitable to dispatch an offender into another world, when he is not of a capacity to fit himself for it”<sup>37</sup>—is downright odd. First, assuming the statement is true, what relevance does such theological reasoning have for the Court? Second, assuming this other world exists, why does the plurality believe that this other world will not be more understanding and well-suited for this offender? If we believe in an afterlife of some sort, it is hardly fanciful to think that it will be capable of effectively incorporating or curing the defendant. Last, even if executing the defendant were “uncharitable,” it is unclear how that lack of charitable-ness would be relevant to the Court’s role in interpreting the Constitution. Most people would consider most punishments to be “uncharitable,” but the Eighth Amendment prohibits only “cruel and unusual punishment.” Charity to offenders is not a recognized litmus test for assessing the constitutionality of either capital or noncapital sentencing.

It is the fifth reason from *Ford*—that execution of an insane person serves no retributive purpose—that merits closest attention, for it is this rationale that the *Panetti* Court ultimately examines most closely in its analysis.

### B. Understanding Panetti’s Retributivist Reasoning

In *Ford*, the Court plurality noted that “we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.”<sup>38</sup> Unfortunately, the *Ford* plurality did not explain why that retributive value is not achieved.

In *Panetti*, a proper majority of the Court reconsidered this issue and endorsed the idea that retributivist values cannot be squared with the execution of the presently incompetent.<sup>39</sup> In trying to flesh out the rationale for this position, the *Panetti* Court first observed:

Considering . . . whether retribution is served[,] it might be said that capital punishment is imposed [to serve retributive ends] because it has the *potential to make the offender recognize at last the gravity of his crime* and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.<sup>40</sup>

The Court reasoned that these two ends are not reasonably achieved in a case involving someone like Scott Panetti. As the Court stated, where “the

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<sup>37</sup> *Ford*, 477 U.S. at 407 (internal quotation marks omitted).

<sup>38</sup> *Id.* at 409.

<sup>39</sup> Justice Kennedy was joined by Justices Stevens, Ginsburg, Breyer, and Souter.

<sup>40</sup> *Panetti v. Quarterman*, 127 S. Ct. 2842, 2847 (2007) (emphasis added).

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," then the goals of having a) the prisoner recognize "the severity of the offense" and b) the community vindicate its judgment of the offender's culpability are "called in question."<sup>41</sup>

Applying this reasoning, the Court found that Panetti's mere *awareness* of the articulated reason for the state's plan to execute him was insufficient. The Court's concern was that Panetti's understanding of the reason for his punishment—i.e., the government's desire to stop his preaching—was not tethered to the political community's reasons for punishing him.<sup>42</sup> On that basis, the Court remanded the case to ensure that the trial court adopted procedures under which it considered whether the delusions associated with Panetti's "severe, documented mental illness . . . prevent[ed] him from comprehending the meaning and purpose of the punishment to which he has been sentenced."<sup>43</sup>

Note that the Court, in developing its holding, observed that the death penalty serves retributive purposes by reference to two objectives: one is focused on the community, and the other is oriented around the defendant's reaction to the state's action. The *community*-centered objective is satisfied by the death penalty because it permits "the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed."<sup>44</sup> The other end, concerning the defendant's reaction to the state's punishment, is purportedly achieved through capital punishment because the death penalty possesses "the potential to make the offender recognize at last the gravity of his crime."<sup>45</sup>

The Court's discussion of these two objectives warrant further scrutiny. At first glance, the Court's analysis appears hedged by equivocation and caution: after all, the Court only opines that it "might be said" that the death penalty serves these retributive purposes.<sup>46</sup> Furthermore, the Court refers to "the *potential* [of the death penalty] to make the offender recognize" the gravity of his offense.<sup>47</sup> Should we credit the caution in such statements?

In the end, no. The initial hesitation the Court displays is withdrawn by the very next sentence in the opinion, in which the Court determines that the execution of someone who does not rationally understand why he is be-

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<sup>41</sup> *Id.* at 2861.

<sup>42</sup> *Id.* at 2859–61.

<sup>43</sup> *Id.* at 2862.

<sup>44</sup> *Id.* at 2861.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (emphasis added).

ing punished cannot satisfy these two goals. Thus, the achievement of these goals becomes a litmus test for whether the punishment in question as applied to a particular offender survives constitutional scrutiny. If these two objectives are to represent conditions of constitutional magnitude, then we require a greater understanding of what each means and what each requires.

*I. The Community-Centered Objective.*—The Court claims to justify the death penalty in retributive terms in part because execution vindicates the community’s interest in denouncing the conduct of the offender with the “ultimate penalty.”<sup>48</sup> But the Court’s analysis is problematic. First, if satisfying the community’s desire for punishment counts as a retributive goal, the Court uncritically understands the death penalty as the “ultimate” penalty. Second, and more importantly for our purposes, the Court wrongly thinks that the satisfaction of the community’s desires is a “retributive” goal that is effectively achieved through the imposition of the death penalty.

To begin with, let’s examine the idea of the death penalty as the “ultimate” punishment. The Court’s claim has a veneer of sense: once imposed, the death penalty is obviously irrevocable. But there is no inherent reason to presuppose that the death penalty must be the most severe penalty a society imposes. Executing the offender is only the “ultimate” penalty because the Court has removed from the punitive arsenal all sorts of other penalties that might be more severe and equally irrevocable, such as prolonged inflictions of extreme pain and mental distress imposed upon the defendant leading up to eventual death by torture—or attaching the punishment to the offender’s children, which may effect a fate worse than death for the offender.

Additionally, it is the “ultimate” penalty only because some jurisdictions have decided to actually *use* the death penalty instead of capping punishment at, for example, forty years of incarceration in a maximum security prison facility. In other words, we could imagine setting the standard of what counts as “ultimate” through less and more severe punishments than the death penalty.

This flexibility is important because one must bear in mind the various ways in which law not only reflects social meanings, but also creates and reshapes those social meanings.<sup>49</sup> The Court, in establishing what counts as the ultimate penalty, didn’t signal any awareness of how its own judgment of what constitutes the ultimate penalty will inform the public’s subsequent understanding of what’s the ultimate punishment.<sup>50</sup> This failure to heed the

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<sup>48</sup> *Id.*

<sup>49</sup> See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661 (1998).

<sup>50</sup> It is no answer to say the Court uses “ultimate penalty” only in a descriptive sense either. If the Court is merely stipulating that the death penalty is the most severe punishment currently available, it cannot escape its own responsibility for permitting that punishment to continue when it has in the past interpreted the Constitution to prohibit its application. See *Furman v. Georgia*, 408 U.S. 238 (1972).

meaning-making function of law is especially important with respect to whether victims or the public would feel that sufficient denunciation was achieved. The Court, in other words, presumes that the community's interest in adequate denunciation will only be achieved through the death penalty and cannot be achieved through lesser means. But the task of achieving adequate denunciation to vindicate the community's interest is subject to a host of contingent considerations. Some members of the community, including the families of victims, may find sufficient denunciation through a less severe punishment inflicted upon the offender. Others in the community, including the families of victims, might think that staying the executioner's hand appropriately forces the defendant to suffer or confront his demons for a longer period of time. Conversely, some community members may feel their interests are never adequately vindicated, notwithstanding the execution of the offender.<sup>51</sup>

Once we see the contingent nature of the various benefits associated with the community-centered objective, we can understand why, in fact, the community-centered objective is not really an aspect of retributive justice. After all, what makes a justification of punishment retributive in nature is its ability to be explained and appreciated for the intrinsic value in the punishment of the offender for the offense,<sup>52</sup> without reference to the contingent benefits that the public might (or might not) enjoy.<sup>53</sup> (The precise contours of such a justification are articulated in Part II.) Accordingly, and most importantly, the so-called "retributive" community-centered goal is not retributive because satisfying the community's desires for denunciation (and with it, closure) is only contingently and speculatively achieved through the death penalty.<sup>54</sup>

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<sup>51</sup> See generally Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 399 (2007).

<sup>52</sup> See Michael S. Moore, *Justifying Retributivism*, 27 ISR. L. REV. 15, 19 (1993) (noting that a commitment to the intrinsic goodness of punishing wrongdoers is a "distinctively retributivist" claim).

<sup>53</sup> The value of retributive punishment, in other words, is internal to its practice and is not contingent upon the achievement of some future benefit to others outside the relationship of punisher and punished. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 180–81 (Ferdinand Schoeman ed., 1987); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 107 n.180 (1992) ("[I]f members of society other than the offender being punished are the intended recipients of the denunciatory message, then the theory seems to abandon retribution in favor of utilitarian purposes such as education, prevention, or deterrence."); cf. JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95–118 (1970) (understanding expressive benefits of punishment in utilitarian terms).

<sup>54</sup> One further quick point: when applying the community-centered goal to cases like *Panetti*, the Court's reasoning is insufficient. The Court concludes that Panetti's inability to understand rationally his punishment would interfere with the public's satisfaction in "affirm[ing] its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed." *Panetti v. Quarterman*, 127 S. Ct. 2842, 2861 (2007). But the Court offers no explanation of why the Court should overturn a decision to seek the death penalty made by a politically accountable executive branch when that decision was approved by a popularly constituted jury.

One caveat: to the extent the community-centered objective is understood *ex ante*, not *ex post*, and thus to encompass the same interests and values as those having to do with the objectives inhering in the relationship between the state and the offender, then the analysis is different. I have here understood the Court to refer to the community-centered objective in the *ex post* sense. But inasmuch as the community interest is understood as saying we simply want the state to be faithful to its obligation to enforce the law, then there is nothing contingent or speculative about the good achieved through the punishment. Of course, it would still require an explanation of why punishment of offenders is intrinsically good. For that, consequently, I propose that we turn to that aspect of the Court's holding resting on the notion that retribution is frustrated when the defendant is not a fit interlocutor for the communicative meaning of the state's punishment.

2. *The Communicative Relationship Between State and Offender.*—In the same breath in which the Court addressed the community-centered goal, it also mentioned how the imposition of the death penalty achieves the goal of extending to the defendant “the potential to make the offender recognize at last the gravity of his crime.”<sup>55</sup> I will sometimes call this goal, for purposes of brevity and contrast, “the defendant-centered” goal. In fact, the goal is not *defendant-centered*, but rather focuses on the *relationship* emanating from the communicative punitive encounter between the state and the offender, and the offender's reaction to that encounter.

This objective of having the defendant realize the gravity of his offense through punishment, like the community-centered goal, is only contingently realized; the Court itself observed this by using the word “potential.”<sup>56</sup> Because of the contingent nature of this defendant-centered goal, one might think, as the Court did in *Panetti*, that the state should not apply the death penalty when the defendant lacks the capacity to realize the gravity of his wrongdoing. But if that's the case, then one might also think the death penalty should not be applied when the defendant has *already* realized the gravity of his wrongdoing.

After all, if the defendant recognizes the gravity of his past offense, there is no need for the death penalty to reinforce that realization. If lesser means are available to secure one's recognition of the gravity of one's actions, then the death penalty would be a wasteful sanction, drawing attention and resources away from other cases. After all, perhaps incarceration

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<sup>55</sup> *Id.*

<sup>56</sup> Two interesting studies of death row inmates' “last words” are very instructive as they show a number of examples where it appears the defendant grasped the wrongness of his actions and exhibited profound contrition in his last statement. See, e.g., Vanessa Barker, *Last Words: Execution as Legitimation Crisis* (draft available with author), in WHO DESERVES TO DIE? (Austin Sarat & Karl Shoemaker eds. 2010) (on file with the author); Linda Ross Meyer, *The Meaning of Death: Last Words, Last Meals*, in WHO DESERVES TO DIE?, *supra*. The studies, however, also show a range of other attitudes, including defiance and hostility to the state or the victims or the families.

or fines would perform the same role that the death penalty does. Perhaps an adjudication of guilt after a trial has that potential. Perhaps even a defendant's acceptance of responsibility and entering a plea of guilty to the court suffices. So why should we assume that the death penalty should be used for its potential to make the defendant realize the gravity of his crime when other more parsimonious methods are possibly available and effective? At least with some cases, the death penalty would do nothing more to focus the defendant's mind than would other sanctions such as incarceration or fines, or no punishment at all. Thus the rationale offered for the death penalty seems insufficiently narrowly tailored to the goal it is trying to advance.

A better way of framing the goal discussed by the Court is to understand that the goal of state retribution is not to *achieve* the defendant's self-awareness of his guilt, but rather to *create the conditions* under which the defendant can come to develop self-awareness of his wrongdoing and respond appropriately. This understanding makes punishment's value non-contingent but still internally intelligible and retributive in nature. But in order to assess the nature and implications of the Court's retributivist reasoning, we need to examine why we should care if the defendant recognizes the gravity of the crime he committed. Justice Kennedy's opinion in *Panetti* makes clear that, under the Constitution, we must care about what the punishment means to the offender.<sup>57</sup> But the Court's reasoning here is opaque because it fails to explain what the connection is between the defendant's recognition of the gravity of the crime and the retributive punishment imposed in response to that crime.<sup>58</sup>

As I explain in the next Part, there is a way of connecting the defendant-centered goal to retributive justice. Doing so requires a theory that contends that the intelligibility of retributive punishment is most visible when seen through the lens of communicative action. But before explicating that account, we must first quickly survey how the Court has elsewhere characterized retribution. For if these other views of retribution fail to raise the same questions about the propriety of executing Panetti, then we can reasonably infer that there are now five votes implicitly agreeing upon a communicative account of retributive punishment. And if that's right, we

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<sup>57</sup> See Meyer, *supra* note 56, at 5.

<sup>58</sup> By embracing the defendant-centered goal, it might seem that the Supreme Court is gesturing toward a rehabilitative objective. See Case Comment, *supra* note 32, at 212 (viewing the Court's analysis as "essentially rehabilitative" and drawing on "religious assumptions that seem out of place"). But to claim that what's motivating the Court is a rehabilitative ideal would be odd given that the Court expressly uses the language of retributive justice. Moreover, if it were truly rehabilitative logic, the Court would likely evince some desire to see a defendant reintegrated into society. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 6-7 (1995) ("According to the rehabilitation ideal . . . rehabilitation programs are supposed to provide the basis for determining when sentences should be terminated in favor of parole to the community."). For more on the distinctions that can be drawn between rehabilitation and communicative retributivism, see *infra* Part III.B.1.

can better examine what implications can be drawn from that agreement for scenarios beyond the execution of the presently incompetent.

### C. *Misrepresenting Retributivism*

*Panetti's* discussion of retributive justice differs from the Court's previous statements about retribution. Importantly, in a number of cases from a few decades back, when retributive goals seemed especially to fall out of favor,<sup>59</sup> members of the Court often conflated retributive justice with revenge, and displayed no great admiration for either. As Justice Marshall wrote in *Furman v. Georgia*, the landmark case invalidating Georgia's death penalty statute, "Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."<sup>60</sup> Other examples where members of the Court conflated retributive punishment with vengeance are abundant.<sup>61</sup>

By contrast, in other cases, certain Justices have located retribution's value in the good of reducing "the greater evil" of private revenge.<sup>62</sup>

Despite such crude associations, support for retributivism has re-emerged over the last thirty years. Indeed, retributive justice notions are currently regarded as sufficiently respectable to justify punishments ranging from the death penalty for murder to punitive damages.<sup>63</sup> Consequently, the

<sup>59</sup> *E.g.*, *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law.").

<sup>60</sup> *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (footnote omitted).

<sup>61</sup> *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 189 (1963) (Brennan, J., concurring) ("To my mind that would be 'punishment' in the purest sense; it would be naked vengeance. Such an exaction of retribution would not lose that quality because it was undertaken to maintain morale."); *Trop v. Dulles*, 356 U.S. 86, 112 (1958) (Brennan, J., concurring) ("But I cannot see that this [punishment] is anything other than forcing retribution from the offender—naked vengeance."); *Morissette v. United States*, 342 U.S. 246, 250–51 (1952) (identifying retribution with "retaliation and vengeance"); *In re Yamashita*, 327 U.S. 1, 41 (1946) (Murphy, J., dissenting) ("[A]n uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit.").

<sup>62</sup> *See Furman*, 408 U.S. at 308 (Stewart, J., concurring) (identifying retribution's value as "promoting the stability of a society governed by law" lest "self-help, vigilante justice, and lynch law" erupt); *cf. OLIVER WENDELL HOLMES, THE COMMON LAW* 41–42 (Dover 1991) (1881) ("If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."). As others have noted, this argument is just a straightforward "revenge-utilitarianism." Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1169–73 (1980). Moreover, this justification gives no prima facie reason to punish offenders; rather, it warrants punishment for only those citizens who seek to punish the offenders outside the law.

<sup>63</sup> *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662 (2008); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2621 (2008) ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."). Perhaps the Court has always had some appreciation for the value of retribution. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 555 (1998) (discussing the "retributive and deterrent functions" of

Court's more recent statements on retribution also deserve attention. In *Kennedy v. Louisiana*, a recent case dealing with the constitutionality of executing a defendant for the crime of raping a child, the Court majority, again led by Justice Kennedy, wrote that the goal of retribution "reflects society's and the victim's interests in seeing that the offender is repaid for the hurt he caused."<sup>64</sup> Justice Kennedy's characterization there is broadly consistent with other statements made by the Court. For example in *Atkins v. Virginia*, the Court characterized retribution as "the interest in seeing that the offender gets his 'just deserts.'"<sup>65</sup> Canvassing a welter of similar references to retribution in the Court's opinions,<sup>66</sup> one observer concluded that the dominant understanding among the Justices has been one that identifies retribution in terms that permit society to "express its moral outrage over [an offender's] crime."<sup>67</sup> This is evidence of the Court's "social denunciation" view, which links the benefits of punishment to its ability to express the public denunciation of the criminal.<sup>68</sup>

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the criminal law); *Hudson v. United States*, 522 U.S. 93, 99 (1997) (observing retribution as one of "the traditional aims of punishment"); *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997) (same).

<sup>64</sup> 128 S. Ct. at 2662. Justice Kennedy's language of repayment and "hurt" are each problematic. Repayment is a problematic idiom because it wrongly reinforces the image of punishment as payment for a debt. This analogy is wrong for several reasons. First, we have no antecedent obligation not to incur civil debts, in contrast to those that would be punishable in criminal law. Second, the payment of a debt for criminal action does not compensate the losses of a victim the way a civil and contractual debt does—civil debts are undertaken on a voluntary basis, in contrast to criminal debts. Third, civil debts can generally be determined ex ante, whereas there is no equivalently precise calibration available to price the cost of assault or rape. See JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 139-40 n.26 (1990). Personhood plays an important role here too. The holder of the debt is the state, which has its own interest in protecting the regime of decision-making. But the state shares its interest in the debt with the public and the victim, and the debt is not one that can be separated into units of fungible currency such that the portion held by the government can be waived while the portion held by the victim is retained.

Separately, the use of "hurt" is misleading insofar as it relates to "harm," because many retributivists focus their attention on the culpability of the offender and less on the actual harm that results from that culpability. See, e.g., Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad but Instructive Arguments Against It*, 37 ARIZ. L. REV. 117, 119 (1995); Kimberly D. Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183 (1994); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 409; Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1600-03 (1974).

<sup>65</sup> *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

<sup>66</sup> See *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); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

<sup>67</sup> See Case Comment, *supra* note 32, at 211-12.

<sup>68</sup> 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (London, MacMillan 1883) ("[Criminal] law gives definite expression and a solemn ratification . . . to the hatred which is excited by the commission of the offence.").

Viewed together, these various strands illuminate the contested understanding of retribution on the Court.<sup>69</sup> One strand indicates that the state's infliction of retribution is appropriate because of its capacity to minimize "the greater evil" of private vengeance.<sup>70</sup> A second perspective equates retribution with vengeance.<sup>71</sup> And a third view appreciates retribution as a socio-legal practice of punishment through which society ventilates its outrage, perhaps for the purpose of creating social solidarity,<sup>72</sup> or to ratify our hatred of the criminal.<sup>73</sup> This third strand, evolving from the language of *Atkins* and *Kennedy*, discusses retribution in terms of "seeing" just deserts imposed on the offender. This strand also manifests itself in *Panetti*'s language related to the community-centered goal. However, what the Court has failed to explain is whether what matters is the *fact* of just deserts being imposed or only the *appearance* of just deserts.<sup>74</sup>

In any event, there is little reason to suspect that the result in *Panetti* would have remained the same if the outcome had rested on any one of the three views of retribution listed above. Crude vengeance, vengeance-minimization, and "seeing" punishment imposed on a person are all consistent with permitting *Panetti*'s execution to go forward.<sup>75</sup>

Admittedly, a more sanguine understanding of retributive justice is possible if we take the Court's statements in *Atkins*, *Panetti*, and *Kennedy* to mean a view of retribution grounded in the *imposition* of just deserts rather than the mere *appearance* of just deserts. Under that reading, retribution as just deserts probably counsels a more restrained role for retribution vis-à-vis the execution of those who were mentally incompetent at the time of their crime. Indeed, the "just deserts" approach might call for a less severe penalty—or perhaps no penalty at all—if the offender's responsibility, as opposed to his actual wrongdoing, at the time of the misconduct is called into question by virtue of his mental condition.

But understanding retribution as requiring the imposition of just deserts might seem problematic in a case like *Panetti*'s, where the expressed concern is not the mental condition at the time of the misconduct, but at the

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<sup>69</sup> See generally Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1185–86 (2003).

<sup>70</sup> See sources cited *supra* note 62.

<sup>71</sup> See Sigler, *supra* note 69, at 1179–83. On the differences between retributive justice and revenge, see *infra* Part II.D.

<sup>72</sup> See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 63 (W.D. Halls trans., 1984).

<sup>73</sup> 2 STEPHEN, *supra* note 68, at 81.

<sup>74</sup> How would the Court's views on retribution address a secret but fair punishment—would such an event be consistent with any of the previous statements made by the Court? Possibly the *Atkins* language of imposing "just deserts" would fit, but it is unclear what purpose is served by use of the word "seeing."

<sup>75</sup> As I have explained elsewhere, and as is indicated in Part II, those thirsty for vengeance are less inclined to be interested in the relevant excuses or justifications advanced by a defendant. See Markel, *Shaming Punishments*, *supra* note 6, at 2209–10.

time the punishment is imposed. If Panetti's just deserts are a temporally fixed property that are a function of his competence at the time of his misconduct, then "just deserts" retributivism would also not change the outcome in *Panetti*.<sup>76</sup> Only an account of retributivism that considers punishment in the context of state communicative action can make sense of the *Panetti* Court's rational understanding requirement.

Thus, from the perspective of understanding the defendant-centered goal discussed in *Panetti*, what matters is not the mere opportunity for social denunciation, but the communicative nature of the action the state undertakes through its retributive punishment. This communicative understanding of retribution associated with the defendant-centered goal has rarely been recognized in the Court's jurisprudence, aside from intimations in *Panetti* and arguably by the plurality in *Ford*. But the opacity of the Court's statements in those cases leaves open numerous and substantial questions concerning what such an understanding would look like, and what its implications would be for the death penalty. The next two Parts outline an answer to those questions respectively.

## II. A COMMUNICATIVE ACCOUNT OF RETRIBUTIVE PUNISHMENT

As suggested above, the *Panetti* Court's invocation of the defendant-centered goal as a retributive value makes most sense if one understands retributive punishment as a communicative practice. The discussion below sketches an account of this understanding, one that explains and justifies the intrinsic goodness of retributive punishment independent of the external social ends it might serve. It also explains why we *punish* mentally competent offenders for their *crimes*—as opposed to "treat" them or ignore them in search of cheaper measures of harm-reduction. That said, such a view does not entail indifference to the consequences and costs of punishment.<sup>77</sup> Once retributive punishment is properly understood as a form of justified communicative state action, Part III will demonstrate how it intersects with the problems arising from the implementation of the death penalty.

While this account builds upon prior accounts of retributive justice, it also departs from them in various ways. The point here, however, is not to trumpet or explicate these differences or claim originality on the whole account. The aim is first to present a sketch of retributive justice that illus-

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<sup>76</sup> See Stephen P. Garvey, "As the Gentle Rain from Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 1030 (1996) (claiming that from a retributivist perspective, an offender's desert is "fully congealed at the time of the crime").

<sup>77</sup> Prima facie duties cannot be denied as obligations, but the determination of how and when to discharge those obligations is a prudential matter and these obligations may be set aside when other duties supervene. Phrased differently, the socio-political obligation to create and maintain institutions of retributive justice must be balanced against other social obligations and moral duties. To say that these competing obligations exist does not deny the internal intelligibility of retribution for past offenses. For an instructive elaboration on reconciling competing obligations, see Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815 (2007).

trates the basis for a communicative conception of punishment that is retributive or non-instrumental in nature, and then to explain the implications of such an account for how we think about the death penalty. The bare claim is that states have positive, though not inflexibly demanding, reasons to censure and punish legal wrongdoing in a manner shaped by law when that response is administered by an agent of the state to the person who deserves such a response in virtue of his legal wrongdoing. But let's try to elaborate what underlies this claim. What, in other words, are we trying to communicate through retributive punishment?

The late John Rawls once defined retributive justice as a view of punishment based on the idea that

[w]rongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing . . . and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him.<sup>78</sup>

As Professor Michael Moore summarized, retributivism is the “view that punishment is justified by the moral culpability of those who receive it.”<sup>79</sup> Underlying this description is a sense that imposing punishment for wrongdoing is a self-evidently attractive obligation.<sup>80</sup>

The problem with these views is that many people think the nature of this obligation still needs more explication. Imagine Jack. He has spitefully run over his neighbor's prize-winning dog. If the state seeks to punish Jack on account of his purported moral desert, several questions arise. First, why does Jack deserve *punishment*? Why shouldn't Jack undergo some form of “treatment” that can cure his antisocial condition or disease?<sup>81</sup> Skeptics might ask why one *should* embrace the pursuit of retributive justice through authorized coercive condemnatory deprivations or setbacks to the defendant's interests.<sup>82</sup> The account below tries to situate retributive justice as a socio-legal institutional practice, the value of which is internally intelligible when the state inflicts some level of coercion upon an offender

<sup>78</sup> John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955).

<sup>79</sup> Moore, *supra* note 53, at 179. For Moore, moral culpability is the same as desert. *Id.* at 181–82.

<sup>80</sup> See, e.g., Robert Blecker, *Rethinking the Death Penalty: Can We Define Who Deserves Death?*, 24 PACE L. REV. 107, 123–24 (2003) (providing an example of retributivist intuitionism).

<sup>81</sup> E.g., TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 81–89 (1969); KARL MENNINGER, THE CRIME OF PUNISHMENT (1968); TRUDY S. SETTEL, THE WISDOM OF GANDHI (1995) (“All crime is a kind of disease and should be treated as such.”).

<sup>82</sup> Even if one agrees with the claim that Jack deserves to endure some punishment in the form of a coercive condemnatory deprivation, it does not follow that the state has a right or a duty to punish him. Why is the state adjudicating and punishing Jack—and not the victim or her allies? We need an account that can help us understand what it is about Jack's past offense that might entail the state's prima facie right and obligation to punish him. I don't try much to answer these questions here, but I have tried to do so elsewhere. See, e.g., Markel, *Retributive Damages*, *supra* note 6, at 257–73.

whose alleged violation of an extant legal norm has been subject to fair and reasonable adjudication.

*A. Holding Agents Responsible for Choices of Unlawful Actions*

Retributive punishment for legal wrongdoing is justified in part because it communicates to the offender a respect for his dignity by treating him as a responsible moral agent.<sup>83</sup> When the state adjudicates and punishes a person's unlawful wrongdoing, her moral agency is affirmed through that process because she can express remorse, recognize her wrongdoing, and make efforts to avoid that conduct in the future. Or, in the alternative, during the adjudicative process, the offender may give reasons that the conduct was not wrongful under the circumstances.<sup>84</sup> Involved in the retributive encounter of adjudication and punishment is a cognitive process that possesses moral weight.<sup>85</sup> In other words, we are respecting him by holding him responsible as a moral agent capable of choosing to act unlawfully and thus in a blameworthy manner.<sup>86</sup> When we credibly build institutions of criminal justice that attempt to adjudicate and punish an offender who steals, rapes, or murders, we are trying to tell him that his actions matter to this community constituted by shared laws and that he will be held responsible for his unlawful actions.<sup>87</sup> Imagine that Jack maliciously kills Jane's child. If the state, in its ordinary course of business, knowingly did nothing to respond to Jack's attack, its inaction could be read to express two conclusions: first, an indifference to the legal rights of its citizens; and second, a statement of condescension to Jack that his actions will not be taken seriously by the state, even though he chose to commit the wrongdoing without excuse or justification.

Retributive punishment constitutes a way in which we hold Jack responsible for his unlawful choices. When the state creates credible legal institutions to advance retributive justice, it expresses certain commitments *ex ante* and communicates these commitments *ex post* through retributive punishment. In this way, the punishment—the censure that appears through the coercive setback—communicates to offenders that they are autonomous agents capable of responsibly choosing between lawful and unlawful actions, and the reason the defendant is being punished is because he can and

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<sup>83</sup> See HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 46–49 (1976).

<sup>84</sup> See Andrew Von Hirsch, *Penal Theories*, in THE HANDBOOK OF CRIME AND PUNISHMENT 659, 666–67 (Michael Tonry ed., 1998).

<sup>85</sup> Cf. MICHAEL S. MOORE, PLACING BLAME 133 (1997) (“Voluntariness of action, accountability, intentionality, causation, justification, and excuse are the primary categories in terms of which we judge someone as morally responsible and thus legally punishable.”).

<sup>86</sup> The preconditions for this account's attractiveness are that the laws being vindicated are reasonable ones, democratically enacted, and the procedures by which one's guilt is established are appropriately conceived and reliably applied.

<sup>87</sup> See Pettit, *supra* note 35 (discussing conditions of responsibility in context of punishment).

must be held responsible for his freely chosen actions. To borrow from C.S. Lewis, retribution “plants the flag of truth within the fortress of a rebel soul.”<sup>88</sup> As a result, the punishment of a competent criminal instantiates a belief in the ideal that one is morally responsible for one’s actions.<sup>89</sup>

We can also give greater currency to the idea that retributive punishment is a communicative practice, not merely an expressive one. In this vein, we ground the value of retribution in the criminal’s ability to understand the state’s desire to repudiate his wrongful claim to be above the law. Say the perpetrator was mentally impaired, such that during his last dinner before execution, he tells the prison guard, I want to save my dessert for tomorrow night.<sup>90</sup> Would retributive punishment make sense in this context? On the view I’m developing, it would not. Indeed, the retribution would not be internally intelligible if the offender could not understand the meaning of the state’s condemnatory action after its adjudication. The offender must be able to understand the communication, though he need not be persuaded by it. He may proclaim his innocence notwithstanding the evidence to the contrary, but if he cannot comprehend that he is being punished for his offense, then the punishment is not retributive, but merely a coercive deprivation visited upon the offender, a punishment whose condemnatory character is lost on the offender.

Although this argument may seem similar to a justification for punishment based on moral desert alone, it is not exactly the same. Imagine on Monday, Jack kills Jane’s child but then on Tuesday, he bangs his head in a horrible accident and subsequently no longer has the capacity to understand why he’s being punished. Arguably, nothing has happened to change his moral desert if that moral desert of punishment was temporally fixed on Monday and the question is whether to punish him on Wednesday.<sup>91</sup> But the retributive point of punishment—communication—would be lost if he’s punished on Wednesday, not because we should be lenient because he’s already suffered a trauma; rather, because the punishment would lose its communicative significance to him—even if the state’s expressive goals to others are still possibly realized.<sup>92</sup> What’s important to see is that the good

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<sup>88</sup> C.S. LEWIS, *THE PROBLEM OF PAIN* 95 (1944).

<sup>89</sup> Importantly, one cannot say that the affirmation of another’s dignity as a morally responsible agent ceases as soon as there has been a (correct) judgment of a court; it must continue throughout the retributive setback.

<sup>90</sup> Cf. Christopher Hitchens, *Fool Me Thrice*, SLATE, Jan. 28, 2008, <http://www.slate.com/id/2182938> (discussing Governor Clinton’s execution of Ricky Ray Rector).

<sup>91</sup> See *supra* note 76 and accompanying text.

<sup>92</sup> Of course, if Jack lobotomized himself intentionally after the crime, we might have reason to punish him for his now self-created condition of ill-repair, much the way we also punish the person who chooses to get drunk before committing a robbery or rape. Similarly, a principle of responsibility applies if at the time of punishment, we can explain to Jack his crime and the evidence underlying it, even if he does not remember the crime himself, much in the way we do to a person who commits a crime while he is drunk.

achieved by retributive punishment is realized in the practice of punishment itself, though whether that good should be pursued in all situations and contexts needs to be weighed against the pursuit of other goods. In making these claims, however, we can still see that the point of retributive punishment is not to achieve general psychological satisfaction, reduce private violence, or educate the public about norms of right conduct; all of these are contingent goals attainable through a variety of means.<sup>93</sup>

Notwithstanding the internally intelligible value of retribution's *communicative* practice, the state's retributive punishment also performs important coinciding *expressive* functions. That is, when the state creates institutions to communicate reprobation of the offender, the fact of retributive institutions signals that our actions and our interests matter to the state and to those around us. The expressive function of punishment (the signals to the undifferentiated masses) is secondary and derives legitimacy only when the primary communicative function to the offender is properly achieved—by virtue of the defendant's culpability and competence.

Of course, we might think punishment may not be necessary to communicate to particular offenders the value of being held responsible in particular instances. We could envision an offender who, immediately after committing her misconduct, comes forward, attempts to make restitution, accepts responsibility, and evinces her awareness of this ideal through her own repentance. This should indicate that something else is at stake when we say that state coercion should justifiably be used even where the offenders have apparently internalized the significance of the first ideal.

#### B. *Effectuating Equal Liberty Under Law*

Even against a quickly repentant offender, retributive punishment is warranted to effectuate our commitment to the principle of equal liberty under law. In a liberal democracy, punishment serves to fulfill part of equality's promise because, as citizens, we are each burdened by an obligation to obey those laws reasonably crafted, enforced, and applied.<sup>94</sup> When someone flouts a legitimate law, he elects to untether himself from the common enterprise of living peaceably together under a common law. He is not merely flouting a particular law that he may disagree with, but rather he defects from an agreement about the basic structures of liberal democracy that he (would have) made as a reasonable person in concert with other reasonable people. By his act, the offender implicitly says, "I have greater liberty than you, my fellow citizen." He cuts himself off from the social order, to impose a new order by his acts, against people who should enjoy equal liberty as guaranteed by the rule of law in a liberal state.<sup>95</sup>

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<sup>93</sup> See MOORE, *supra* note 85, at 90.

<sup>94</sup> The account here may not apply in contexts departing from these conditions.

<sup>95</sup> See MURPHY & COLEMAN, *supra* note 64, at 124.

By making credible the threat to impose retributive punishment, the state makes its best reasonable efforts to reduce the plausibility of individuals' a) false claims of superiority over their victims, if there are any, or b) false claims of power against the state. In other words, the state's coercive measures against the offender communicate our fidelity to the norm that we all are permitted to enjoy the same package of liberties under law,<sup>96</sup> and that the infringement of those liberties renders the offender eligible for a sanction that would be visited on all the others who are also convicted of violating the same laws. Importantly, these coercive messages are communicated to the person most in need of hearing and experiencing that message of reprobation—the offender who has been held to violate the laws.

Note that it does not matter that few people, if given the chance, would seek to steal, rape, or murder.<sup>97</sup> All that matters is that, *ex ante*, the offender can be seen as defecting from a legal order to which she has good reason to give allegiance, and that she defects in a way that demonstrates that she has taken license to do what others are not entitled to do. If the state establishes no institutions to credibly threaten punishment, the offender's implicit or explicit claim to superiority over others commands greater plausibility than it would if the state had created such an institution.<sup>98</sup> This rationale helps explain both the notion of equal liberty under law and the subsequent obligation of restraint by citizens.

Of course, if we asked the typical offender who commits a “smash and grab,” he would deny that he is making any implicit or explicit “claim” against the victim or the state. He would further deny that he is trying to shift the rules of property or inalienability or to usurp the will of the democratic apparatus. He is just violating the law and hoping to get away with it because he needs or wants the money. Consequently, there might be something implausible about viewing criminal conduct as a rebellion against the state or one's fellow citizens. That same reaction of implausibility might also be triggered by the claim that we respect offenders by punishing them.<sup>99</sup> It only looks implausible, however, if we are expected to explain

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<sup>96</sup> See Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 25–26 (2003); John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J. JURIS. 91, 99–101 (1999). Of course, this does not assume that in fact we all have the same likelihood of enjoying the same liberties; clearly, tastes and various constraints—economic, geographic, etc.—will influence the patterns resulting from the provision of equal liberty under law.

<sup>97</sup> For a discussion of how this account sidesteps the criticisms of the “fair-play” theory of punishment associated with Herbert Morris's famous essay, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 24, 26 (Jeffrie G. Murphy ed., 1985), see Dan Markel, *Misguidedly Merciful? A Reply To Professor Meyer* (March 3, 2009) (unpublished manuscript, on file with author).

<sup>98</sup> On the point of diminishing the plausibility of an offender's claims to superiority, I draw from Jean Hampton, *The Retributive Idea*, in JEAN HAMPTON & JEFFRIE G. MURPHY, FORGIVENESS AND MERCY 111 (1988), and Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659 (1992).

<sup>99</sup> See, e.g., Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 627 (2009). I address the substance of Ristroph's claims a bit more in *Ex Ante Retributivism* (manu-

why punishment is justified to an offender who already knows he's an offender. That objective seems misplaced. What we need is a theory that explains the attractiveness of retributive punishment to a person trying to secure the conditions for human flourishing *ex ante*—before he knows whether he's going to be rich or poor, an offender or a victim, but knowing he will be able to control his conduct and be punished only for misconduct proscribed by law and subject to his control.<sup>100</sup> Speaking to that person, it seems much more plausible to endorse the attempt to read such misconduct as warranting punishment because it is a rebellion against the liberal democratic public order and its institutions of punishment, which the person would have authorized as a reasonable response to offenses *ex ante*.

Commitments to these ideals described above explain why certain individuals should be punished and not others. Specifically, we can see why—without reliance upon mere intuitions or emotions of vengeance, anger, or hatred—the state must take care to punish only the guilty, and not the innocent. After all, only a convicted offender has been judged to have made claims denying his responsibility, his status as an equal under the law, and his proper role in the chain of democratic decisionmaking. Those found guilty *should* be held responsible and punished. A failure to punish when we reasonably could do so signals that we do not care about the ac-

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script on file with author), but let me say something to the point here. Ristroph accuses me (among other retributivists) of a circularity in the argument (it is better termed a *non sequitur*, but no matter): retributivists, according to Ristroph, “assert that responsible agents must be punished, and that failure to punish is failure to recognize the criminal as a responsible agent.” *Id.* at 627. She cites me for that proposition though her own parenthetical in the footnote hedges the statement more carefully by noting that I think a failure to punish *may* be taken as “a statement of condescension” to the offender. *Id.* at n.132. And *that* is surely correct.

My point (and I suspect some other retributivists would agree) is not that failing to punish necessarily means failure to acknowledge as a responsible agent. It is rather that one way of acknowledging someone's responsibility is by holding him responsible, and one way of holding responsible is to punish. This does not exclude other ways of dealing with offenders that are compatible with treating them as responsible. The contention, stated simply, is that the failure to punish will, in many or nearly all instances, represent a failure to acknowledge as responsible, and thus a failure to realize an important good (of accountability for one's actions). For example, if we did not punish someone for his actions, but rather gave him shock therapy, this (arguably) would be not treating him as a responsible agent but instead as a thing to be manipulated or managed by the state. Or again, if we did nothing when someone broke a law, and instead said, “who cares?” we may not be treating that person as a responsible agent who is capable of owning up to his actions. In these last two instances, the failure to punish does indeed mean a failure to hold responsible. But I am not committed to the false thesis that all failures to punish are failures to hold accountable—only that many of them are. Moreover, consistent with what's in the text at various points, we might also fail to hold someone responsible (i.e., to punish) because of other principled or practical commitments that make punishment impossible, or infeasible, or undesirable in particular cases.

<sup>100</sup> Cf. JEFFRIE G. MURPHY, *Marxism and Retribution*, in *RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW* 93, 100 (1979) (“The criminal himself has no complaint, because he has rationally consented to or willed his own punishment. That is, those very rules which he has broken work, when they are obeyed by others, to his own advantage as a citizen. He would have chosen such rules for himself and others in the original position of choice.”).

tions of the offender, the rights and interests justifying the rule that the offender breached, or the integrity of our democratic decisionmaking structure. These signals wrongly emit, in other words, a lack of concern for reducing Type II (false negative) errors of nonpunishment for those laws whose underlying values we have committed to protect through this structure of punishment. And it is only those laws, and not simply generic moral vices such as smugness or a nasty demeanor, that themselves warrant punishment under law.

Additionally, to underpunish or overpunish relative to comparable offenders is to make (rebuttable) claims that some people are granted favors at the hands of the state, thereby violating a basic liberal commitment to be treated with equal concern and respect under the law. Values of consistency and even-handedness call for the reduction of the errors involving under- and overpunishment relative to comparable offenders, which often result from excessive discretion. Finally, the innocent should *not* be punished, for they have not made claims of legal superiority through their actions, nor can they plausibly be deemed to have usurped power from the decisionmaking structure, which they have good reason to obey *ex ante*.

Two points bear emphasis. First, good retributive reasons exist to reduce both errors of under- and overpunishment in a system reflecting retributive values in a liberal democracy. There will obviously be tragic choices associated with how to balance the need for reducing one sort of error against another, but at the very least we can recognize the deficiencies associated with both kinds of errors. This is a point that has been largely lost on those courts and commentators who try to understand retribution strictly through a victim-vindication or social denunciation model of punishment. Second, the internal intelligibility achieved by punishing a guilty offender explains the conceptual linkage between legal guilt and retributive punishment in a way that utilitarians cannot.<sup>101</sup>

### *C. Retributivism's Internal Limits*

Retributivism understood as communicative action presents not only reasons for punishments but also reasons for limiting the availability, amount, and kind of punishment. Obviously, the practice of retribution poses significant risks of error and abuse by authorities. When errors or abuses occur, the results stand at odds with the animating principles of retributive justice. Consequently, retributive punishment can be commended only when sufficient measures are taken to substantially and reasonably reduce or eliminate those risks. Because of these risks of error and abuse, moreover, retributive practices must be conducted with a degree of modesty, and upon assurances that those risks of error and abuse are tolerably

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<sup>101</sup> For a very instructive addition to the literature on this subject, see Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258 (2008).

minimal.<sup>102</sup> While invoking a principle of modesty may seem theoretically vague, it actually has substantial policy implications, as described in Part III.

Additionally, embedded in the account furnished so far is an intent requirement on the part of the state's punishing agents. To insist only on the offender's perception of his defeat, to the exclusion of the *potential* internalization of correct values that the confrontation encourages, would stand in tension with our first interest: affirming our recognition of each other as autonomous moral agents capable of responsible decisionmaking. In order to achieve this vision in the concrete practice of punishment, it is crucial that the denial of the offender's false value claims is carried out in a way that is conducive to the internalization of the values that the retributive encounter is meant to uphold. The retributive punishment *need not guarantee the defendant's internalization of those values*, but it should proceed with the desire for that result, and the state ought not take measures that, in the course of punishment, directly preclude it. At bottom, the state must strive for a punishment that not only denies the offender's claim of superiority, but also invites his transformation.<sup>103</sup> To borrow the philosopher Robert Nozick's memorable and apt phrase, "[t]he hope is that delivering the message will change the person so that he will realize he did wrong, then start doing things because they are right."<sup>104</sup>

#### D. Retributive Punishment as Distinct from Revenge

Contrary to various courts and commentators,<sup>105</sup> we can see how retributive justice, especially in its institutional form, might usefully be contrasted with revenge—at least as ideal types.<sup>106</sup> To begin with, what induces retributive punishment is the offense against the legal order. Therefore, where the law runs out, so must retribution. By contrast, revenge may address slights, injuries, insults, or nonlegal wrongs. Nozick identified five other characteristics that tend to distinguish retribution from revenge:

<sup>102</sup> As Professors Allen and Laudan demonstrate, however, an "innocentistic" social concern eliminates only Type I errors, i.e., those false positives involving mistaken punishment. As a matter of social policy, we also have very strong reasons, on retributive and nonretributive grounds, to be concerned with Type II error reduction, that is reducing the false negatives associated with failing to punish the guilty, as well. Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65 (2008). *But cf.* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (2008) (providing a qualified defense of the "innocence movement").

<sup>103</sup> Markel, *Shaming Punishments*, *supra* note 6, at 2209–10; *cf.* *Ezekiel* 33:11 ("I have no pleasure in the death of the wicked; but that the wicked turn from his way and live."). A similar point is lucidly developed in R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 27–30, 79–82 (2001).

<sup>104</sup> See ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 377 (1981).

<sup>105</sup> See *supra* Part I.C; see also Markel, *State, Be Not Proud*, *supra* note 6, at 410 n.13 (providing citations).

<sup>106</sup> I qualify this discussion by reference to ideal types because there have often been cultures or social norms involving revenge that fall somewhere in between. For a good discussion of this cultural history, see WILLIAM IAN MILLER, *EYE FOR AN EYE* (2006).

(a) retribution ends cycles of violence, but revenge fosters them; (b) retribution limits punishment so that it is in proportion to the wrongdoing, whereas revenge is not necessarily limited by this principle; (c) retribution is impartially administered by the state, while revenge is often personal; (d) retributivists seek the equal application of the law, whereas no generality attaches to the avenger's interest; and (e) retribution is cool and unemotional, while revenge has a particular emotional tone of taking pleasure in the suffering of another.<sup>107</sup>

A few other important distinctions can be drawn. Retributivism always seeks to attach the punishment to the offender directly because it is the offender who makes the claims the state seeks to reject, not the offender's children or parents, whereas revenge may target an offender's relatives or allies.<sup>108</sup> Retributivism, distinct from revenge, is uninterested in making the offender experience generic suffering and instead seeks to use the state's power to coerce the offender in particular ways, such that certain ideas can be communicated through that coercion.<sup>109</sup> Retributivism is interested in, and speaks to, the moral autonomy and dignity of the offender, whereas revenge may be indifferent to those qualities. Such indifference crucially affects whether, and what kind of, defenses—justifications and excuses—might limit retribution. Finally, retributivism's intent requirement, discussed above, requires that the punishment not preclude the internalization of the "sense of justice" that would allow for an offender to demonstrate his respect for the norms of moral responsibility, equal liberty under law, and democratic self-defense, whereas revenge has no such requirement.<sup>110</sup>

The value of retributivism, on this account, is realized when the state attempts to communicate its commitment to these ideals through the use of its coercive power against the offender. In contrast to those who might be tempted to view retributivism as merely an "expressive theory" reducible to the success of its norm-projection to society, the account here reveals re-

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<sup>107</sup> NOZICK, *supra* note 104, at 366–68.

<sup>108</sup> This is not to deny that retributive punishment may result in third-party harms, nor to suggest that revenge is *always* targeted at third parties close to the offender. The point is narrow: retribution does not aim to harm third parties, and in some cases, the kind of retribution imposed should take into account innocent third-party harms. *Cf., e.g.,* Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147 (urging greater use of time-deferred incarceration to mitigate innocent third-party harms).

<sup>109</sup> An avenger who sees his antagonist experience suffering from some other source, such as disease, may decline to follow through on the revenge, whereas the state's retributive interest would not be satisfied merely by having an offender suffer.

<sup>110</sup> See Markel, *Shaming Punishments*, *supra* note 6, at 2216–17. On democratic self-defense's role in this account of punishment, see *id.* at 2199–2202, and Markel, *Retributive Damages*, *supra* note 6, at 263–65. I have omitted discussion of this notion here because it is somewhat less germane to the project of interpreting and extending *Panetti*.

tributivism's intelligibility even if we focus strictly on the relationship between state and offender.<sup>111</sup>

### III. COMMUNICATIVE RETRIBUTIVISM AND THE DEATH PENALTY

In this Part, I hope to explain how the values of a communicative account of retribution trigger much greater hostility to the use of the death penalty. For those embracing a communicative view of retribution, the concerns arising from the institutional application of the death penalty can be sorted into roughly two categories—contingent objections and categorical (or noncontingent) objections.

#### A. *Contingent Retributivist Challenges to Capital Punishment*

1. *Arbitrary Distributions of Death.*—As I've described elsewhere,<sup>112</sup> a desire to avoid randomness, arbitrariness, and invidious bias in the distribution of the death penalty are core commitments of the institutional and communicative account of retributivism I have described. If the death penalty is distributed in one of these manners, the agents imposing the death penalty act without legitimacy, for they transgress the bounded permission that itself authorizes the agents' use of coercion over others. As various reports have shown over the last number of years, many offenders sentenced to death row are there because morally irrelevant factors such as race and intrastate geography played a role in their sentencing.<sup>113</sup> These objections, however, do not themselves indicate the need for an end to the death penalty, but they do indicate a need for a more evenhanded imposition of it. Prescriptively, that could suggest a response of either more executions or fewer.<sup>114</sup> But as a legal matter, the Supreme Court's jurisprudence on the death penalty largely precludes use of mandatory death penalty schemes to effect a more evenhanded imposition of capital punishment.<sup>115</sup> Conse-

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<sup>111</sup> This notion might be enhanced for some through the thought experiment of the "secret but fair punishment." See Markel, *Shaming Punishments*, *supra* note 6, at 2211–12; *cf.* MOORE, *supra* note 85, at 90.

<sup>112</sup> See Markel, *Against Mercy*, *supra* note 6; Markel, *State, Be Not Proud*, *supra* note 6.

<sup>113</sup> *E.g.*, ILL. DEP'T OF CORR., COMM'N ON CAPITAL PUNISHMENT (2002), [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/chapter\\_01.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_01.pdf).

<sup>114</sup> See Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1391–92 (1988).

<sup>115</sup> See *Sumner v. Shuman*, 483 U.S. 66, 77–78 (1987) (holding unconstitutional a mandatory death penalty scheme for individuals convicted of capital crimes while already serving life sentences); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (striking down a mandatory death penalty scheme). *But see* *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (permitting mandatory application of the death penalty when jurors determine that aggravators outweigh mitigators).

quently, the leveling down of punishment is likely to be the primary route available to achieve more evenhanded punishment.<sup>116</sup>

2. *Inaccuracy.*—A more powerful retributivist objection to the imposition of the death penalty is the problem of inaccuracy. Various empirical studies have shown that there is a disconcertingly high error rate associated with death-penalty eligible cases.<sup>117</sup> Many of these errors are uncovered prior to the execution of the offender.<sup>118</sup> Some, lamentably, are not.<sup>119</sup>

These arguments may not quell the concerns of those who suggest that case-by-case review and appeals could show that at least some of the people on death row did in fact commit the crime they were convicted of, and were not arbitrarily sentenced to death on the basis of race or the county in which they were prosecuted.<sup>120</sup> This reaction, however, requires a uniquely robust confidence in institutions that have proven to be demonstrably fallible. One is properly wary of inflicting the death penalty because once it is imposed it is impossible to correct the error in any way meaningful to the offender. But as explained in Part III.B.3, there are cases that can overcome the accuracy concerns associated with the irreversibility of the death penalty.

3. *Culpability Gaps and Social Responsibility.*—There are other reasons for caution that warrant consideration by retributivists. First, the death penalty is frequently imposed on a class of offenders whose socio-economic

<sup>116</sup> It might be possible to ratchet up punishment to achieve evenhandedness without mandatory schemes if we tinker with instructions on aggravating and mitigating factors that could ensure execution of more defendants who come from “favored” races and geographic origins. But I suspect that would be hard to do, both in theory and practice.

<sup>117</sup> *E.g.*, James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000).

<sup>118</sup> According to the Death Penalty Information Center, 133 people in twenty-six states have been released from death row since 1973 based on evidence of their innocence. *See* Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6?> (last visited July 6, 2009). In light of the shoddy laboratory work repeatedly performed in various unregulated crime labs, the number of wrongly convicted will probably rise. *See generally* Paul Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007).

<sup>119</sup> One study by the Equal Justice Institute USA has found evidence that, by 2000, at least fifteen people were executed in the modern era (that is, post-1977) for crimes “despite compelling evidence of innocence.” *See* GRASSROOTS INVESTIGATION PROJECT, EQUAL JUSTICE USA, *REASONABLE DOUBTS: IS THE U.S. EXECUTING INNOCENT PEOPLE?* (2000), available at <http://www.quixote.org/ej/grip/reasonabledoubt/reasonabledoubt.pdf>. For a compelling possibility of a wrongly and recently executed person, see Dan Markel, *Innocents Lost: Who Needs David Gale When You’ve Got Ruben Cantu?*, SLATE, Nov. 29, 2005, <http://www.slate.com/id/2131194>. While one might reasonably view the possibility of wrongful execution as remote, see Allen & Laudan, *supra* note 102, one must also consider that the lack of information on this subject is created by the fact that there exists little incentive for people to investigate the innocence of people who are already dead. Between the choice to spend time clearing the name of someone who has not yet been executed and that of someone who has been executed, people will tend to choose the former.

<sup>120</sup> *See, e.g.*, Markel, *State Be Not Proud*, *supra* note 6, at 417 (describing the criticism of Illinois Governor Ryan’s commutation of death row).

backgrounds and personal histories often reveal a collective failure to ensure that each child is given a fair shot at securing the basic goods that enable a life well lived.<sup>121</sup> On this view, forbearing from a penalty as severe as death is consistent with the recognition that our society has often abandoned our shared obligations to those who ended up enmeshed in our criminal justice system. This recognition need not concede that the offender lacks responsibility for his crime in order to highlight our own too-eager acquiescence to urgent criminogenic social conditions.

Second, the retributivist social planner cannot disclaim responsibility for the harms caused to its state's executioners. Many of these executioners, and the teams that assist them, suffer from psychological traumas and associated medical difficulties.<sup>122</sup> That problem, coupled with the fact that many executions are botched,<sup>123</sup> counsels restraint.

For the foreseeable future, these contingent criticisms of the death penalty provide a justification for substantial skepticism about the use of capital punishment on retributivist grounds. Arguably, however, these criticisms lose their force over time as the administration of justice is rationalized and improved both inside and outside the domains of criminal law.<sup>124</sup> The interesting question, then, is what happens if these practical problems were to disappear? Are there any categorical objections to the death penalty from a retributive institutional standpoint? For the reasons next articulated, the answer would appear to be yes.

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<sup>121</sup> See Carol Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 767 (2005) (“[The] conflict between collective responsibility for crimogenic conditions and the imposition of individual criminal responsibility for crime is best captured by a *New Yorker* cartoon in which a jury foreperson delivers the following verdict: ‘We find that all of us, as a society, are to blame, but only the defendant is guilty.’”).

<sup>122</sup> See M. J. Osofsky & H. J. Osofsky, *The Psychological Experience of Security Officers Who Work with Executions*, 65 PSYCHIATRY 358 (2002); M. J. Osofsky et al., *Role of Moral Disengagement in the Execution Process*, 29 LAW & HUM. BEHAV. 371 (2005). One might argue that those working for the state in this capacity assume the risk of trauma. Even if there were an assumption of risk that satisfied fair notice of the harms, the fact of such apparent consent does not work a categorical defense on behalf of the government. There are some bargains the state may not strike, just as there are certain bargains an offender may not make. That said, I don't wish to deny that prison guards in noncapital contexts may also experience various risks. These also need to be considered and addressed by making prisons safer and more humane places to work and live.

<sup>123</sup> See Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1104 (2003); see also Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335 (2003).

<sup>124</sup> One might argue that the death penalty may traumatize executioners even if it is fairly and painlessly applied. But a willing state can quite plausibly evade this difficulty by automating executions or disaggregating the tasks associated with execution.

## B. Categorical Retributivist Challenges to Capital Punishment

1. *Executions Prevent Internalization of Retributivism's Animating Values.*—When execution is the specific punishment for an offender, the state forecloses the opportunity to see the norms animating retributive justice effectuated in the person's behavior and outlook during and after the communicative punitive encounter.<sup>125</sup> After the punishment, the offender cannot conduct himself in a manner that affirms notions of moral responsibility or equal liberty under law. In other words, he is precluded from participating in the goods that animate retributive justice in a political community.

It bears emphasis that retribution remains distinct from the rehabilitation of the individual offender. Rehabilitation has traditionally—though not exclusively—been deemed a form of treatment, viewing criminality as a product of antecedent physical or social causes such as sickness, rather than as the product of a deliberate choice to undertake conduct that has been prohibited by the polity. By viewing criminality as the product of sickness rather than of free choice, a rehabilitative perspective arguably violates a person's right to be punished for choices made as a dignity-bearing, morally autonomous agent. By contrast, retribution, as Professor Herbert Morris observed, respects a (competent) person's right to be punished as an autonomous agent.<sup>126</sup>

Three other distinctions can be drawn between rehabilitation and communicative retribution. The first relates to whether offenders possess a stronger moral claim than nonoffenders to scarce social resources; retributivists are likely to deny that claim as a general matter.<sup>127</sup> Second, the value of rehabilitation does not require, as a logical predicate, that a person commit a crime in order to justify the instillation of pro-social values.<sup>128</sup> A per-

<sup>125</sup> See Mary Ellen Gale, *Retribution, Punishment, and Death*, 18 U.C. DAVIS L. REV. 973, 1032 (1985).

<sup>126</sup> See Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 486 (1968) (“A person has a right to institutions that respect his choices. Our punishment system does; our therapy system does not.”); see also G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 126 (Allen W. Wood ed., H. B. Nisbet trans., Cambridge Univ. Press 1991) (1820) (“The injury. . . which is inflicted on the criminal is not only just in itself (and since it is just, it is . . . his right); it is also a right for the criminal himself. . . . For it is implicit in his action, as that of a rational being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under his right.”) (original emphasis omitted).

<sup>127</sup> In a society where resources for criminal justice are always balanced among competing attractive social projects and political duties, one can see why the person who has not violated a criminal law has a stronger claim to those scarce social resources than someone who has violated that public trust. Of course, in considering prisoner reentry to society, the polity may reasonably decide that investing in the skills of offenders is a worthwhile endeavor to reduce the social cost of recidivism and to undertake a form of democratic self-defense and social self-protection. That decision, however, is made less for the benefit of the offender than it is for the good of society.

<sup>128</sup> Rehabilitation, like other forward-looking utilitarian accounts of social intervention, offers no necessary reason to predicate an intervention upon a crime. Any person who looks antisocial might war-

son's crime is only evidence of a need for social intervention in the form of rehabilitation, but depending on the crime and the context, one might think rehabilitation is neither necessary nor sufficient for such a goal to be pursued.<sup>129</sup>

Finally, the communicative retributive goal of preserving a chance for an offender to internalize certain values and to evidence that internalization is not the same as ultimately seeking the reentry of an offender into society or reconciling the offender and the victim or the victim's allies. To be sure, such events are not to be categorically avoided or prevented under retributive views. Rather, through its use of coercive measures, retributive punishment communicates certain fundamental norms. The coercive measures are themselves defective if the retributive encounter leaves no chance for the offender to evidence that her behavior or outlook has changed for the better as a result of that coercive communicative measure.

All that said, I acknowledge that there may be many offenders for whom internalization of these ideals holds no attraction. That's their freedom, which they can choose to exercise.<sup>130</sup> Nonetheless, the reason for this restriction on the mode of punishment is to avoid what might be called "intrinsic pointlessness." In the way that an insult shouted to an offender in a language she does not understand is a pointless exercise from the offender's point of view, a punishment that leaves no opportunity for subsequent internalization grimly forecloses the reconstruction of the offender's self as moral agent and as citizen. To use Nozick's slightly odd phrase: death removes the opportunity to be "connected with correct values" during and after one's punishment.<sup>131</sup> Of course, this objective is of little concern to someone concerned solely with revenge or social denunciation or the minimization of private revenge. However, retributive justice differs from these goals in salient ways, and I believe this is one of them.

But what about the time spent on death row? To an outside observer, it might seem that the period a person waits there provides the necessary opportunity to internalize the values animating communicative retributivism. Indeed, as Samuel Johnson said, nothing concentrates the mind so wonderfully as the sight of the hanging gallows.<sup>132</sup> But this reasoning is misplaced

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rant containment or "rehabilitation." By contrast, retributive punishment is conceptually linked with the predicate of an offense for the reasons mentioned in Part II.

<sup>129</sup> For example, someone who commits a crime may not have exhibited the kind of moral vice that is necessary for the introduction of rehabilitative techniques—think of possession of a small amount of marijuana. Alternatively, there might be some kind of antisocial behavior undertaken by a person that suggests the need for intervention notwithstanding the fact that the person didn't as such commit a particular crime.

<sup>130</sup> And it's a freedom that the *Panetti* Court also recognized. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2862 (2007) ("The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.")

<sup>131</sup> NOZICK, *supra* note 104, at 377–78 (1981).

<sup>132</sup> See 2 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 123 (1913) ("Depend upon it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.")

because it misunderstands the critical tracking between intention and causal action necessary for retributive punishment. To be clear: we do not create those delays in order to allow for that internalization; the delay occurs largely because of procedural wrangling. To use Nozick's example, if a witness sees a murder in a canyon and leaves to fetch the police, her killing of the murderer by accidentally starting an avalanche does not constitute retribution.<sup>133</sup> In a similar vein, just as the heightened risk an offender faces of sexual assault in prison is not intended to be part of one's punishment, neither is the time an offender spends on death row. These hardships are not articulated by the legislature as the aspects constituting the punishment options available to the courts.<sup>134</sup> Thus, the execution cannot be a communicative punishment even if the confinement prior to the execution serves as time at which the defendant internalizes some of the correct values. For the reasons mentioned earlier about how the intentions must line up with the causal actions appropriately to create the correct social meaning, the confinement period is not a period that can reliably be said to serve communicative retributive purposes. Indeed, as a practical matter, during that waiting period on death row, the prisoner is often focused on whether he will be released or pardoned while also fearing impending death, making it hard for him to actually lend much thought to the values animating retributive justice.<sup>135</sup>

Thus, what makes capital punishment problematic is this inconsistency between the death penalty and the requirement of leaving open the possibility of internalization. As explained in Part IV.A, we should not let the Court retain the weird and implausible notion that the state may "communicate" its reprobation of the offender when it fully expects no change in response or outlook from the defendant other than his expiration. To hold that view would be to misunderstand what is meant by "communication" as opposed to "expression."

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<sup>133</sup> See NOZICK, *supra* note 104, at 369–370 (discussing how Gricean meaning is achieved through the appropriate tracking of intention to causal action).

<sup>134</sup> Apparently, some states used to require a relatively short period of confinement prior to the execution of the offender. See, e.g., *Rooney v. North Dakota*, 196 U.S. 319, 324–35 (1905). To the extent this practice was once common, then along with practices associated with last meals and last words, it would seem to suggest that the state intended for the offender to contemplate his wrongdoing prior to his execution. But that view, while illuminating, falls short for reasons explicated below. In short, the executioner's fatal blows leave no chance for moral reconstruction once they fall. Thus, the executioner's actions are at best understood as expressive, not communicative. See *supra* note 133 and accompanying text.

<sup>135</sup> Over a century ago, the Supreme Court stated that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . ." *In re Medley*, 134 U.S. 160, 172 (1890); see also *Lackey v. Texas*, 514 U.S. 1001, 1045–47 (1995) (Stevens, J., mem. respecting denial of cert.); Gale, *supra* note 125, at 1032. It was this sense of dread and pointlessness that W.C. Fields satirized. En route to the gallows, Fields quips to his hangman that his execution will "sure be a lesson to me." See *MY LITTLE CHICKADEE* (Universal 1940).

2. *The Immodesty of Capital Punishment.*—A second reason the death penalty is inconsistent with communicative retributivism is that it involves an immodest statement of power over citizens. That is, because of its relative severity and irreversibility,<sup>136</sup> the imposition of the death penalty flouts the retributivists' desire to see the practice of punishment as a dignified use of coercion, a practice designed to communicate the ideals discussed in Part II. On this view, retributive punishment has a moral aesthetic, and thus it must be meted out with the correct attitude, a posture of modesty. Accordingly, because the death penalty acts with such finality, it necessarily entails an inappropriate bearing of overweening confidence. Indeed, although retributivists affirm the significance of communicating the norm of moral responsibility through punishment, the continued anxiety about trying to avoid punishment of the innocent demands the realization that one cannot fully comprehend all that surrounds us.<sup>137</sup> Hence the concern for accuracy in distribution of punishment is fundamentally a retributivist concern that renders the death penalty—*ex ante* as an institutional practice—deeply problematic, even if in some cases *ex post* we are less anxious about the accuracy because we “know” we have the right person.<sup>138</sup>

This persistent uncertainty is vitally important because, taken seriously, it counsels in favor of preserving avenues for state contrition. With most other forms of punishment, the state itself can communicate and make plain its contrition for wrongs due to error or abuse, and it can do so in a way that can be appreciated by the person wrongly convicted or abused. But when the guillotine drops, this opportunity is forfeited for, at that point, the state cannot demonstrate its own sense of remorse to the offender, even if it could make some amends to the surviving family.<sup>139</sup> A posture of modesty should thus be characteristic of all retributive practices because, quite simply, the state may be wrong for reasons it cannot or will not discern until much later.

I don't mean to suggest, historical experience to the contrary,<sup>140</sup> that our own current rites of execution are spectacles of social self-

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<sup>136</sup> See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability.”).

<sup>137</sup> I recognize this objection to the death penalty might, to some, seem better placed under “contingent” rather than categorical objections, but I have placed it here because I want to suggest the unwavering importance of modesty as a value in institutional punishment regardless of the merits of any particular case.

<sup>138</sup> Cf. Rawls, *supra* note 78, at 3 (distinguishing between the justification of a practice and the justification of a particular action falling under that practice).

<sup>139</sup> I note, however, that the focus here on the death penalty's faults should not be taken to imply that other forms of punishment are trouble-free.

<sup>140</sup> See LOUIS P. MASUR, RITES OF EXECUTION 25–26 (1989).

righteousness.<sup>141</sup> No doubt, for many the decision to execute is motivated by legitimate concerns about social self-protection and accompanied by rituals that convey a sense of hesitant hope that execution really is, all things considered, the best thing to do. Still, as long as humans remain fallible and the specter of inaccuracy haunts our institutions, the earlier claim—that executions require an improper posture of immodesty because they prevent the state from apologizing to the offender for its potentially wrongful treatment—persists as a further reason for concluding that a communicative conception of state retribution is incompatible with the death penalty.

3. *Capital Punishment and Human Dignity.*—Might it nonetheless still make sense to preserve the death penalty for special cases? Consider Jack, our offender from Part II. Say Jack has committed a murder revealing unmitigated wickedness. However, he has freely confessed to the crime; there is independent and conclusive corroborating evidence; he has exhibited contrition and apologized to his victim's family; and he feels guilty unto death. In fact, he feels so guilty that he would prefer to die at the hands of the state, rather than by his own hand, because he does not want to deprive the state of any deterrent benefit that might flow from his execution. Under such an unusual scenario, what retributivist reasons remain not to execute him? There is no posture of preening sanctimony because Jack has himself recognized his wrongdoing and told the state of his guilt. Let's assume further that he has spent two years on death row, where he has focused on internalizing the meaning of moral accountability and equal liberty under law. Moreover, technology has made Jack's execution possible without causing pain to Jack or psychological harm to his executioners.

Under these circumstances, what retributivist reasons, if any, forbid the execution of Jack? There are a few possible answers. The first concerns the institutional level at which the communicative conception of retributive punishment operates; at that level, it is permissible for the legislature to assume that an offender like Jack probably does not exist. But this answer may seem unsatisfying to critics who prefer case-by-case review because the legislature can always create a law that gives discretion to a more "local" decisionmaker to determine whether Jack's scenario exists in a specific case. Hence, an appeal to the institutional nature of communicative retribution only permits a determination that retributivism would *allow* the abolition of the death penalty. It does not yet demonstrate that the abolition of execution is required under all circumstances.

So there are two remaining lines of response. To recap, the first one discussed earlier contends that even though Jack's sincere repentance is evidence that he has already internalized the values of retributive punish-

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<sup>141</sup> For example, Linda Ross Meyer's illuminating article on last words and last meals, *supra* note 56, suggests ways in which corrections officials exhibit attentiveness to the dignity and agency of the offender during the rites of execution.

ment, it would be insufficient, on the communicative account of retribution, to think that the internalization process remains only a purely cognitive event. Instead, the reason we communicate to persons is so that they respond in some manner appropriate to the message. We want Jack not only to appreciate the values animating retributive punishment but to live faithfully by them to the extent he can, whether he is inside or outside of prison. To use Nozick's phrase again: "The hope is that delivering the message will change the person so that he will realize he did wrong, then start doing things because they are right . . . ."<sup>142</sup> The death penalty deprives offenders of the ability to live those values day by day during and, if applicable, after their punishment.

By this logic, granting Jack's request of the death penalty in order to demonstrate that he has gone through a moral reconstruction is in some sense too easy a way out. To execute Jack frustrates the objective of making Jack struggle to live in accordance with the values undergirding the state's response through punishment. And to give Jack any say on the matter would be especially odd, since as a matter of retributive punishment, we do not credit Jack's preferences anyway—the point of punishment is that there is some *coercion*. It is that coercive measure that communicates the diminishing of the plausibility of the defendant's claim to act licentiously.

A second line of argument is also available, one that examines the relationship between retributivism and the concept of human dignity.<sup>143</sup> With respect to punishment, the concept of dignity may be understood as the exalted moral status that attaches to human existence by virtue of the distinctly human capability for acting in accordance with autonomy and reason.<sup>144</sup> Dignity helps explain, among other things, why we punish and how we punish.<sup>145</sup> In terms of why we punish, we do so out of respect for the dignity of an offender by regarding, under the right conditions, his actions as the product of autonomous moral choice.

But in terms of how we punish, we are concerned not only with the offender's dignity, but also our own. As Jeffrie Murphy trenchantly observes in the context of torture,

[s]ending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil . . . are not human ways of relating to another person. [The offender] could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any

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<sup>142</sup> See NOZICK, *supra* note 104, at 377.

<sup>143</sup> See *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring) ("[D]eath stands condemned as fatally offensive to human dignity.").

<sup>144</sup> I have elsewhere addressed why I find the meaning of dignity enigmatic outside the context of punishment. See Markel, *State, Be Not Proud*, *supra* note 6, at 465 n.246 (trying to distinguish dignity from a capacity for rational autonomy).

<sup>145</sup> See generally Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759, 771–72 (2000).

other characteristically human activities during the process—a process whose very point is to reduce him to a terrified, defecating, urinating, screaming animal.<sup>146</sup>

The death penalty, in the same manner as torture, wrongly disables a person from engaging in quintessentially basic human activities. Execution too is a process that reduces the person to “a terrified, defecating, urinating, screaming animal.”<sup>147</sup> It thus eliminates the possibility that punishment will comport with the respect for dignity qua autonomous personhood that animates—at least in part—retributive punishment.

The failure to respect the offender’s human dignity degrades the punishing agent’s dignity, and in a democracy, our own.<sup>148</sup> Indeed the belief in the fact of a collective dignity explains why executioners have often worn hoods or taken measures to disaggregate the tasks associated with killing of the offender.<sup>149</sup> There is a horror and tarnish involved. Moreover, although not uniquely a democratic value, the idea of human dignity undergirds liberal democracy—the system of government in which political coercion can only be justified and exercised when consistent with respect for the free and equal nature of all human persons. That notion of limited government is disturbed by the choice to conduct executions when revocable alternatives exist to communicate condemnation adequately. As Austin Sarat observes, when democracies execute, they render citizens complicit in capital punishment, a complicity that “contradicts and diminishes the respect for the worth or dignity of all persons that is the enlivening value of democratic politics.”<sup>150</sup> Because retributive justice, as I have sketched it out above, is

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<sup>146</sup> MURPHY, *Cruel and Unusual Punishments*, in *RETRIBUTION, JUSTICE, AND THERAPY*, *supra* note 100, at 223, 233 (1979).

<sup>147</sup> *Id.* It is not uncommon for the offender to have to wear “execution diapers” during their punishment. *See, e.g.*, The Electric Chair, <http://www.capitalpunishmentuk.org/chair.html> (last visited June 23, 2009). *See also* sources cited *supra* note 123.

<sup>148</sup> Murphy has criticized the suggestion that the dignity of the collective is diminished, arguing that the affront to human dignity, say from torture, arises because torture is an independent wrong upon a person, not because it disgraces the torturer or the public in whose name torture occurs. MURPHY, *supra* note 146, at 233–34. But here I part from Murphy. If there were no taint involved, why wouldn’t executioners forbear from disguise? It can’t simply be a fear of retaliation. In any event, and more generally, we can readily regard certain practices that degrade public dignity—for example, desecrating the bodies of the dead who once consented to such manipulation—even though no person is specifically wronged by such actions.

<sup>149</sup> *See* Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791, 2796 nn. 37–39 (2007); JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 25 (1997) (noting the historical practice under which “professional executioners wore disguises or hideous masks or had their faces blackened”); *see also* Lesley Clark, *State Will Keep Black-Hooded Executioner*, *MIAMI HERALD*, Feb. 16, 2000, at 7B.

<sup>150</sup> AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 16–17 (2001).

part of that democratic politics, it too must reject the death penalty.<sup>151</sup> This is especially true because capital punishment involves state action, which we properly limit to a narrower band of permissible action than we would to an individual within that liberal state.<sup>152</sup>

### C. *Objections Considered*

At this point, I want to raise and consider a pair of responses to the arguments described above.

1. *The Problem of Missed Opportunities.*—First, to the extent that the arguments against the death penalty rely upon the fact that executions differ from other punishments, it is useful to note the limitations of those differences. For example, if someone is imprisoned for life without parole, and the state only discovers later, after he dies in prison, that he was factually innocent, then the opportunity for the state's apology and reparation to that person is lost. Additionally, someone innocent could be indicted and then die during his trial, never having cleared his name. In both cases, the state's opportunities to exercise modesty and express contrition are lost. Such cases might even suggest that we must simply abandon punishment altogether to remain faithful to the internalization principle.

This objection fails, however, because it misses the idea that the state's intentions must track its actions correctly to create plausible social meanings.<sup>153</sup> Retributivists, as much as anyone else, recognize that a system is bound to err and will predictably create conditions where some innocent persons will be swept up in the dragnet of the criminal justice system that pursues the goal of punishing the guilty. At the institutional level, the state cannot be said to *intentionally* foreclose the opportunity to make amends to a wrongly convicted person when a person dies upon the eve of his sentencing. Nor can the same be said when the defendant dies in prison before her name can be cleared. Like the rest of us, the state cannot be held to impos-

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<sup>151</sup> See also Robert A. Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501, 1510–16 (1981) (arguing that a Kantian perspective insisting on concern for the dignity of offenders is difficult to reconcile with capital punishment).

<sup>152</sup> In other words, private parties' actions that are undignified but arise from autonomous action—consensual dwarf-tossing, sadomasochistic “play”—should be given more leeway than what we would allow from the state, which acts in the name of us all. Kent Greenawalt illustrates this point by distinguishing between a situation where the state refuses the invitation to castrate a sex offender in the name of protecting his dignity and a situation where a person with misplaced sexual urges preemptively seeks out castration to minimize his chances of undertaking sex crimes. See Kent Greenawalt, *Dignity and Victimhood*, 88 CAL. L. REV. 779, 782 (2000).

<sup>153</sup> NOZICK, *supra* note 104, at 369 (discussing the nine conditions of communicative retribution, of which this is one). *But cf.* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 603–05, 620–33 (1981) (challenging the bases by which ascriptions of intent by courts and commentators are made); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353, 1356–58 (2008) (discussing and critiquing the ways in which the state's intentions toward the punished matter for constitutional challenges to putative punishments).

sible standards of right conduct. But the problem with capital punishment, is that it is unusual among punishments because executions take an *affirmative* step to prevent the possible recognition of wrongful convictions in the future. By precluding executions, at least there is a chance for error to be recognized, apologized for, and, in some cases, recompensed appropriately.<sup>154</sup>

Still, even with respect to executions, one might think the retributivist condemnation of the death penalty as an institutional practice is too hasty because there might be possible retributivist reasons in favor of the death penalty. Especially significant among such reasons are those addressing moral desert.

2. *Retribution, Moral Desert, and Death.*—What, if any, good and sufficient retributivist reasons stand in *favor* of the death penalty? Primarily, one cannot deny that various people *believe* that some crimes are so bad that the offenders deserve to die and that the execution of these people is proportionate to the heinousness of their crimes.<sup>155</sup> As the Court in *Gregg v. Georgia* put it:

[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.<sup>156</sup>

But this statement leaves questions about whether there is a reasoned basis for this belief, and whether that reasoned basis is a retributivist one.

Let us stipulate that some offenders commit truly wicked crimes. Retributivism's commitment to setting the severity of punishment according to the severity of the crime would require that this offender receive the most severe punishment the state imposes. But nothing intrinsic to retributivism says that the most severe punishment the state must impose is the death penalty. Indeed, as we saw in Part I, if we thought of the most severe punishments we could imagine, they might include extended periods of immiseration and torture, or the forced spectacle of watching one's loved ones be immiserated and tortured for extended periods of time.<sup>157</sup> Nothing

<sup>154</sup> It is true that lost time in prison cannot be restored. But that point's significance should not be exaggerated. Otherwise it would seem to preclude civil plaintiffs from obtaining a remedy in tort for harms endured on account of false imprisonment. Moreover, it would seem to deny the fact that a victim of false imprisonment or her allies and survivors might appreciate the expression of apology and recompense from the state.

<sup>155</sup> See, e.g., WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY (1979); Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment*, 11 HOFSTRA L. REV. 273, 301 (1982); Robert Blecker, *Among Killers, Searching For the Worst of the Worst*, WASH. POST, Jan. 3, 2000, at B1 ("I believe that some people kill so viciously, with an attitude so callous or cruel, that they deserve to die—and society has an obligation to execute them.").

<sup>156</sup> 428 U.S. 153, 184 (1976).

<sup>157</sup> See *supra* text accompanying notes 49–50.

about the retributivist answer to *why* we punish requires that the death penalty be one of the options in *how much* we punish.<sup>158</sup>

The reason some people think retributivism requires the execution of murderers is because of their confusion associating retribution's proportionality principle—e.g., that crimes be punished in accordance with their severity—with the separate notion of *lex talionis*.<sup>159</sup> *Lex talionis* is merely a notion that says someone should suffer in a way that mirrors the suffering that person imposed on another person.<sup>160</sup> It is not itself a justification for institutions of punishment nor does it provide a basis for understanding why someone should be punished “in-kind.”<sup>161</sup> To the extent it is a principle, it is probably best understood as a principle that imposes a limit or ceiling on the amount of compensation one must pay as punishment.<sup>162</sup> In any case, one need not be a retributivist to embrace *lex talionis*, and an embrace of retributivism need not entail a commitment to *lex talionis*.<sup>163</sup>

Moreover, even if *lex talionis* were necessarily conjoined to retributivism, it does not follow that execution is the only way of punishing a murderer.<sup>164</sup> Per Jeremy Waldron, murder is wrong not because it ends life as such, but because it involves the intentional and radical disruption of an

<sup>158</sup> I readily note that retributivism cannot determine which range of punishments is commensurate with a given offense, though to me, the concession seems to be of little significance. Retributivism, after all, need not purport to be a comprehensive theory of criminal justice. It suffices if it can explain why roughly proportionate and even-handed punishment of a defendant is not an unjustified harm, or put simply, why such punishment has intrinsic value or intelligibility.

<sup>159</sup> Although most retributivists endorse a principle of proportionality between crime and punishment, this does not require the conclusion that what was once a crime is always a crime or that what was once a fitting punishment will immutably remain a fitting punishment. These decisions have their own social meaning to be mediated through the legislatures of the particular society, and the retributivist should support these decisions so long as they fall broadly within liberal parameters. See Markel, *Shaming Punishments*, *supra* note 6, at 2206–09.

<sup>160</sup> See Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25 (1992); Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUDIES 289, 299 (1996). As Waldron notes, even as strict an adherent to *lex talionis* as Kant rejected punishments strictly in kind for crimes like rape or bestiality. *Id.* at 38 n.27.

<sup>161</sup> The problems with *lex talionis* are well known. In addition to the fact that it may require the state's agents to undertake morally odious actions, and the fact that it cannot be applied where the harm or victim is diffuse—for instance, counterfeiting or tax fraud—*lex talionis* cannot be applied in a manner that easily takes into account varying levels of *mens rea*, even though distinguishing among culpable states of mind is part of the basic analysis of wrongdoing. See Russ Shafer-Landau, *Retributivism and Desert*, 81 PAC. PHIL. Q. 189, 193 (2000). *But see* Waldron, *supra* note 160 (trying to overcome these difficulties).

<sup>162</sup> See, e.g., Irene Merker Rosenberg & Yale Rosenberg, *Lone Star Liberal Musing on “Eye for Eye” and the Death Penalty*, 1998 UTAH L. REV. 505, 510–15 (explaining why the biblical verse “eye for eye” does not reflect *lex talionis*).

<sup>163</sup> See Waldron, *supra* note 160, at 25 (“[S]ince LT is a principle about what counts as an appropriate punishment, it is compatible with a variety of theories about the point or justification of punishment, including utilitarian theories.”).

<sup>164</sup> See *id.* at 25.

“autonomous life.”<sup>165</sup> In this vein, Waldron appropriately poses the following:

Very well, then let us radically disrupt the autonomous life of the offender. Does this mean we have to kill him? It depends on whether or not we have available some other punishment that shares this abstract feature with acts of killing.<sup>166</sup>

Furthermore, even if an offender may morally deserve death for his actions, it does not follow that the state should be the one inflicting death on him. The same reasons that it would be wrong for the state to torture a sadistic torturer might also apply to why the state should not execute a person convicted of murder: we could be wrong about the identity of the offender, punishment through execution requires immodesty, it unduly endangers the well-being of the punishing agents of the state, and it offends both the individual’s and the polity’s dignity.<sup>167</sup> In addition, and central to the claim this Article makes about *Panetti*, death forecloses the opportunity to evidence the internalization of the ideals animating the communicative aspect of retributive punishment. To be sure, some crimes are heinous, and severe punishment is warranted for those crimes—the account of communicative retributivism explains why this is so. But justice prohibits the execution of an offender because it interferes with the inherently communicative aspect of retributive punishment. It disrupts the chance for the offender, and the polity, to live by the very norms that animate the project of retributive justice.<sup>168</sup>

For someone to insist upon capital punishment as a matter of retributive justice is to move away from the question of why punishment is justified, and toward the question of how much punishment *the state* should impose. This move can only be made, I submit, if the retributivist can point to how the particular punishment is consistent with the underlying justification of the retributivist account of punishment. Under the account defended in Part II, there is a capacious range of punishments that a state may impose after democratic and reasoned deliberation. The death penalty falls out of that range for the reasons just articulated here.

#### IV. *PANETTI* AND THE FUTURE OF THE EIGHTH AMENDMENT

This Part draws upon the preceding analysis to revisit two important matters left unaddressed by the Court in *Panetti*. The first addresses why, if

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<sup>165</sup> *Id.* at 41–42.

<sup>166</sup> *Id.* at 42. Waldron’s argument only shows that lex talionis does not *require* the death penalty for murders; it does not show that lex talionis precludes the death penalty for murders.

<sup>167</sup> While some of these criticisms could apply to punishments such as locking up a dangerous offender in a prison, these problems are not irrevocable and irremediable.

<sup>168</sup> In this respect, one sees that this account of justice goes beyond a simple principle of enforcing any and all policies of which the government provides fair notice.

we take *Panetti*'s embrace of communicative retributivism seriously, the Court cannot persuasively restrict the rationale to serve merely as a restraint on executing the presently incompetent. Thus, Section A explains why communicative retributivism erodes the Court's justification for the death penalty generally. The second issue concerns how *Panetti*'s embrace of communicative retributivism also subverts a common theme in the Court's Eighth Amendment jurisprudence—that the Constitution is agnostic among sentencing purposes. The implications of such a departure from penal agnosticism are momentous and reach well beyond capital punishment. Section B furnishes a sketch of those implications for three areas: noncapital punishment of the presently incompetent; actual innocence claims pursued through postconviction procedures; and proportionality review of all punishments.

*A. Panetti as Death Knell for the Death Penalty:  
Why "Communicative Minimalism" Doesn't Work*

The analysis of the previous two Parts has tried to explain how the defendant-centered goal in *Panetti* makes more sense once situated in the context of a communicative account of retributive punishment (as described in Part II). Proving consistency alone, however, does not show that the Court *must* embrace the argument that communicative notions of retribution *require* hostility to the death penalty as a general matter. The following discussion tries to make the logical connection a bit tighter and more obvious.

Stepping back, and revisiting the discussion we had in Part I, we can now imagine what Justice Kennedy might try to say on behalf of *Panetti*'s majority: "Yes, I understand that our ruling in *Panetti* commits the Court to a vaguely communicative account of retribution now, but why doesn't our *Panetti* decision leave it open to us to understand that communicative account more narrowly than is described in Parts II and III of this Article? Couldn't we say that the conditions of communication necessary to satisfy the defendant-centered goal are fulfilled when the defendant rationally understands why he is being executed prior to his execution and then dies? Why are we necessarily committed to punishment strategies that leave an opportunity for the offender to internalize the animating values of retributive justice and to demonstrate that internalization?"

While tempting at first blush, this potential response, which might be termed "communicative minimalism," is predicated on an implausible conception of what counts as communicative action. Recall an earlier example used to distinguish communication from expression.<sup>169</sup> If I were to call my brother to say, "Dad is coming home for dinner at 8:00 p.m.," and I insist that I want my brother to recognize or to *rationaly understand* why this information is important in some way, there must be some response I desire

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<sup>169</sup> See *supra* note 5.

or expect. If I didn't care that *he* rationally understood that information, it wouldn't matter if I spoke in a language that my brother didn't understand or if I called at all. But because I did call and spoke in a language he understood, and because I want him to rationally understand why I called, there must be some response or outlook that I am hoping will follow from my telling him this information.<sup>170</sup> Otherwise, once I insist on his rational understanding, my call would be pointless vis-à-vis the goal of communication. The phone call (taking place in a language not understood by my sibling) is not necessarily pointless qua *expression*—because I might call to get something off my chest or because I wanted someone else to hear me call my brother—but it is pointless qua *communication*.

The same logic applies to communicative punishment. If the Justices are serious about a communicative minimalist approach, it would mean that theoretically they are willing to entertain the implementation of the “defendant-centered” goal by deployment of something like Kafka’s Harrow needle, which inscribes the law broken by the offender into his flesh as it kills him.<sup>171</sup> Perhaps this kind of punishment can be genuinely communicative in an era and polity where religious views permissibly inform government policy, and where we would have some basis for thinking the defendant could expiate his misconduct through his “sacrificial” death and conduct himself responsibly in some afterlife.<sup>172</sup>

But ours is a government that must act with secular purpose; it must not act in a way that endorses religious worldviews. So the use of Kafka’s Harrow or any other execution method would not operate as a sufficiently communicative mode of punishment because such methods provide no opportunity in the here and now for the defendant to respond to the communicative experience of punishment—defined as the death penalty in this case. If there’s no opportunity to respond meaningfully, then the punishment serves only the expressive purposes of the state or the public in promoting opportunities for social denunciation, vengeance-minimization, or some other contingent goal such as general deterrence. To use Kant’s famous words, one would be using the offender *merely* as a means to an end.<sup>173</sup>

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<sup>170</sup> To be sure, the possible inferences are context-sensitive. They might include: “please do not go out,” “please go out,” “set the table,” or “do not eat all the chicken in the fridge.”

<sup>171</sup> See Franz Kafka, *In the Penal Colony*, (Ian Johnston, trans. 2003) (1919), available at <http://www.kafka.org/index.php?id=162,167,0,0,1,0>; see also Case Comment, *supra* note 32, at 212 n. 85 (invoking the Kafka analogy). The analogy to Kafka’s story cannot be taken too far. Recall that under Kafka’s rendering, the Condemned Man “was incapable of understanding anything,” and the machine applied a level of pain that would not likely survive the Court’s recent test in *Baze v. Rees*, 128 S. Ct. 1520, 1530–31 (2008), which prohibits a “substantial” or “objectively intolerable” level of pain. But with the right level of “comfort” and the right defendant, those embracing the minimalist position would have a hard time denying the lure of the Harrow.

<sup>172</sup> On the relationship between anthropological understandings of sacrifice and the death penalty, see Mateo Taussig-Rubbo, *The Unsacrificeable Subject?*, in *WHO DESERVES TO DIE?*, *supra* note 56.

<sup>173</sup> I have refrained from emphasizing Kant’s familiar formulations of the categorical imperative because of the risk that his own seemingly fervid support for the death penalty would prove distracting

This choice to communicate censure simply by killing the person is problematic because the punishment destroys that person's capacity for exercising responsibility within a regime of equal liberty under law. Execution, in other words, subverts the very principles that justify a communicative retributivist account of punishment by denying the offender's rational agency and depriving him of an opportunity to make responsible choices to live within the law during and after the punishment experience.

*I. Can Prior Internalization Legitimate an Execution?*—It is still necessary to better address why it is that the defendant's internalization *prior* to execution is not a sufficient basis for proceeding with the execution. If the punishment is designed to be communicative of the ideals in Part II and the punishment is the coercive setback that the state imposes, we need to be able to explain why the period prior to the punishment does not serve as an appropriate time in which the communicative goal of the punishment can be achieved.

Think back to Part II.B, when I explained why even the remorseful defendant warrants punishment. The idea there was that the punishment itself is an important communication device by which we signal our condemnation and its relative severity. If someone demonstrates remorse immediately after criminal misconduct, that's not a basis for relieving the state of its positive basis for retributive punishment. Holding this person responsible through punishment effectuates the idea of equal liberty under law. Under this view, it is not redundant to punish the remorseful offender. To ask for relief of punishment on the basis of contrition alone is to ask for special favors, such that one can act unlawfully without repercussions. This request disrupts the idea that retributive justice helps maintain an order of equal liberty under law over time.<sup>174</sup> Indeed the offender better *manifests* his remorsefulness by willingly undergoing the punishment reasonably imposed on everyone similarly situated who is convicted for that crime.

The argument above provides a *prima facie* reason for the state to ignore prepunishment expressions of contrition as a basis for withdrawing punishment. The communicative minimalist approach, which ostensibly seeks to preserve the death penalty for some competent offenders, is a mite different. It's not denying the need for punishing the contrite. Indeed, as Justice Kennedy might argue, it is not the defendant's expression of contrition that serves as a basis for relieving the punishment. Rather, it is his capacity for rational understanding and the potential for contrition while living on death row that provides evidence that the defendant is fit for execution.

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and confusing. See Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

<sup>174</sup> See sources cited *supra* note 96.

But there are two problems with this move. The first is that it justifies the punishment's ostensible communicative success by looking at what happens prior to the imposition of the communicative punishment. As explained in Part III.B.1, the period of languishing on death row is not articulated by the legislature as the communicative punishment; rather, it is the adjudication followed by the actual execution that is intended to convey the condemnation and thereby serve as the punishment. If the execution is designed to be doing the communicative work, then whatever apparent "internalization" that happens prior to the execution cannot be relied upon as an aspect of intentional punishment. That is logically no different than Nozick's example of the murderer in the canyon killed by the avalanche accidentally started by a witness to the murder. The killing of the murderer in that situation is not a form of state retribution. The situation on death row is only different because there *has* been an adjudication that involves some judgment of guilt. But there has not yet been the punishment called for by the legislature in conjunction with the jury or judge—the death penalty. Because our intentions have to line up with our causal actions to convey the correct social meaning, we cannot use the defendant's postconviction but prepunishment attitude as evidence of the intrinsic success of the communicative punishment; after all, the intended punishment has not yet been imposed.

The second problem with relying on the pre-execution period the defendant spends on death row as a sufficient time and place for communicative goals to be achieved is less a logical claim than a normative one alluded to earlier. The goal of communicative retribution is to deliver the message in a way that "will change the person so that he will realize he did wrong, then start doing things because they are right . . ." <sup>175</sup> The punishment must preserve the opportunity for both the cognitive event of internalization and the opportunity to evidence that internalization. Because the execution of the defendant forecloses that moral reconstruction of the defendant—by living in fidelity to the values of retributive punishment—the punishment of the death penalty must be rejected. And, circling back to *Panetti*, a commitment to a defendant's rational understanding is important because it signals the constitutional importance of communication. But communication is pointless in the absence of the possibility that the offender can accept and live the values, and not just understand that the state holds those values.

In short, insisting on rational understanding is pointless vis-à-vis the offender unless one is hoping to achieve something vis-à-vis that particular offender. If the state is interested in sending a message to the offender through a punishment that will not permit any observable effect, then the state is sending the message for reasons that are independent of their effect on that person—it is not interested in communication but expression. An insistence on rational understanding only makes sense once one commits to

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<sup>175</sup> NOZICK, *supra* note 104, at 377.

communicative conceptions of punishment that by their nature leave room for *possible* internalization—that is, the moral reconstruction of the self,<sup>176</sup> which is both possible and difficult, both in prison and outside it.<sup>177</sup>

Note that the state need only be concerned with preserving avenues of internalization. One could have a rational understanding of why one is being punished without also accepting the animating values of retributive punishment. One is free to remain defiant against those values. Maybe someone who hastily read too much Nietzsche would rebel against claims he is to enjoy equal liberty under law. The Nietzschean offender is smart enough to understand why he is being punished and that he is being punished for his crimes, but he doesn't *accept* the justification of punishment as applied to him. Under the theory of punishment defended here, it is still important that this defendant be punished, but not executed, because to execute him forecloses the possibility that he will change his mind and evidence that internalization of the animating values of retributive punishment.<sup>178</sup>

This point about *institutional design*, alluded to earlier in Part III.C.1, bears emphasis. When an offender is convicted by a jury and then dies of a heart attack the moment the judge finishes announcing the sentence, there is no difficulty presented that cannot be accommodated by my account. In this scenario, the state did everything it could to create the possibility that the communicative goal will be advanced. But the fact that in some circumstances that goal will be frustrated by dint of circumstance or defiance is not a problem as such for an account stressing how the state *ought to intend to interact with an offender*. Simply, the state should not intend to foreclose the possibility that the defendant will have a cognitive appreciation of why he is being sentenced and an opportunity to demonstrate his fidelity to living in accordance with the values retributive punishment instantiates and reflects.

2. *Why Isn't a Brute Intuition of Cruelty Sufficient?*—One other response might seem available. Conceivably, the Court could argue that the outcome in *Panetti* merely reflects a widespread “brute intuition” that it is

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<sup>176</sup> See *supra* note 104 and accompanying text.

<sup>177</sup> The idea that one can internalize and live these values inside prison is important and should thwart any inference that this account entails a regime of indeterminate sentencing and parole.

<sup>178</sup> A trickier and different scenario occurs when the offender says “I rationally understand that I committed a crime and the state is purporting to kill me for that crime, but I think my crime is serving only as a pretext for execution. In other words, I see lots of people commit these crimes and get punished with prison, but I am being *executed* on account of my race or because of the race of my victim.” Assuming, for argument's sake, a race-neutral distribution of punishment, the defendant does not lack rational understanding of why he is being punished so much as why he is being punished in this way. Where race *is* being used inappropriately as a basis for distributing the mode of punishment, the defendant's claim warrants attention because the obligation to create institutions of retributive justice includes an obligation to run them fairly and without regard to morally irrelevant features of the defendant or the crime. See generally Markel, *Against Mercy*, *supra* note 6.

wrong, or “simply offensive,” or “simply cruel” to execute someone who cannot rationally understand why he is being punished—that doing so would violate widespread social norms that themselves inform the interpretation and application of the Eighth Amendment’s prohibition on cruel and unusual punishments.<sup>179</sup> Thus, the Court could respond to the earlier arguments by concluding that it would be cruel and unusual to punish someone lacking present rational understanding. If an offender lacks rational understanding, then our killing him violates *our* sense of humanity or dignity, and that’s sufficient to limit the reach of *Panetti*’s holding to the presently incompetent.

There are two problems with this brute intuition-based approach. First, at a doctrinal level, the Court could have simply said that it offends humanity to execute someone lacking rational understanding and left it at that. But it did not. Instead, and with much more length and clarity, the Court wrote about the retributive reasoning associated with the community-centered goal and the defendant-centered goal. Those goals require sensitivity to the reasons retributivists provide for these views, and not simply reliance on brute intuition to guide public policy of great constitutional significance.

Second, and more importantly, using the intuition “that killing someone lacking rational understanding is wrong” to justify the outcome in *Panetti* is problematic because the Court gives us no reason to think that particular intuition is more widespread (or correct) than the inference that the death penalty is *always* wrong because it is offensive to human dignity.<sup>180</sup> Moreover, the Court also fails to provide a basis for preferring the intuition that it is cruel to execute the presently incompetent over an intuition that it is permissible to execute those who are *aware* of what the state is telling them but lack a *rational understanding* of why what the state is telling them is in fact true. In short, the Court’s reasoning furnishes no basis for concluding that the outcome in this case is motivated by the idea that someone who has rational understanding of why he is being punished is a more appropriate executable subject, morally or psychologically, than someone who is merely aware of why the state *says* it is punishing him. All three intuitions are epistemically indistinguishable.<sup>181</sup>

Here is the important upshot: in the preceding pages, I have explained how it is that a communicative account of retribution that takes seriously “the defendant-centered” goal embraced in *Panetti* disrupts any hastily established association of retributive norms and the death penalty. Once the Court committed itself to a retributive theory that situates punishment as a

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<sup>179</sup> See Bonnie, *supra* note 2, at 276 (arguing that concern for human dignity, rather than retributivism as such, explains the bar against executing the presently incompetent).

<sup>180</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).

<sup>181</sup> See also Slobogin, *supra* note 31, at 32 (considering a fourth intuition, i.e., that of the cruelty to “execute someone who knows he is about to be killed”).

communicative enterprise requiring the defendant's rational understanding that his punishment is a response to his criminality, it also committed itself to a view that the punishment must leave some *opportunity* during and after the punitive encounter for the defendant to internalize why he is being punished so that he may do something with that rational understanding. Preferably, the defendant would demonstrate and live by those values that he is internalizing; but he would also inexorably retain the freedom to reject them (like the Nietzschean offender).

In the end, communicating with an offender means treating him as someone whose response matters to us.<sup>182</sup> As George Bernard Shaw wrote, "The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them: that's the essence of inhumanity."<sup>183</sup> By insisting on a defendant's rational understanding of why he's being punished, the Court's reasoning in *Panetti* demonstrates an implicit desire to overcome that inhumanity of indifference—by censuring offenders in a manner that still invites them to participate in the correct values of moral responsibility and equal liberty. The execution of an offender, by contrast, withdraws that invitation.<sup>184</sup>

### B. *Panetti and the End of Penal Agnosticism*

The following discussion explores the implications of *Panetti*'s reasoning for noncapital punishment. Before doing so, it makes a broader observation about how *Panetti* fits into the skein of caselaw about the Eighth Amendment's prohibition on cruel and unusual punishments.

*I. A Tradition of Penal Agnosticism.*—In a number of cases in recent decades, the Court has indicated that the Eighth Amendment's prohibition on cruel and unusual punishments is largely agnostic with respect to the sentencing approaches or purposes embedded in a state's criminal laws. This view was most famously espoused by Justice Kennedy in his concurring opinion in *Harmelin v. Michigan*, which affirmed a life sentence without parole to a first-time felon convicted of possession of 672 grams of cocaine.<sup>185</sup> More recently, Justice O'Connor stated this view in her control-

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<sup>182</sup> Cf. Greenman, *supra* note 3, and accompanying text.

<sup>183</sup> GEORGE BERNARD SHAW, *THE DEVIL'S DISCIPLE* act II, at 33 (1901).

<sup>184</sup> As I explain in the text shortly, the account here is not meant to suggest that the Court has affirmatively laid out principles that require the states to seek punishment. Rather, if they seek punishment, they must do so consistent with the communicative (and negative) retributive principles I discuss in this Article.

<sup>185</sup> 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) ("[T]he Eighth Amendment does not mandate adoption of any one penological theory."). If, however, one looks at the cases actually cited by Justice Kennedy, they only support the notion that states and the federal government have long given different weights to different sentencing purposes. They do not support the actual proposition that the Court has itself held that the Eighth Amendment requires sentencing agnosticism. So Justice Kennedy's concurring opinion might be thought to clearly articulate this principle for the first time.

ling opinion in *Ewing v. California*, a case affirming application of California's three-strikes law to a defendant convicted of stealing some golf clubs.<sup>186</sup> Noting that a sentence may be justified by reference to traditional goals such as retribution, rehabilitation, incapacitation, and deterrence, Justice O'Connor observed that such decisions are generally legislative choices owed deference by reviewing courts operating in a federal scheme of power sharing.<sup>187</sup> Indeed, as Professor Steiker observes: "In the morass [of cases constituting the Court's Eighth Amendment jurisprudence], . . . one theme has remained consistent: the Court insists that the Constitution is agnostic when it comes to penological purposes. That is, states are free to choose their penal goals and to structure their punitive practices to achieve those goals."<sup>188</sup>

Inasmuch as Professor Steiker's claim—that penal agnosticism is a longstanding tradition—is true,<sup>189</sup> it bears emphasis that *Panetti* signals a break from this tradition. As Part I demonstrated, the Court did not credit any nonretributive basis, such as incapacitation, as a plausible basis for executing Panetti—or not executing him. Instead, it used retributive terms to justify capital punishment. Furthermore, the Court did not explain itself under just any retributive language: the majority insisted on a defendant's "rational understanding" as a prerequisite for one's punishment, thereby understanding retribution in communicative terms. By contrast, if retributive punishment could simply be equated with revenge or social denunciation, the holding in *Panetti* would have to come out the other way—a defendant's awareness (or less) would have been a sufficient standard for the Court, and Panetti's execution could have proceeded apace.<sup>190</sup>

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<sup>186</sup> 538 U.S. 11, 24–25 (2003) (quoting Justice Kennedy's concurring opinion in *Harmelin* stating that the Constitution does not "mandate adoption of any one penological theory").

<sup>187</sup> *Id.*; see also *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Our federal system recognizes the independent power of a State to articulate societal norms through criminal law . . . ."); *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., concurring) ("State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise.").

<sup>188</sup> See Carol Steiker, *Panetti v. Quarterman: Is There a Rational Understanding of the Eighth Amendment?*, 5 OHIO ST. J. CRIM. L. 285, 290 (2007).

<sup>189</sup> The Court recently affirmed a broadly pluralistic view that punishment is justified by reference to "one or more of three principal rationales: rehabilitation, deterrence, and retribution." *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008). However going back to at least *Williams v. New York*, 337 U.S. 241 (1949), the Court has often made statements suggesting a less pluralistic approach. See *id.* at 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."). The Court's capital punishment jurisprudence going back to 1976 also evinces a more constrained approach, with various cases seeking to justify the death penalty exclusively in terms of deterrence and retribution. *E.g.*, *Kennedy*, 128 S. Ct. at 2661 (discussing the "two distinct social purposes served by the death penalty: retribution and deterrence" (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976))). See also *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring in the judgment) ("[R]etribution provides the main justification for capital punishment."). This jurisprudential constriction of purposes is somewhat odd since the death penalty also works an obviously blunt form of incapacitation.

<sup>190</sup> See *supra* Part I.C.

By highlighting what Part I referred to as the defendant-centered goal of retributive punishment, the *Panetti* Court ultimately subjected the defendant's punishment to scrutiny under the standards of communicative retributivism, even if it did so in an undertheorized or somewhat inchoate manner.<sup>191</sup> In other words, it is fair to say that the Court constitutionalized communicative retributivism as a standard to assess the appropriateness of a given punishment.<sup>192</sup>

My point, until now, has been that *Panetti*'s reasoning indicates that communicative retributivism is the discourse that must be used to explain to an offender why he is being punished. That doesn't mean, in and of itself, the state must use that rationale to decide whether to punish anyone at all. Rather, all it means is that the message being communicated to an offender through his punishment must be consistent with and evocative of the idea that the defendant is being punished on account of his past wrongdoing, and not (simply) because doing so would be a useful vehicle, say, for promoting general deterrence.

2. *Elevating Negative Retributivism Across the Eighth Amendment.*—While the Court constitutionalized certain retributive limits in *Panetti*, it is important for this analysis to be somewhat circumspect. In particular, the reasoning in *Panetti* does not furnish a sufficient basis to say that the Court embraced a positive version of communicative retributivism—by which the Court would have established a constitutional imperative for states to make good faith efforts to reduce Type II—false negative—errors. Instead, all we can say about the retributivist reasoning in *Panetti* is that it makes most sense when understood as performing a “restraining” role on a state's punitive energies in the service of reducing Type I—false positive—errors of mistaken or overpunishment.<sup>193</sup>

The communicative account of retribution found in *Panetti* reveals that the Court is committed to ensuring that each punishment satisfies two pre-

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<sup>191</sup> So here I part company with Professor Steiker, who argues that the *Panetti* decision leaves the Court's options regarding the constitutional purposes of punishment “wide open.” Steiker, *supra* note 188, at 295. On this point, I think Professors Meyer and Wilkins share my view. See Meyer, *supra* note 56; Wilkins, *supra* note 13, nn.265–67.

<sup>192</sup> Admittedly, the Court in *Panetti* referred in a few places to “punishment” and in a few places to the special context of “execution” and the “death penalty.” Thus, a conservative reading of *Panetti* would likely resist any attempt to extract lessons from *Panetti* for noncapital cases, and in doing so, they might rely on the “death is different” mantra credited to Justice Brennan. See *Furman v. Georgia*, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (“Death is a unique punishment in the United States.”). But as I explain in the text below, that restriction would flout common sense and basic logic in certain respects. For an extended discussion of the idea that the Supreme Court should abandon its bifurcated approach to analyzing capital and noncapital punishments, see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case For Uniformity*, 107 MICH. L. REV. 1145 (2009).

<sup>193</sup> Positive retributivism, in other words, provides an “energizing” rationale for the state to pursue the reduction of Type II—false negative—errors involving the factually guilty escaping any punishment or the legally guilty escaping sufficient punishment.

requisites: first, that the trial court finds the offender guilty; and second, that the offender is competent at the time he commits the crime, at the time he is adjudicated guilty, and at the time he experiences the punishment—i.e., that he can rationally understand why he is being punished. Viewed in isolation, these conditions form a reasonably thin set of requirements that together constitute a view in the philosophy of punishment known as “negative retributivism.”<sup>194</sup> In other words, guilt and competence are jointly necessary conditions if state punishment is to satisfy the limits imposed by negative retributive principles alone. *Panetti* makes clear that absent some intrinsic and intelligible good arising solely from the communicative retributive encounter between a competent and guilty offender and the state, the pursuit of social utility promotion is impermissible. To put it differently, under negative retributive principles, utility promotion is a permissible basis for punishment but only so long as such a basis does not stand in tension with the retributive limits on punishment. Thus, utility promotion cannot serve as an unchecked and free-standing justification for punishment.

As a general matter, these two conditions of guilt and competence are viewed as “thin” because, at most, they operate as a side constraint on the pursuit of utility promotion. Indeed, negative retributivism is plainly compatible with punishing nobody at all.<sup>195</sup> A negative retributivist approach simply requires that if one is going to be punished, he needs to be guilty of an offense and mentally competent to rationally understand the basis for his punishment. In its quantitative variant, the negative retributive approach also requires that the defendant “must not be punished to a degree that is out of proportion” to his offense.<sup>196</sup>

Here though, the matter is a mite more complicated because the negative retributive limits I’m bringing to light are merely aspects of the communicative account of retributive punishment. But it should be noted that while one can’t be a communicative retributivist without embracing negative retributivist limits, some people might regard themselves as agreeing with the negative retributive principles without necessarily agreeing to communicative retributivism.

In any event, the requirements of guilt and competence embedded within *Panetti* conjoin to battle two aspects of Type I errors: those punishments that are wrongly imposed on an innocent person, and those punish-

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<sup>194</sup> See J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *PHILOSOPHY OF LAW* 677, 678 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991). The idea that retribution in this context is “negative” refers to what the state may not do—punish the innocent or punish the guilty excessively relative to the offense’s severity. As noted above, a positive account of retribution would explain why the state should or must pursue punishment of the guilty in order to try to reduce Type II false negative errors.

<sup>195</sup> See DUFF, *supra* note 103, at 11–12 (2001).

<sup>196</sup> See 2 J.L. MACKIE, *Morality and the Retributive Emotions*, in *PERSONS AND VALUES: SELECTED PAPERS* 206, 207 (1985).

ments that are excessive. Excessiveness can be based on some judgment of what punishment is disproportionately high relative to the underlying offense, or it can be judged based on what comparable offenders for comparable offenses receive. This set of restraints may look rather anemic if they are simply taken to require that the state may not intentionally execute the innocent or mentally incompetent to promote social utility. But digging a bit deeper into our current punishment practices reveals that negative retributivism performs a valuable restraining role along several dimensions outside the capital context.

Before I proceed further, I want to address one important response: namely, that *Panetti* is limited to the death penalty context only.<sup>197</sup> To my mind, there is no persuasive justification for suggesting that guilt and competence are not also necessary preconditions to any legitimate *noncapital* punishment.<sup>198</sup> Let me explain.

The “death-is-different” jurisprudence of the Court conventionally takes two strands: one recognizing the death penalty’s finality, and the other its severity.<sup>199</sup> With respect to finality, the Court emphasizes the need for extra procedural safeguards to ensure accuracy and fairness in the distribution of a penalty that is otherwise irrevocable once meted out.<sup>200</sup> Although some commentators might challenge the soundness of this claim,<sup>201</sup> to my mind, the emphasis upon the final and irrevocable aspect of the death penalty makes some sense. Death is different from time spent in prison in this respect: for although time in prison cannot be recompensed, the state can make evident its contrition to the falsely incarcerated defendant, and the defendant might be able to live a meaningful life once that error has been acknowledged. That opportunity is foreclosed in the context of the death penalty once it is imposed.<sup>202</sup>

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<sup>197</sup> See *supra* note 192.

<sup>198</sup> I address the functional arguments in the text regarding the “death is different” treatment, but as Rachel Barkow shrewdly notes, there is no textual basis for such a distinction under the Eighth Amendment, which simply addresses “cruel and unusual punishments.” See Barkow, *supra* note 192, at 1163-64.

<sup>199</sup> See Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (noting that the Court has historically understood capital cases differently on account of the penalty’s finality, which leads to heightened accuracy-enhancing safeguards, and its severity, which leads to the exclusion of certain crimes or persons, such as rape or juveniles).

<sup>200</sup> See, e.g., *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (“[N]o doubt that ‘[d]eath is different.’” (citation omitted)); *id.* at 614 (Breyer, J., concurring) (“[The] Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”); *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O’Connor, J., concurring in part and concurring in the judgment) (noting that the Supreme Court regularly invalidates capital sentences when there is evidence of “an unacceptable risk that the death penalty may have been meted out arbitrarily or capriciously or through whim . . . or mistake” (citations and internal quotations omitted)).

<sup>201</sup> See, e.g., Barkow, *supra* note 192, at 1173–75.

<sup>202</sup> See Markel, *State, Be Not Proud*, *supra* note 6.

Pointing to the death penalty's distinctive severity, the Court stands on substantially less sturdy ground in invoking the mantra that "death is different." As explained in Part I, the Court has created a set of rules prohibiting capital punishment against particular crimes—such as rape—and against particular classes of offenders—such as those who at the time of the crime were juveniles or mentally retarded.<sup>203</sup> These rules create a problematic set of distinctions. It certainly makes sense to exclude from punishment those who were mentally incompetent or were incapable of exercising mature moral reasoning because of age. However, there is no plausible basis for suggesting that someone who is mentally impaired enough to be spared execution should not also be spared from spending the rest of his life in a cage.<sup>204</sup> The severity of the punishment is not the problem; it's the fact of punishment. The same illogic applies to juvenile offenders.<sup>205</sup>

As to the severity of the underlying crime, it similarly makes no sense for the Court to heartily engage in spirited proportionality review when the penalty is death and the crime is rape,<sup>206</sup> but to abjure from meaningful review when the penalty is forty years in prison for the possession of nine ounces of marijuana.<sup>207</sup>

In any event, even if the "death is different" caselaw makes sense with respect to reviewing sentences, it cannot be said that it makes any difference with respect to what should be a predicate for criminal liability. In other words, that "death-is-different" as a sentence does not necessarily change the underlying substantive law requiring that an offender's guilt in all criminal cases be found beyond a reasonable doubt and that her actions were lacking a justification or excuse. Thus, the value the Court attaches to negative retributivism in the capital context as conditions to be satisfied for liability perforce applies in the noncapital context too. In brief, guilt and competence are and ought to be prerequisites for all *criminal liability*, and not simply for a particular *mode* or *amount* of punishment.

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<sup>203</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

<sup>204</sup> See *Atkins*, 536 U.S. at 352 (2002) (Scalia, J. dissenting) (pointing out that the logic of the majority's argument might extend to all criminal prosecutions involving the mentally retarded).

<sup>205</sup> FRANKLIN E. ZIMRING, *AMERICAN YOUTH VIOLENCE* 84 (1998) ("Diminished responsibility is either generally applicable or generally unpersuasive as a mitigating principle."); Barkow, *supra* note 192, at 1180 ("The Court has offered no explanation for why the diminished responsibility of juveniles is confined to death penalty cases. If adolescents may not be responsible enough to get the same death sentence as an adult, they may not be responsible enough to get the same term of confinement as an adult.").

<sup>206</sup> See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (death penalty for the rape of an adult woman is unconstitutional); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664–65 (2008) (death penalty for the crime of child rape is unconstitutional).

<sup>207</sup> See *Hutto v. Davis*, 454 U.S. 370, 375 (1982); see also *United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006) (noting that gross disproportionality will only be found in truly "extraordinary" circumstances).

3. *Effectuating Negative Retributivism.*—The preceding excavation of the negative retributivist principles embedded within the reasoning of *Panetti* yields at least three implications of substantial practical significance. The following discussion sketches these implications in an admittedly preliminary fashion.

a. *The noncapital punishment of the presently incompetent.*—First, and most straightforwardly, the rational understanding requirement in *Panetti* that restrains a state from executing presently incompetent offenders cannot be reasonably restricted to the capital context. The Court’s insight that punishment is primarily communicative requires that the objects of punishment be fit “interlocutors” for the message punishment is intended to send and for the condemnatory and yet hopeful attitude that accompanies retributive punishment.<sup>208</sup> Parts III and IV.A explained how that communicative aspect stands in square tension with the death penalty for competent offenders. But the tension exposed there easily extends to the context of *noncapital* punishment of presently incompetent offenders. Thus, the current practice by which we warehouse in prison those lacking rational understanding of their punishment cannot stand.<sup>209</sup> It is equally futile to visit stigmatic condemnation through noncapital punishment upon those persons who cannot rationally understand why they are being punished and thus cannot plausibly engage in the moral reconstruction of the self in response to the punishment. The *Panetti* Court tried to dance around this particular issue in certain ways by emphasizing the context of capital punishment. But for the reasons indicated above, and for reasons *Ford* and *Panetti* articulated, i.e., the defendant lacks appreciation for why he is being singled out for communicative condemnation, there is no plausible rationale for using the apparatus of condemnatory retributive punishment upon persons who cannot rationally understand why they are being punished. The threat of the death penalty only makes an intolerable and nonsensical situation worse by degree, not kind. Invoking “death is different” here does not provide a persuasive defense to the current practice of retributively “punishing” the presently incompetent. If need be, society can confine these erstwhile offenders in quarters that provide medical treatment, not punitive condemnation.

b. *Negative retributivism and actual innocence.*—A second implication arising from the constitutionalized status of negative retributivism is a robust and freestanding right against the government that would prevent

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<sup>208</sup> See Nozick, *supra* note 104.

<sup>209</sup> See Bernard Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006); Paul F. Stavis, *Why Prisons Are Brim-full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. CIV. RTS. L.J. 157 (2000); Evelyn Lundberg Stratton, *Solutions for the Mentally Ill in the Criminal Justice System: A Symposium Introduction*, 32 CAP. U. L. REV. 901 (2004) (providing an empirical portrait); Fox Butterfield, *Prisons Replace Hospitals for the Nation’s Mentally Ill*, N.Y. TIMES, Mar. 5, 1998, at A1.

punishment of the “actually innocent.”<sup>210</sup> Under current American law, there is a relatively complex and frustrating body of habeas corpus rules under which prisoners can sometimes successfully challenge their prior adjudications of guilt on the basis of having endured a violation of their constitutional rights during earlier proceedings.<sup>211</sup> To the chagrin of many observers, the Court has thus far been chary of recognizing a freestanding constitutional right that the actually innocent have against punishment.<sup>212</sup>

Some scholars have convincingly explained why the Court’s apparent stinginess is doctrinally inappropriate—at least when pursued under the Due Process Clause.<sup>213</sup> But the negative retributivism embedded in *Panetti* reveals that the Eighth Amendment might also provide a shield of protection. Just as negative retributivism logically restrains *punishments* that cannot be meaningful to defendants because of their incompetence, it also provides a shield to defendants whose punishment lacks any chance of successful communication because the predicate for the condemnation—the offender’s guilt—is absent. Because negative retributivism inveighs against the punishment of either the innocent or the incompetent, courts should recognize defendants’ Eighth Amendment rights to be free from punishment when they can show they are actually innocent of the crime of which they were accused and convicted.

That’s not to say the rights pertaining to the actually innocent cannot be regulated in some ways—for example, by insisting that defendants and their counsel are reasonably diligent before and after conviction. But recognizing a freestanding Eighth Amendment right against punishment of the innocent would at the very least eliminate the debacle that the Court’s actual innocence doctrine has become: namely, a mere vehicle to enter a “gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”<sup>214</sup> So long as the defendant can demonstrably show innocence through newly discovered evi-

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<sup>210</sup> See generally Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1630–31 (2008) (lamenting the fact that “the Supreme Court has repeatedly declined to recognize a constitutional claim of innocence”).

<sup>211</sup> See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION 889 (5th ed. 2007).

<sup>212</sup> See *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Moreover, the Supreme Court recently rejected the claim, brought through a Section 1983 lawsuit, that defendants have an unfettered right to secure and test DNA evidence that may exonerate them. See *Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308 (2009). As I explain elsewhere, however, the *Osborne* case should not serve as a basis for inconsolable pessimism. See Dan Markel, *DA’s Office v. Osborne: Bad Facts Make Tough Cases*, PrawfsBlawg, June 19, 2009, <http://prawfsblawg.blogs.com/prawfsblawg/2009/06/das-office-v-osborne-bad-facts-make-tough-cases.html> (arguing that lower courts and the Supreme Court in future cases can reasonably restrict *Osborne*’s holding to situations in which there is strong evidence of strategic manipulation by litigants; the holding need not naturally extend to those cases where the defendant’s claims of actual innocence are more plausible than *Osborne*’s claims were).

<sup>213</sup> See, e.g., George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263 (2004).

<sup>214</sup> *Herrera*, 506 U.S. at 404.

dence that is highly probative and was earlier unavailable, the freestanding Eighth Amendment claim would avoid this conceptual charade.

*c. Proportionality review of punishment.*—Last, insofar as one’s offense permits but does not require the state to punish an offender under negative retributivist principles, the offender’s guilt for that crime only permits the state to impose an amount of punishment proportionate to the crime and culpability of the offender.<sup>215</sup> Hence, while there are many considerations that reasonably inform the scope of a proportionate sentence, the ceiling on such a sentence is capped by negative retributivism. This necessitates some rethinking on the Court’s part regarding how to approach proportionality review under the Eighth Amendment in noncapital cases as well as capital ones.<sup>216</sup> Under current constitutional doctrine, judges have permitted sentences of 200 years for possession of twenty images of child pornography by a first time offender;<sup>217</sup> fifty-five years for selling small amounts of marijuana while having a gun nearby;<sup>218</sup> forty years for selling a small amount of marijuana;<sup>219</sup> and the list could go on. The reasons these sentence have been upheld stem from factors mentioned earlier, such as deference to legislative choices or recognition of the federal nature of power-sharing.<sup>220</sup>

However, the purposive language underlying the Eighth Amendment and the precedents it has inspired must curb these recklessly permissive approaches to punishment. If those limits include negative retributivist principles, as I’ve contended above, then the mere facts of an offender’s competence and guilt of some offense cannot underwrite a blank check for *any* kind of noncapital sentence. *Panetti*’s embedded reasoning should force the courts to be far more scrupulous in how they review the proportionality of noncapital punishments to ensure that the sentences imposed are roughly commensurate with the severity of the crimes committed, rather than simply “not grossly disproportionate.”<sup>221</sup>

To be sure, these terms are vague standards and thus do not lend themselves well to predictable rule-observing behavior. But just as appellate

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<sup>215</sup> See MACKIE, *supra* note 196, at 208 (discussing the “quantitative variant” of negative retributivism).

<sup>216</sup> As mentioned earlier, the Court has already subjected a number of death penalty cases to rigorous proportionality review under the “death is different” line of analysis. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2664–65 (2008); *Tison v. Arizona*, 481 U.S. 137, 156–58 (1987) (defendant must have at least exhibited reckless indifference to life to warrant the death penalty). A similar level of engagement would be appropriate in the context of proportionality review of noncapital sentencing. *Cf., e.g., Ewing v. California*, 538 U.S. 11, 28–31 (2003) (upholding California’s three-strikes rule).

<sup>217</sup> *State v. Berger*, 134 P.3d 378, 388 (Ariz. 2006), *cert. denied*, 127 S. Ct. 1370 (2007).

<sup>218</sup> *United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006).

<sup>219</sup> *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

<sup>220</sup> See *Ewing v. California*, 538 U.S. 11, 24–25 (2003).

<sup>221</sup> *Id.* at 30.

courts have come together to reason about what counts as probable cause or what counts as an excessive punitive damages award, the Court could also adopt new metrics and benchmarks to ensure that “Our Federalism” does not create a kind of sentencing “open-mindedness” so capacious that virtually any sentence passes muster. Negative retributivism principles should serve to create a ceiling on punishment, such that punishments must satisfy a standard of being “reasonably proportionate” to the offender’s offense and culpability, instead of being merely not “grossly disproportionate.”<sup>222</sup>

#### CONCLUSION

As I’ve tried to argue in this Article, close attention to *Panetti*’s reasoning, once contextualized in the realm of punishment theory, establishes two sets of important inferences. First, because a communicative rationale for retribution is inconsistent with the death penalty for the reasons offered above, the Court ought to realize that its belated but wise embrace of the defendant-centered goal leaves it with no available conceptual resources upon which to draw in trying to justify continued use of the death penalty.<sup>223</sup> *Panetti* should augur, in other words, a new period in which the Court’s “execution of retributivism” entails general grounds for optimism among death penalty skeptics.

Second, the Court’s retributivist reasoning in *Panetti* requires a commitment to punishing only those who are both guilty and presently competent, with punishments that are not excessive to the defendant’s crime and culpability. Together those conditions create a “negative retributivist” set of restraints on the state’s punitive activities such that an offender’s claim of actual innocence, present incompetence, or excessive punishment must be heard with greater sympathy and effect. Importantly, after *Panetti*, negative retributivism supervenes on all other penal purposes, contrary to the refrain that the Eighth Amendment is indifferent among penal purposes.

I want to reiterate that the inferences I’ve drawn above for capital and noncapital punishment are not stripped from the face of the *Panetti* opinion. Instead, they are enmeshed inside the *ratio decidendi* of the case—the rationale which makes the best sense of the holding in this otherwise potentially obscure Supreme Court opinion.

Thus, the Supreme Court now stands at a critical juncture between two notions of “executing retributivism.” If the Court continues to follow the *Panetti* road of restrained retribution as communicative action, we should

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<sup>222</sup> I should add that the negative retributivism feature of the Eighth Amendment likely does not create a refuge for complaints about underpunishment, though there are other aspects of the Eighth Amendment’s history and understanding that might address that. I leave that issue for another day. See Dan Markel, Luck or Law? The Constitutional Case Against Indeterminate Sentencing (June 1, 2009) (unpublished manuscript, on file with author).

<sup>223</sup> Cf. *Henslee v. Union Planters*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) (“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”).

see the Court turn away from the use of capital punishment more generally and show a willingness to revisit a few of the other wild excesses we permit in our criminal justice system. But if the Court circles back to theories through which it reflexively conflated retribution with mere revenge or social denunciation,<sup>224</sup> it will continue to misuse retributive theory as a justification for punishment, and will repeat basic mistakes that previous Justices have made.

The Court, in other words, can execute retributivist ideals by implementing them, or by doing violence to them. In what can only be described as a bittersweet irony, Scott Panetti's sad delusions have served as a catalyst, bringing us to a juncture where the hope of a better and more justly applied Eighth Amendment is ahead of us and not far beyond our current grasp.

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<sup>224</sup> See *supra* Part I.C.