

## Death Row, Calls for Indifference, and Redemption of the Soul

CORINNA BARRETT LAIN\*

In response to Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525 (2016).

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### I. INTRODUCTION

In the summer of 2015, Justice Kennedy wrote a separate concurrence in *Davis v. Ayala*, a capital case challenging an all-white jury, to bring attention to the exceedingly harsh conditions of solitary confinement on death row.<sup>1</sup> Windowless cells the size of a standard parking lot space, meals through a slot in the door, monitoring by cameras, communication via intercoms, and containment in that space for twenty-three hours a day, with one hour allotted to exercise in a caged pen akin to a dog run—these are the typical conditions of solitary confinement on death row,<sup>2</sup> and the condemned are subject to them

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\*Professor of Law and Associate Dean of Faculty Development, University of Richmond School of Law. I thank Eric Berger, Emily Cherry, Christopher Corts, Paul Crane, Robert Highfill, Jim Gibson, Shari Motro, David Skeel, Carol Steiker, Mary Kelly Tate, Kevin Walsh, and Clark Williams for their comments on an earlier draft, and Snapper Tams for excellent research assistance. Special thanks goes to Marah McLeod for inviting this Response, commenting on an early draft, and engaging me in this important and thought-provoking discussion.

<sup>1</sup> See *Davis v. Ayala*, 135 S. Ct. 2187, 2208–10 (2015) (Kennedy, J., concurring) (“This separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.”). In *Ayala*, the Supreme Court upheld the death sentence of a Hispanic defendant who challenged his sentence based on the fact that he was tried by a jury in which all African-Americans and Hispanics were excluded. *Id.* at 2208 (majority opinion).

<sup>2</sup> See *id.* at 2208 (Kennedy, J., concurring); Corinna Barrett Lain, *Following Finality: Why Capital Punishment Is Collapsing Under Its Own Weight*, in *FINAL JUDGMENTS: THE AMERICAN DEATH PENALTY AND THE LAW* (Austin Sarat ed., forthcoming 2017) (manuscript at 15), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2792235](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2792235) [<https://perma.cc/D9ZG-TXPA>] (discussing conditions of solitary confinement).

for agonizingly long periods of time.<sup>3</sup> As Justice Kennedy noted, the “human toll” of these conditions is both astounding and well-established, and yet the issue has received relatively little attention in the public discourse.<sup>4</sup>

Enter Marah McLeod, who had already drafted her article, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*,<sup>5</sup> when *Ayala* was decided. McLeod adds to a body of “expert scholarship” that Justice Kennedy views as key to understanding the complex issues presented by solitary confinement on death row, and solitary confinement as a penal practice more generally.<sup>6</sup> Her article is both an endorsement of, and response to, Justice Kennedy’s chief lament: “[S]o stark an outcome ought not to be the result of society’s simple unawareness or indifference.”<sup>7</sup>

In this Response, I first engage with McLeod’s article, summarizing its key claims and endorsing its call for legislative action, while disagreeing at times with the analytical moves it makes along the way. I then turn to two questions that the article inspired. One stems from comments in the constitutional, academic, and public discourse calling for indifference to the way we treat the condemned in light of the way they treated their victims. Given the depravity of the crimes the condemned have committed, why should we care about the conditions under which they are housed on death row? The other stems from McLeod’s description of death row as originally intended to facilitate redemption of the soul in preparation for destruction of the body. For those who still care about redemption of the soul—and religion runs deep in arguments for the death penalty and against it—how do the conditions of death row impact the opportunity for redemption, and how might the answer to that question contribute to the death penalty discourse today?

A good article asks important questions. A great article inspires questions of its own. *Does the Death Penalty Require Death Row?* is a great article.

## II. A COMMENT ON THE CONTRIBUTION

McLeod’s article makes two key claims. First, it argues that the human “waste management” system known as death row cannot be justified as an

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<sup>3</sup> On average, the condemned spend just under seventeen years awaiting their execution. See *Execution List 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2015> [https://perma.cc/CDN3-GZ9Q] (listing years from death sentence to execution for each inmate executed in 2015).

<sup>4</sup> *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring).

<sup>5</sup> Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525 (2016).

<sup>6</sup> *Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring). An estimated 25,000 inmates in the United States are currently serving all or part of their sentences in solitary confinement. See *id.* at 2208–09. Just under 3,000 of them are on death row. See *Death Row Inmates by State and Size of Death Row by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year> [https://perma.cc/ZKH4-D6V5] (noting 2,943 people on death row as of January 1, 2016).

<sup>7</sup> *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring).

administrative necessity, as conventional wisdom would have it.<sup>8</sup> Death row might be justified as a punishment practice, McLeod argues, but that makes it a decision only the legislature is competent to make—the second key claim of her paper.<sup>9</sup> Legislatures are responsible for prescribing crime and punishment, McLeod reminds us, while prison administrators suffer from what she calls “executioner bias”—the tendency to favor structures that disassociate and dehumanize the condemned in order to emotionally detach from those they will ultimately be asked to execute.<sup>10</sup>

These insights are original, important, and true. Death row is not an administrative necessity; it is a choice. And given the gravity of that choice and the incentives at work, the decision to have it (or not) should be made by legislatures rather than prison personnel. McLeod shines a much-needed light on the justification for death row, challenging our assumptions and bringing clarity to questions of institutional design. Her work constitutes a significant contribution to the literature.

This is not to say that I agree with McLeod’s article at every turn. Although I was convinced by the article as a whole, I disagreed at times with the arguments it made along the way. Two in particular merit mention.

First, the article claims that prison administrators lack the authority to maintain death row because it is not required for security reasons.<sup>11</sup> But the fact that death row is not *required* for security reasons does not mean that prison administrators lack the authority to maintain it on those grounds. As McLeod recognizes, the Supreme Court has held that “a prison’s internal security is peculiarly a matter normally left to the discretion of prison administrators.”<sup>12</sup> Thus, the question in my mind is whether death row makes enough sense as a security measure to justify it on that basis, even if prison administrators acting in their discretion could do something else instead. Maybe the answer to that question is no, but I needed a thicker account of

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<sup>8</sup> McLeod, *supra* note 5, at 555 (quoting Mona Lynch, *Supermax Meets Death Row: Legal Struggles Around the New Punitiveness in the US*, in *THE NEW PUNITIVENESS: TRENDS, THEORIES, PERSPECTIVES* 66, 79 (John Pratt et al. eds., 2005)); *see also id.* at 565–66 (“The administrative rationale for death row, grounded in claims that death-sentenced inmates are categorically more dangerous, has been undercut by empirical studies . . . . Retaining death row is not a necessity for security reasons.”).

<sup>9</sup> *See id.* at 533.

<sup>10</sup> *Id.* at 578–80 (discussing “executioner bias” on death row).

<sup>11</sup> *See id.* at 531 (“This Article addresses for the first time the authority of prison administrators to establish death row. The analysis begins with a consideration of the nature of the decision to establish death row, and concludes—contrary to prevailing assumptions—that death row cannot be justified for administrative reasons.”); *see also id.* at 566 (“Retaining death row is not a necessity for security reasons. The fact that some death-sentenced prisoners are exceptionally dangerous does not require that all death-sentenced prisoners endure the harshness of permanent isolation.”).

<sup>12</sup> *See id.* at 571–72 (quoting *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986)).

prison administrators' power in the security domain to get there.<sup>13</sup> Death row may not be necessary as a security measure, but it strikes me as at least plausible on those grounds and thus well within prison administrators' discretion.<sup>14</sup> Ultimately, this is no problem for me; I agree that death row is a decision only legislatures should make, but I come to that conclusion for the policy reasons that McLeod so powerfully articulates rather than her argument that prison administrators lack the authority to maintain it in the first instance.

Having concluded that death row cannot be justified administratively, McLeod then turns to a discussion of the various punishment rationales that might justify its existence, which brings me to the other analytical move I resisted in her analysis. "Is Death Row Necessary to Rehabilitate the Condemned?" the article asks in one of its major subheadings.<sup>15</sup> *What rehabilitation?*, I thought as I read, *they are condemned*.<sup>16</sup> McLeod's focus in this portion of the article is not on rehabilitation of the soul (a topic I return to at the end of this Response), but rather on rehabilitation as one would ordinarily understand it—as an attempt to help offenders become productive members of society.<sup>17</sup> *But the condemned will never become productive members of society*, I found myself repeating, *they are condemned*.<sup>18</sup> McLeod's argument is that the reversal rate for death sentences is so high that we should not think of them that way,<sup>19</sup> and she uses the same logic when discussing whether the death penalty is necessary for retribution and deterrence as well. Death row *could* serve a retributive purpose, she argues,

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<sup>13</sup>For the foundation of that sort of account, see generally Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029 (2011).

<sup>14</sup>See McLeod, *supra* note 5, at 540, 587 (noting that in most states, prison administrators maintain death row under their general authority to maintain security, although a few state statutes require that death-sentenced inmates be housed in a manner that affords maximum security, and a few specifically require death row).

<sup>15</sup>*Id.* at 552.

<sup>16</sup>See *Glossip v. Gross*, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting) ("Capital punishment by definition does not rehabilitate."). I set aside in this discussion my qualms about conflating the necessary with the permissible, which permeates McLeod's analysis in this portion of the article as well.

<sup>17</sup>See McLeod, *supra* note 5, at 556 ("Any death row that is retained should prepare its inmates for the possibility of eventual reentry into human community, because many of its inmates will do so.").

<sup>18</sup>In Missouri, the one death penalty state that integrates the condemned with other inmates, *id.* at 547–48, one can imagine the condemned becoming productive members of the *prison* society—but that response assumes away death row, whereas McLeod is considering penal purposes to justify it.

<sup>19</sup>See *id.* at 556 ("But the argument that rehabilitation is wasted on death row inmates because they will never reenter ordinary society, or even prison society, presumes that death-sentenced inmates will be executed. That is not true. Many death-sentenced inmates will not be executed. . . . The claim that rehabilitation is wasted on death-sentenced inmates because they will never reenter society is not only morally questionable but often factually incorrect.").

but “the high incidence of capital sentencing error presents a profound challenge to the justice of harsh death row conditions imposed on retributive grounds.”<sup>20</sup> Likewise, McLeod questions a deterrence-based justification for death row in light of the remarkably high reversal rate in capital cases and accompanying “risk of unjust additional harm to prisoners improperly sentenced to death.”<sup>21</sup>

And that is what I have a problem with. McLeod is right about the remarkably high error rates in capital cases,<sup>22</sup> but I do not see how that matters for the punishment purposes that might justify death row. For the wrongfully convicted, the proper punishment is zero. Nada. Zilch. Those people should not be on death row, *or anywhere else in our corrections system*. They should not have been punished in the first place, so there is no punishment practice that makes sense under this logic—death row or otherwise. The same is true for those who are not wrongfully convicted, but rather wrongfully sentenced to death. These are people who should not be on death row (by definition, that is the error) and, again, no punishment practice is justifiable for those who should not be subject to it in the first place. In short, we cannot look at error rates in evaluating the justification for death row as a punishment practice because no punishment practice is acceptable under that rationale. The argument proves too much.

Again, in the end, I agree with McLeod’s core claim—death row may or may not be justified as a punishment practice (as opposed to administrative necessity), but that is a decision for the legislature to make.<sup>23</sup> Moreover, I quite like McLeod’s discussion of death row as a punishment practice; I think she is right that its harshness belies a distinctly retributive purpose, albeit one that has not been expressly contemplated or approved as such by the legislature.<sup>24</sup> My problem is with the logic of the argument here, not with the questions McLeod asks—indeed, the questions she asks are part of what convinces me that it is the legislature that should be answering them.

In sum, McLeod’s question—*Does the Death Penalty Require Death Row?*—does a great service in forcing us to think about what it is we are trying to accomplish with death row, and how the answer to that question ought to influence the way we think about institutional design. The article is right about the need for legislative involvement and accountability in this area, notwithstanding my disagreements with its reasoning along the way, and it also caused me to pause and reflect on several other thought-provoking

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<sup>20</sup> *Id.* at 563.

<sup>21</sup> *Id.* at 565.

<sup>22</sup> McLeod cites Bureau of Justice statistics indicating that over forty percent of persons sentenced to death between 1976 and 2013 were removed from death row due to court decisions or commutations. *Id.* at 556 (citing TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 19 tbl.16 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf> [<https://perma.cc/K4YZ-2TYX>]).

<sup>23</sup> McLeod, *supra* note 5, at 592.

<sup>24</sup> *See id.* at 566–78.

questions associated with the harsh conditions of death row. In the remainder of this Response, I turn to the two that most captured my attention.

### III. CALLS FOR INDIFFERENCE

As McLeod notes in her discussion of the possible retributive justification for death row, Justice Thomas wrote his own one-paragraph concurrence in *Davis v. Ayala*, stating, “I write separately only to point out, in response to the separate opinion of Justice Kennedy, that the accommodations in which Ayala is housed are a far sight more spacious than those in which his victims . . . now rest.”<sup>25</sup> The comparison struck me as odd. But more than that, I was disturbed by the implication that we should not concern ourselves with how the condemned are treated given what they have done.

Then it occurred to me that this sort of thinking is not all that uncommon. I still remember Justice Scalia writing about “the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat” and then adding with disdain, “How enviable a quiet death by lethal injection compared with that!”<sup>26</sup> His comment came back to haunt him when the man condemned in that case was exonerated by DNA,<sup>27</sup> but it was the comparison in the first place that I found so disturbing.

One can find similar statements in the scholarly literature and public discourse. Retributivist Robert Blecker’s work is perhaps the best example of calls for indifference in the scholarly realm.<sup>28</sup> And in the political arena, consider the following from the minority leader of the Senate in Virginia, my home state, who recently told the General Assembly in response to concerns about lethal injection:

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<sup>25</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring). The concurrence continues (and comes to an end) with the statement: “And, given that his victims were all 31 years of age or under, Ayala will soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.” *Id.*

<sup>26</sup> *Callins v. Collins*, 510 U.S. 1141, 1142–43 (1994) (Scalia, J., concurring in denial of certiorari) (discussing the convictions underlying *McCullum v. North Carolina*, 512 U.S. 1254 (1994)).

<sup>27</sup> See, e.g., Steve Benen, *Scalia’s Perfect Capital Punishment Case Falls Apart*, MSNBC (June 5, 2015), <http://www.msnbc.com/rachel-maddow-show/scalias-perfect-capital-punishment-case-falls-apart> [<https://perma.cc/AHJ2-XEYK>]; Daniel Bier, *Scalia’s Defense of the Death Penalty Is in Tatters*, NEWSWEEK (June 14, 2015), <http://www.newsweek.com/scalias-defense-death-penalty-tatters-342329> [<https://perma.cc/8UU6-N6JC>]; Dahlia Lithwick, *A Horrifying Miscarriage of Justice in North Carolina: How Many Times Was Justice Antonin Scalia Wrong About Henry Lee McCollum and the Death Penalty?*, SLATE (Sept. 3, 2014), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/09/henry\\_lee\\_mccollum\\_cleared\\_by\\_dna\\_evidence\\_in\\_north\\_carolina\\_after\\_spending.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/09/henry_lee_mccollum_cleared_by_dna_evidence_in_north_carolina_after_spending.html) [<https://perma.cc/48W9-RSGT>].

<sup>28</sup> See generally ROBERT BLECKER, *THE DEATH OF PUNISHMENT* (2013). McLeod discusses Blecker’s work at McLeod, *supra* note 5, at 557–63.

So the guy suffers for two or three minutes. Let me tell you something—when you kill seven people, when you shoot a cop three times in the back of the head, when you hire somebody to slit your girlfriend’s throat in front of your children—I really could care less how damn long you suffer . . . .<sup>29</sup>

The *Richmond Times Dispatch*, which covered the lethal injection story, reported that the state senator “also imagined a world in which criminals were executed in the manner of their crimes. Under that system, [the senator] said, Oklahoma City bomber Timothy McVeigh might be taken to a field and blown up.”<sup>30</sup>

One of the wonderful contributions of McLeod’s article is that it caused me to think about these sorts of statements and comparisons in a serious way. Given how the condemned treated their victims, why should we care about the conditions under which they are languishing on death row, or the drugs we use in executions by lethal injection? For that matter, why should we care when an execution gets botched? Why not applaud instead?

The answer, I submit, is the same reason we do not rape rapists, or torture torturers, or set fire to arsonists’ homes. It is worth pausing for a moment to think about that—why don’t we treat vicious criminals in a vicious manner? It is not because they don’t deserve it (at least in some talionic way)—because they do.<sup>31</sup> It is that these people are *so bad* that a civilized society could never use the way they treated their victims as the baseline for how they should be treated. That sort of thinking would allow us to get even with vicious criminals—it is proportional—but a civilized society could never aim that low. This was Dostoevsky’s point in observing that “[t]he degree of civilization in a society can be judged by entering its prisons.”<sup>32</sup> How we treat those we justifiably despise says more about us than them.

The Eighth Amendment’s Cruel and Unusual Punishments Clause embodies this principle—that we don’t do to others what they did to someone else, *not* because they deserve better, but because it would demean us. That said, my point is less about the Eighth Amendment and more about the values that animated its adoption in the first place. Those values are important not because they are codified in the Eighth Amendment; rather, they are codified

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<sup>29</sup>Graham Moomaw, *General Assembly Votes to Shield Identities of Companies Supplying Lethal Injection Drugs*, RICH. TIMES DISPATCH (Apr. 20, 2016), [http://www.richmond.com/news/virginia/government-politics/article\\_25377abb-93b9-5887-b314-c63adb8b0380.html](http://www.richmond.com/news/virginia/government-politics/article_25377abb-93b9-5887-b314-c63adb8b0380.html) [https://perma.cc/L359-FWTS].

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

<sup>31</sup>*Lex talionis* is the principle that a punishment should correspond in degree to the offense of the wrongdoer—“an eye for an eye, a tooth for a tooth.” See *Lex Talionis*, DICTIONARY.COM, <http://www.dictionary.com/browse/lex-talionis> [https://perma.cc/L5NJ-8V8A].

<sup>32</sup>*Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (quoting THE YALE BOOK OF QUOTATIONS 210 (Fred R. Shapiro ed., 2006)).

in the Eighth Amendment because they are *that* important. We do not impose cruel punishments even when criminals deserve them, and that is because the cruelty that they impose upon their victims is no model for the way a civilized society should treat its members, even the worst of the worst of them.

And that brings me back to Justice Thomas. Justice Thomas observes that the conditions of death row are way more spacious than the coffin the victims are in<sup>33</sup>—and that is true—but what does that have to do with anything? Does he really think that the way a depraved murderer treated his victims is the baseline for comparison? If so, he ought to justify why that is the case.

As I think about it, several of the Justices (and Justice Thomas is one of them) often begin their opinions in capital cases with a detailed description of the facts of the condemned’s crime even though that person is not challenging the propriety of the death sentence *per se*.<sup>34</sup> At issue in these cases is how we treat the condemned before they die, while they die, and, most commonly, before they have been condemned to die—what procedural protections are due in the capital trial and sentencing process.<sup>35</sup> I submit that the facts of the crime in this context have absolutely nothing to do with it; again, the way criminals treat their victims is no standard for how a civilized society should treat them. Indeed, as Eric Berger has noted in the lethal injection context, the nature of the crime is not something the Justices tend to reference in other Eighth Amendment cases involving prison conditions, medical care, and the like.<sup>36</sup> So how do we explain Justice Thomas’s concurrence in *Ayala*?

One possibility is that Justice Thomas disagrees with my analysis. Maybe he really does think that the way *Ayala* treated his victims tells us how we should treat him—or at the very least, that because of how the condemned treated their victims, we should not care about how we house the condemned. Again, if so, he ought to justify that reasoning, explain why that is if he can. Another possibility is that Justice Thomas cannot justify the reasoning but has not had cause to pause and think about it; perhaps no one has gently suggested that he do so. My earnest hope is that someone does. And then, of course,

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<sup>33</sup> *Id.* (Thomas, J., concurring); *see also supra* note 25 and accompanying text.

<sup>34</sup> *See, e.g.,* *Lynch v. Arizona*, 136 S. Ct. 1818, 1820–21 (2016) (Thomas, J., dissenting); *Kansas v. Carr*, 136 S. Ct. 633, 637–40 (2016) (Scalia, J., majority opinion); *Glossip v. Gross*, 135 S. Ct. 2726, 2735 (2015) (Alito, J., majority opinion); *Brumfield v. Cain*, 135 S. Ct. 2269, 2283–84 (2015) (Thomas, J., dissenting); *White v. Woodall*, 134 S. Ct. 1697, 1700–01 (2014) (Scalia, J., majority opinion); *see also* *Wainwright v. Witt*, 469 U.S. 412, 440 n.1 (1985) (Brennan, J., dissenting) (“However heinous Witt’s crime, the majority’s vivid portrait of its gruesome details has no bearing on the issue before us.”).

<sup>35</sup> *See* cases cited *supra* note 34.

<sup>36</sup> *See* Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 993–94 (2016) (“Indeed, the Court usually does not reference the inmates’ crimes in other civil rights Eighth Amendment actions, involving, for instance, prison conditions or medical care.”); *see also id.* at 935 (“Along similar lines, Justice Alito described each of the inmate’s crimes [in *Glossip v. Gross*]. While these crimes were horrific and arguably justify the imposition of capital punishment, they are nonetheless irrelevant to the question of whether the State’s protocol violates the Eighth Amendment.”).

there is the darkest of possibilities—that such statements are made not because they have any logical relevance to the issue at hand, but rather to inflame passions. I feel a deep-seated need to believe that is not what is going on here; it would be so unprincipled, so unwise, so distinctly injudicious.<sup>37</sup>

Regardless of what is driving such statements, it merits mention that they reflect poorly on the very institution we look to for its considered judgment. And they send a signal to others that such crass comparisons are fine—like the state senator in Virginia, who claims it just does not matter whether we get lethal injection right because of what these people have done.<sup>38</sup> That cannot be the right answer, and should not be the signal our most respected intellectual leaders send.

#### IV. REDEMPTION OF THE SOUL

The other thought that McLeod's article inspired comes from her description of death row as originally intended to facilitate redemption of the soul in preparation for destruction of the body.<sup>39</sup> Indeed, this is where the word "penitentiary" comes from—the idea that punitive confinement could bring penitence, and with it, redemption of the soul.<sup>40</sup> McLeod notes that death row today is justified on purely secular grounds, while acknowledging that vestiges of the religious purpose of death row remain and that it is not uncommon to see authentic religious conversions among the condemned.<sup>41</sup> Karla Faye Tucker is perhaps the most famous example of this sort of spiritual transformation on death row, but her story is just one among many.<sup>42</sup>

I found McLeod's discussion of the origin of death row intriguing given the role of religion in arguments for and against the death penalty today.<sup>43</sup> In

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<sup>37</sup> What if Justice Thomas is just *angry*—angry about Justice Kennedy reaching out to address an issue not properly raised in *Ayala*, and angry about the solicitude given to capital defendants in light of the nature of their alleged crimes? It seems to me that the three possibilities still hold. Maybe he thinks that the comparison is a relevant answer to Kennedy's overreaching (if so, he should explain why that is). Or maybe he just hasn't thought about it (in which case, he should). Or maybe he is channeling his anger into deliberately inflammatory rhetoric (which is neither principled, nor wise, nor judicious).

<sup>38</sup> Moomaw, *supra* note 29.

<sup>39</sup> See McLeod, *supra* note 5, at 552–53.

<sup>40</sup> See Pat Robertson, *Transcript of Speech on Religion's Role in the Administration of the Death Penalty*, 9 WM. & MARY BILL RTS. J. 215, 220 (2000).

<sup>41</sup> See McLeod, *supra* note 5, at 553.

<sup>42</sup> See Paula M. Cooley, *Women's Religious Conversions on Death Row: Theorizing Religion and State*, 70 J. AM. ACAD. RELIGION 699, 699–700 (2002); Byron R. Johnson, *Jailhouse Religion, Spiritual Transformation, and Long-Term Change*, AM. OUTLOOK, Spring/Summer 2011, at 31, 34–35.

<sup>43</sup> See Davison M. Douglas, *God and the Executioner: The Influence of Western Religion on the Death Penalty*, 9 WM. & MARY BILL RTS. J. 137, 137–38 (2000) (“[P]ublic debates about the death penalty and its use invariably invite considerations of what our religious traditions teach us about the morality of capital punishment.”); Samuel J. Levine, *Capital Punishment and Religious Arguments: An Intermediate Approach*, 9 WM. & MARY

the domestic discourse, I am primarily referring to Christian arguments for and against the death penalty,<sup>44</sup> and since Christians are deeply committed to redemption of the soul,<sup>45</sup> McLeod's discussion led me to think about how the current conditions of death row might impact the redemptive purpose once served there. I concede at the outset that I am now writing from a particular perspective—one that cares about redemption of the soul—and that my thoughts will likely not resonate for those who do not share that perspective. The lens is clearly Christian (although it may well be other things too) and in the interest of full disclosure, the Christian perspective is also mine personally. Indeed, it was thinking about death row then and now as a Christian that led to these thoughts in the first place.<sup>46</sup> For the record, I do not think we use death row for redemption today, and I am not suggesting that we do so. But for those who still care about things like repentance and redemption of the soul, what are the implications of the exceedingly harsh and drawn out conditions of death row?

McLeod argues that pre-execution confinement lasts too long to serve the religious purpose it once did; in her view, it was the “temporal pressure” of being at death's door that caused criminals to repent in anticipation of meeting their maker.<sup>47</sup> While I agree that the prospect of impending death can lead to

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BILL RTS. J. 179, 180 n.2 (2000) (stating that “[r]eligion has consistently played a role in discussions of capital punishment in the courtroom, judicial opinions, and legal scholarship” and citing examples); *see also infra* note 45 (discussing the role of religion in arguments for and against the death penalty among Christians).

<sup>44</sup> *See* JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 96 (2003) (noting that the Christian tradition is “highly influential” on a number of political issues and that “[t]his is certainly true in the United States, for example, where people on both sides of the capital punishment debate often use biblical references in order to claim the moral high ground.”); Thomas C. Berg, *Religious Conservatives and the Death Penalty*, 9 WM. & MARY BILL RTS. J. 31, 32 (2000) (discussing support for the death penalty among “theologically conservative Christians, often labeled as the ‘Religious Right’”); Douglas, *supra* note 43, at 162–68 (discussing opposition to the death penalty by “virtually every mainline Protestant denomination, the Catholic Church, and most Jewish groups” and support for the death penalty by “conservative Protestant groups” such as the Southern Baptists); *see also infra* note 62 (referencing arguments for and against the death penalty based on scripture and other religious doctrine).

<sup>45</sup> As philosopher Jeffrie Murphy explains,

“[F]or the Christian, what happens to the human soul—in this life and the next—is of primary concern. . . . Physical death, on the Christian view, is not the end of the person and is not the gravest of evils we can imagine or inflict. Physical death is the beginning of a process that can end either in what *is* the gravest of evils—eternal estrangement from God—or the greatest of goods, eternal communion with God.”

MURPHY, *supra* note 44, at 98–99; *see also* Berg, *supra* note 44, at 59 (“Christian theology emphasizes the possibility of redeeming even the worst sinner . . .”).

<sup>46</sup> That, and the song “Redeemed.” *See* BIG DADDY WEAWE, *Redeemed, on LOVE COME TO LIFE* (Fervent Records 2012) (lyrics available at <http://www.azlyrics.com/lyrics/bigdaddyweave/redeemed.html> [<https://perma.cc/E7JA-36ZT>]).

<sup>47</sup> McLeod, *supra* note 5, at 554.

repentance and redemption—this is the insight in the saying, ‘there are no atheists in foxholes’—I am not so sure that the *lack* of impending death, at least on death row, necessarily cuts the other way. Hypothetically, it could be the case that the harsh conditions of death row, and the amount of time that the condemned languish there, work in favor of the historical purpose of death row rather than against it. Draconian? Absolutely. Recommended? Not even close. If we care about genuine redemption, we ought never use suffering to induce it.<sup>48</sup> But for born-again Christians who say they needed to hit rock bottom before giving their life to Christ,<sup>49</sup> it is not obvious which way the conditions of death row actually cut. The long wait to execution dissipates whatever motivation comes with being at death’s door, but the torturous conditions, and the amount of time that the condemned must endure them, sure look like rock bottom to me.<sup>50</sup>

But then it occurred to me—no matter how long the condemned spend on death row, their opportunity for redemption is still artificially shortened by the state when they are executed. The death penalty takes away days, months, years from a person’s life; that is the point, that is the penalty. What if the time the state takes is the time that person needed for redemption?

Karla Faye Tucker is a prime example. I was reading about her for this Response when I came across a talk about the death penalty by none other than TV evangelist Pat Robertson. I had wondered what someone like Robertson would say about the redemption question, and there it was in the transcript, someone in the audience had asked him about it.<sup>51</sup> Here is what he said:

Very good point, I’ve had it raised before, and I think it’s—she had 13 years of appeals, and during that period of time, she had a profound religious conversion, and had she been executed within a few weeks of her sentence, that never would have happened, and I don’t know what

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<sup>48</sup> See MURPHY, *supra* note 44, at 37 (“When a person comes to repentance as a result of his own spiritual growth, we are witness to an inspiring transformation of character. Any expressed repentance that is nothing more than a response to a coercive external incentive, however, is very likely to be fake. . . . [O]ut of respect for the genuine article, let us not seek to coerce it.”).

<sup>49</sup> See Johnson, *supra* note 42, at 33 (“[S]uch conversions tend to be tied to people in utter despair, and with absolutely no hope they turn to God as a last resort.”).

<sup>50</sup> One might counter that as the prospect of execution becomes more remote, it becomes harder for the condemned to actually hit rock bottom—at least they do not have death to worry about. But I am not sure why the prospect of living the rest of one’s life in solitary confinement on death row would be any more bearable. And that is my only point here—that it is just not clear how the conditions of modern death row cut by way of *motivating* redemption, as opposed to what I talk about next, which is ensuring that the state does not deprive someone of the possibility of it.

<sup>51</sup> See Berg, *supra* note 44, at 54 (discussing Robertson’s speech and noting, “Then came the obvious question from the audience: given the unlimited power of God, how do you know that any given death-row convict, no matter how unrepentant now, would not be similarly transformed in the future?”).

the answer is. Some things you have to leave to the Lord, but in order to accommodate that, you'd have to essentially do away with the death penalty entirely because you never know at what point of time somebody would have an experience . . . Frankly, the point you raised is excellent and I don't have an answer for it, I really don't.<sup>52</sup>

I'm not sure if Pat Robertson saying the point is excellent and he doesn't have an answer for it makes me feel better, or worse. But there it is.

An even better example may be Charles "Tex" Watson, who was once Charles Manson's right-hand man.<sup>53</sup> Watson was convicted of multiple murders and sentenced to death, but his sentence was commuted to life in prison when California temporarily abolished its death penalty in 1971.<sup>54</sup> He has since become a born-again Christian and ordained minister, serving those with whom he is serving time.<sup>55</sup> He has also founded Abounding Love, a prison outreach ministry dedicated to sharing the Good News.<sup>56</sup> All this came about after he became a "lifer." What if he had been executed instead?

Redemption is hard for an angry twenty-something.<sup>57</sup> But time works changes, and what is true generally is true of angry twenty-somethings as well. Sometimes redemption takes growing up, staying sober, and living with regret. In short, sometimes redemption takes time. So I am back to my original question—what if by executing the condemned, we take away the time it takes?

Calvinists would probably answer that if God had laid claim to that soul, redemption would have happened in some way.<sup>58</sup> But I am not a Calvinist, and so I am far less confident about knowing how God resolves the tension between predestination and free will. As such, the possibility that by executing the condemned, we may take away the days, months, even years necessary for

<sup>52</sup>Pat Robertson, Speech at William & Mary Bill of Rights Journal Symposium: Religion's Role in the Administration of the Death Penalty 10 (2000) (transcript available at <http://www.deathpenaltyinfo.org/PRObertsonWMSpeech.pdf> [<https://perma.cc/WRV9-QC62>]); see also Berg, *supra* note 44, at 54 ("Robertson candidly admitted that he had no answer to that question."). For the published version of Dr. Robertson's speech, without the transcription of the question and answer period, see Robertson, *supra* note 40.

<sup>53</sup>See Johnson, *supra* note 42, at 33.

<sup>54</sup>See *Manson Follower Seeks Parole in California*, USA TODAY (Nov. 16, 2011), <http://usatoday30.usatoday.com/news/nation/story/2011-11-16/charles-manson-follower-parole/51234868/1> [<https://perma.cc/C4L2-78TE>]; see also *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (abolishing the death penalty under the state constitution's cruel and unusual punishments clause).

<sup>55</sup>Johnson, *supra* note 42, at 33.

<sup>56</sup>See *ABOUNDING LOVE WITH CHARLES D. WATSON*, <http://www.aboundinglove.org/main> [<https://perma.cc/WD84-YJ64>].

<sup>57</sup>I credit Eric Berger, with thanks, for this insight and articulation of the point.

<sup>58</sup>Calvinists believe that "God, not man, determines who will be the recipients of the gift of salvation." *Calvinism*, CTR. FOR REFORMED THEOLOGY & APOLOGETICS, <http://www.reformed.org/calvinism/> [<https://perma.cc/2RUH-PQEF>].

something incredibly important to happen—again, at least from the perspective of those who care about redemption of the soul (for whatever reason and in light of whatever tradition)—is a prospect I find deeply troubling. Almost as troubling as the fact that I am just now thinking about these sorts of things for the first time.

This is not to say that any of these insights are new. A little research uncovered Saint Augustine making the same point over a thousand years ago,<sup>59</sup> and the Catholic Catechism codifying it for the last twenty-five.<sup>60</sup> Philosopher Jeffrie Murphy has also recognized the point, emphasizing that it is not to be taken lightly: “[F]rom a Christian point of view,” he notes, “there is no more serious way of harming a person than to pose obstacles to that person’s opportunity to repent, reform, atone, and thereby open himself to the possibility of redemption and salvation.”<sup>61</sup> As it turns out, viewing the death penalty through the lens of redemption is not new; it was just new to me.

And this is interesting, too. To the extent Christian values and rhetoric have played a part in the death penalty discourse here in the United States, they have tended to focus on the corporal aspect of capital punishment—respect for life on the one hand, “eye for an eye” on the other.<sup>62</sup> What I have not seen in the religious arguments that permeate the public discourse is a concern for redemption of the soul.<sup>63</sup> Perhaps this is because of where it takes

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<sup>59</sup> See Berg, *supra* note 44, at 53–54 (quoting sermon of Saint Augustine stating, “Thus, do not go so far as to kill the criminal, for in wishing to punish the sin, you are destroying the man. Do not take away his life; leave him the possibility of repentance.”).

<sup>60</sup> See CATECHISM OF THE CATHOLIC CHURCH 604 (Doubleday 2d ed. 2003) (“Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitively taking away from him the possibility of redeeming himself—the cases in which the execution of an offender is an absolute necessity ‘are very rare, if not practically nonexistent.’” (citing POPE JOHN PAUL II, THE GOSPEL OF LIFE: EVANGELIUM VITAE 100 (1995))).

<sup>61</sup> MURPHY, *supra* note 44, at 112.

<sup>62</sup> See also Douglas, *supra* note 43, at 164–68 (discussing rationale for Catholic opposition to the death penalty based on respect for life, and support for the death penalty by conservative Protestants based on theological beliefs about the legitimacy of retribution). Compare *The Church’s Anti-Death Penalty Position*, U.S. CONF. CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm> [https://perma.cc/7S56-AWMR] (“The new evangelization calls for followers of Christ who are unconditionally pro-life: who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil.” (quoting Pope John Paul II, Papal Mass in St. Louis, Missouri (Jan. 27, 1999))), with *Genesis* 9:6 (King James) (“Whoso sheddeth man’s blood, by man shall his blood be shed; for in the image of God made he man.”), and *Exodus* 21:23–25 (King James) (“And if any mischief follows, then thou shalt give life for life, [e]ye for eye, tooth for tooth, hand for hand, foot for foot, [b]urning for burning, wound for wound, stripe for stripe.”).

<sup>63</sup> This is ironic not only because redemption is a core Christian value, but also because theologically conservative Christians—the “Religious Right”—are, as Tom Berg

us; for those committed to redemption, the central challenge would appear to be justifying the death penalty over the redemption-maximizer of life without parole. But whatever the reason and wherever it leads, those who profess to care about things like repentance and redemption should at least be talking in those terms. What Justice Kennedy wrote in *Ayala* is equally applicable here: “[S]o stark an outcome ought not to be the result of . . . simple unawareness or indifference.”<sup>64</sup> Back to the beginning seems a fitting way to close.

## V. CONCLUSION

The death penalty is a breathtakingly complex issue, with or without death row. Yet that complexity affords a unique opportunity for us to pause and think hard about what we are trying to accomplish, and what values—legal, religious, or otherwise—should be guiding us along the way. McLeod’s article is a commendable step in that direction, both for the questions it asks and the questions it inspires us to ask on our own.

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notes, both “the most fervent supporters of capital punishment in America today,” and particularly noteworthy for their “emphasis on ‘personal redemption:’ that the individual person can receive salvation from sin through God’s forgiveness and grace, followed by personal transformation and a direct relationship with God.” Berg, *supra* note 44, at 32, 47–48.

<sup>64</sup> See *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).