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Death and Rehabilitation

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While rehabilitation is reemerging as an important penological goal, the Supreme Court is eroding the long-revered divide between capital and non-capital sentences. This raises the question of whether and how rehabilitation applies in the capital context. Courts and scholars have long concluded that it does not — that death is completely irrelevant to rehabilitation. Yet, historically, the death penalty in this country has been imposed in large part to induce the rehabilitation of offenders' characters. Additionally, there are tales of the worst offenders transforming their characters when they are facing death, and several legal doctrines are based on the idea that death spurs rehabilitation.

Courts' and scholars' conclusion that death is irrelevant to rehabilitation likely stems from changes in our understanding of rehabilitation. While it was once understood as referring to an offender's character transformation, references to rehabilitation now often focus on offenders' direct impacts on society. This has the effect, though, of distracting from the humanness of the worst offenders and consequently not providing them with true opportunities to transform their characters — a denial which challenges the Eighth Amendment's focus on respecting the human dignity of the condemned.

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INTRODUCTION

Rehabilitation is reemerging as an important penological goal.[1] The Supreme Court highlighted this in its recently decided Eighth Amendment case of *Miller v. Alabama*,[2] in which the Court held that a mandatory punishment of life without the possibility of parole for a crime involving homicide is unconstitutional for juvenile offenders.[3] In deciding the case, the Court largely piggybacked on its 2010 *Graham v. Florida*[4] opinion, in which it held that the punishment of life without the possibility of parole for a *non*-homicide crime is unconstitutional for juvenile offenders.[5] In both of these cases, the Court emphasized the importance of rehabilitation, stating that juvenile offenders are entitled to have the opportunity to transform themselves and to be rehabilitated.[6] In fact, the Court found the goal of rehabilitation so important that it upended its long-held conclusion that different rules apply in the capital context than in non-capital cases.[7] By cutting back on its "death is different" jurisprudence in this

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[1] *See* Meghan J. Ryan, *Science and the New Rehabilitation*, 19-28 (Aug. 8, 2012) (unpublished manuscript) [hereinafter *Science*], *available at* http://ssrn.com/abstract=2019368 (citing evidence of legislative reform and a shift in Supreme Court Eighth Amendment Punishments Clause jurisprudence as evidence that rehabilitation is reemerging as an important penological goal).

[2] *See* 132 S. Ct. 2455, 2460, 2468 (2012) (criticizing the punishment of life without the possibility of parole for juveniles as "prevent[ing] those meting out punishment from considering a juvenile's . . . 'capacity for change'" (citation omitted)).

[3] *See id.* at 2475.

[4] 130 S. Ct. 2011 (2010).

[5] *See id.* at 2034.

[6] *See Miller*, 132 S. Ct. at 2468 (stating that the life-without-parole sentencing scheme at issue was problematic because it "disregard[ed] the possibility of rehabilitation even when the circumstances most suggest[ed] it"); *Graham*, 130 S. Ct. at 2029-30 (criticizing the punishment of life without the possibility of parole as applied to juveniles because it "forswears altogether the rehabilitative ideal" — "[b]y denying the defendant the right to reenter the community," the State makes the inappropriate judgment that the juvenile offender is incapable of change).

[7] *Compare Miller*, 132 S. Ct. at 2466-67 (suggesting that death is no longer different), *and Graham*, 130 S. Ct. at 2022-23 (applying a categorical approach, which had previously been applied only in cases involving the death penalty, to the noncapital Eighth Amendment issue), *with* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."), *and* Rummel v. Estelle, 445 U.S. 263, 272 (1980) ("The penalty of death differs from all other forms of criminal punishment . . . .").

way,[8] the Court has raised the question of how rehabilitation applies in various types of cases.

In the context of capital punishment, the Court has long concluded that the death penalty is irrelevant to rehabilitation.[9] Indeed, the Court has repeatedly stated that this is one of the primary ways in which "death is different" and therefore requires special consideration.[10] This belief that death is different and cannot serve rehabilitative goals has led the Court to erect special protections for capital defendants that other defendants do not enjoy. For example, the "death is different" doctrine has led the Court to exempt broad classes of defendants from capital punishment because they lack the ability to appropriately ready themselves for death through individual cognitive or spiritual transformations.[11] It has also led the Court to defer less to individual legislatures' punishment determinations when the death penalty is involved because death is a different, more severe punishment.[12]

The Court's presumption that capital punishment is completely irrelevant to rehabilitation, however, is questionable. Rehabilitation was one of the primary reasons that capital punishment was imposed in early America,[13] and there are several stories of brutal murderers being rehabilitated on death row.[14] Further, the idea that capital punishment is relevant to rehabilitation animates various legal doctrines. For example, the Eighth Amendment prohibits executing "insane" individuals because they lack the capacity to rehabilitate and ready themselves for death;[15] the dying declaration exception to hearsay is rooted in the belief that an individual who believes his death is imminent will transform himself into a trustworthy source;[16]

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[8] *See Harmelin*, 501 U.S. at 995; *Rummel*, 445 U.S. at 272.

[9] *See Harmelin*, 501 U.S. at 995; *Rummel*, 445 U.S. at 272; *infra* Part II.

[10] *See supra* note 9 and sources cited therein; *see also infra* text accompanying notes 81-88.

[11] *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 407-10 (1986) (concluding that it is unconstitutional to execute "insane" individuals in part because "it is uncharitable to dispatch an offender 'into another world, when he is not of a capacity to fit himself for it'" (citation omitted)).

[12] *See, e.g.*, *Rummel*, 445 U.S. at 272 (stating that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare" because non-capital sentences are different; unlike capital sentences, they are revocable, embrace rehabilitation, and do not renounce all that is involved in our idea of humanity).

[13] *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 16-18 (2002); *infra* Part III.A.

[14] *See infra* Part III.B.

[15] *See infra* Part III.C.

[16] *See infra* Part III.D.

and the value of finality, which is emphasized in much of courts' capital habeas corpus jurisprudence, is partially premised on the belief that an offender must accept his sentence so that he can begin the desired rehabilitation process.[17]

Aside from the importance of correcting the historical record, recognizing this overlooked relevance of capital punishment to rehabilitation highlights some important insights regarding the meaning of rehabilitation and its application in the capital context.[18] First, courts' and scholars' understandings of rehabilitation have changed over time.[19] They have shifted from understanding rehabilitation as the offender's character change to understanding it as revolving around an offender's effects on society.[20] Rehabilitation as character change engenders the understanding of capital punishment in early America.[21] It is also the species of rehabilitation that creates media frenzies around "transformed" death row inmates such as the killer Paul Crump, pickax murderer Karla Faye Tucker, and Crips co-founder Stanley "Tookie" Williams III.[22] Further, character-change rehabilitation is at the core of various legal doctrines relying on death's relevance to rehabilitation.[23] Modern understandings of rehabilitation, though, focus more on an offender's direct effects on society.[24] This understanding of rehabilitation is, as courts and scholars have suggested, less relevant to the death penalty, because executed individuals clearly cannot reintegrate into society and thus their effects on society are more indirect.

Additionally, recognizing capital punishment's relevance to rehabilitation through its role in reforming offenders' characters raises the question of whether a real opportunity for character transformation is an essential component of the human dignity to which every death row inmate is constitutionally entitled.[25] The Court has repeatedly stated that the Eighth Amendment prohibition on cruel and unusual punishments is rooted in the idea that everyone — even a death row inmate — is entitled to human dignity.[26] Scholars have

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[17] *See infra* Part III.E.

[18] *See infra* Part IV.

[19] *See infra* Part IV.A.

[20] *See infra* Part IV.A.

[21] *See* BANNER, *supra* note 13, at 16-18; *infra* Parts III.A and IV.A.

[22] *See infra* Part III.B.

[23] *See infra* Parts III.C-E.

[24] *See infra* Part IV.A.

[25] *See infra* Part IV.B.

[26] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept

suggested that this entails allowing even the worst of offenders to retain some autonomy, such as choosing their last meals and final words, and deciding whom to invite to their executions.[27] This autonomy also involves the opportunity to transform one's own character — an event that benefits both the offender and society more generally.[28] To have a true opportunity to reform, however, death row offenders should be provided with greater rehabilitative resources, such as the opportunities to worship and to improve their educations.[29]

This Article attacks the long-held position that death is entirely irrelevant to rehabilitation and asserts that our legal tradition is based on the notion that facing death spurs rehabilitation.[30] An offender who is isolated from the general population for ten to thirteen years and who is facing a near-certain premature death is considered to have greater motivation to repent and reform his character than an offender who is not facing the solemnity of death or a possible confrontation with his Maker.[31] Part I of this Article discusses how rehabilitation is reemerging as an important punishment goal.[32] Part II explains that, despite rehabilitation's reprise, courts and scholars continue to overlook the importance of death in spurring rehabilitation.[33] Instead, courts and scholars continue to conclude with little reasoning that capital punishment is irrelevant to rehabilitation.[34] Part III attacks this conclusion.[35] It outlines the case for why capital punishment is relevant to rehabilitation, explaining that, when the death penalty was first imposed in this country, it was meant to encourage offenders' repentance.[36] Further, there is anecdotal evidence that imposing

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underlying the Eighth Amendment is nothing less than the dignity of man.").

[27] *See, e.g.*, Richard J. Bonnie, Panetti v. Quarterman: *Mental Illness, the Death Penalty, and Human Dignity*, 5 OHIO ST. J. CRIM. L. 257, 277 (2007) (suggesting that "dignity of the condemned" includes providing "a person under the shadow of death . . . the opportunity to make the few choices that remain available to him," including "hav[ing] the opportunity to decide who should be present at his execution, what he will eat for his last meal, what, if anything, he will utter for his last words, and whether he will repent or go defiantly to his grave").

[28] *See infra* Parts IV.A-B.

[29] *See infra* Part IV.B.

[30] *See infra* Parts II-III.

[31] *See infra* Part III.

[32] *See infra* Part I.

[33] *See infra* Part II.

[34] *See infra* Part II.

[35] *See infra* Part III.

[36] *See infra* Part III.A.

capital punishment on an offender actually does serve to reform that offender's character.[37] In addition, this notion that death kindles rehabilitation is central to several legal doctrines, such as the proscription against executing "insane" offenders, the dying declaration exception to hearsay, and the doctrine of finality that is germane to habeas corpus jurisprudence.[38] Finally, Part IV examines why it is important to understand the close relationship between death and rehabilitation.[39] No, this Article is not intended to provide another justification for imposing the death penalty.[40] Instead, highlighting the salience of rehabilitation is meant to unfold courts' and scholars' confusion as to the meaning of rehabilitation and encourage making more rehabilitative resources available to death row inmates.[41] The Article argues that courts and scholars have lost sight of the character-transformation component of rehabilitation and have instead migrated toward an understanding of rehabilitation that focuses on an offender's effects on society.[42] This neglect of the individual offender has led to a system in which death row inmates may be denied aspects of their constitutionally-entitled human dignity by being denied essential rehabilitative services on death row.[43]

I. THE RETURN OF REHABILITATION

Rehabilitation is making a comeback after about four decades of dormancy; it is ascending in popularity as a theory of punishment.[44] This justification for or goal of punishment was heralded and applied from the rise of penitentiaries in the United States in the late 1700s through the performance of prefrontal lobotomies on select offender patients in the mid-1970s, but rehabilitation soon lost significant support.[45] A consensus arose that rehabilitation simply did not work, and much of punishment was redirected toward retributive, deterrence-based, or incapacitative aims.[46] Now, though, several decades later, rehabilitation is on the rise.[47]

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[37] *See infra* Part III.B.

[38] *See infra* Parts III.C-E.

[39] *See infra* Part IV.

[40] *See infra* Part IV.C. In fact, I am not a supporter of capital punishment.

[41] *See infra* Parts IV.A-B.

[42] *See infra* Part IV.A.

[43] *See infra* Part IV.B.

[44] *See* Ryan, *Science*, *supra* note 1, at 4-15.

[45] *See id.*

[46] *See id.*

[47] *See id.*; *see also* Francis T. Cullen, *The Twelve People Who Saved Rehabilitation:*

The reemergence of rehabilitation can be seen in several trends. First, several states have enacted legislation implementing new rehabilitative programs — directed primarily toward addressing criminal offenders' substance abuse, mental illnesses, and reentry into society.[48] For example, in 2007, Illinois enacted a law establishing the state's first mental health courts because it concluded that significant criminal acts could be attributed to offenders' mental illnesses and substance abuse problems.[49] In Indiana, too, the state legislature enacted a law empowering local courts to create problem-solving courts, such as drug courts, mental health courts, and offender reentry courts.[50] Further, the federal government has also advanced the rehabilitative agenda, enacting the Second Chance Act in 2008, which addresses some of these same concerns.[51]

In addition to legislative action, the Supreme Court has recently been giving rehabilitation significantly more attention than usual in its decisions touching on the proper purposes of punishment. For example, in its 2010 case of *Graham v. Florida*,[52] the Court referenced the theory of rehabilitation in determining that life without the possibility of parole is an unconstitutionally cruel and unusual punishment for a juvenile offender committing a nonhomicide offense.[53] This was noteworthy because the Court has traditionally ignored rehabilitation in determining the constitutionality of a sentence under the Eighth Amendment's Punishments Clause.[54] The

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How the Science of Criminology Made a Difference, 43 CRIMINOLOGY 1, 3 (2005) (asserting that "[r]ehabilitation is making a comeback"); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 2 (2006) (noting that there is recent "reinvigorated interest in rehabilitative programs").

[48] *See* Ryan, *Science*, *supra* note 1, at 26-27.

[49] *See* 2007 Ill. Legis. Serv. 95-606 (West).

[50] *See* IND. CODE §§ 33-23-16-12, 33-23-16-20(b) (2010).

[51] *See, e.g.*, 42 U.S.C. § 3797w (2008).

[52] 130 S. Ct. 2011 (2010).

[53] *Id.* at 2029-30; *cf. id.* at 2054 (Thomas, J., dissenting) (criticizing the majority for endorsing the theory of rehabilitation by "declaring that a legislature may not 'forswea[r] . . . the rehabilitative ideal'" and simultaneously acknowledging "that rehabilitation's 'utility and proper implementation' are subject to debate" (quoting *id.* at 2030)); Ryan, *Science*, *supra* note 1, at 25 (stating that, in *Graham*, "the Court, for the first time, focused its Eighth Amendment analysis on the theory of rehabilitation").

[54] Prior to *Graham*, in its 2008 *Kennedy v. Louisiana* opinion, 554 U.S. 407 (2008), the Court did refer to rehabilitation as one of the three principal rationales under which punishment is justified. *See id.* at 420 ("[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution."). The Court did not, however, go on to analyze the relevance of rehabilitation in concluding that imposing capital punishment for the crime of child rape is unconstitutionally

Court explained that "[a] sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation [because] [t]he penalty forswears altogether the rehabilitative ideal."[55] A juvenile offender like Graham, the Court concluded, must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[56] The Court borrowed heavily from this *Graham* reasoning in its more recent Punishments Clause case of *Miller v. Alabama*.[57] In that case, the Court found unconstitutional a mandatory sentence of life imprisonment without the possibility of parole for juveniles who had committed even homicide offenses.[58] The

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cruel and unusual. *See id.* at 413 ("This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense."). The Court also mentioned reform in its 2005 *Roper v. Simmons* opinion, *see* 543 U.S. 551, 570 (2005) ("From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."), but did not clearly address the topic in its discussion of the purposes of punishment justifying the death penalty, *see id.* at 571 ("We have held there are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'" (quoting Atkins v. Virginia 536 U.S. 304, 319 (2002))). Prior to these cases, the Court occasionally mentioned rehabilitation as relevant to punishment in general but not in the instrumental way that it did in *Graham* and *Miller*. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (Kennedy, J., concurring) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."); Spaziano v. Florida, 468 U.S. 447, 477-78 (1984) (stating that rehabilitation is one of the four reasons that "punishment may rationally be imposed" but that rehabilitation "is obviously inapplicable to the death sentence").

[55] *Graham*, 130 S. Ct. at 2029-30. The Court went on to state that, "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Id.* at 2030. Further, the Court explained that "defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates." *Id.*

[56] *Id.* at 2030. The Court elaborated, stating that:

> Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.

Id. at 2032.

[57] 132 S. Ct. 2455 (2012).

[58] *See id.* at 2460 ("We therefore hold that mandatory life without parole for those

Court again emphasized juveniles' capacities for reform[59] and that the punishment of life without the possibility of parole completely disregards the possibility of offender rehabilitation.[60] Instead, the offender must have the opportunity to rehabilitate himself.[61]

One might even consider the uptick in the number of states abandoning the death penalty as evidence of the ascending popularity of rehabilitation.[62] Since 2004, five states have relinquished their capital punishment schemes.[63] In 2004, the death penalty in New York was held unconstitutional,[64] and death penalty proponents were subsequently unsuccessful in restoring the death penalty statute in the state.[65] On December 17, 2007, New Jersey was the first state to statutorily abolish the death penalty since the Supreme Court struck down the death penalty in its famous *Furman v. Georgia* opinion.[66] In

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under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" (citation omitted)).

[59] *See id.* at 2464-65 ("Because juveniles have diminished culpability and greater prospects for reform, . . . 'they are less deserving of the most severe punishments.'" (citing *Graham*, 130 S. Ct. at 2026)); *cf. infra* note 102 (explaining how the term "reform" is often used interchangeably with "rehabilitation").

[60] *See id.* at 2465, 2468 (stating that "[l]ife without parole 'forswears altogether the rehabilitative ideal'" and that "this mandatory punishment disregards the possibility of rehabilitation" (citing *Graham*, 560 U.S. at 2030)).

[61] *See id.* at 2469 (stating that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders and referencing the *Graham* opinion for the proposition that a state "must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'" (citing *Graham*, 560 U.S. at 2030)).

[62] Capital punishment is ordinarily thought to be incapable of serving a rehabilitative goal and therefore irrelevant to rehabilitation. *See infra* Part II.

[63] *See States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 20, 2012) (listing New York, New Jersey, New Mexico, Illinois, and Connecticut as having recently abolished the death penalty).

[64] *See* People v. LaValle, 817 N.E.2d 341, 344, 365, 367 (N.Y. 2004) (finding the statutorily mandated jury deadlock instruction in New York capital cases violative of the state constitution and concluding that, because a jury deadlock instruction is necessary in such cases, the statutorily authorized death penalty is unconstitutional).

[65] *See States With and Without the Death Penalty*, *supra* note 63.

[66] 408 U.S. 238 (1972) (per curiam); *see* Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES (Dec. 18, 2007), http://www.nytimes.com/2007/12/18/nyregion/18death.html?_r=0; *Death Penalty Banned in N.J.: First State in 43 Years to Abolish Capital Punishment*, MSNBC (Dec. 18, 2007), http://www.nbcnews.com/id/22296966/ns/us_news-crime_and_courts/t/nj-first-state-years-ban-death-penalty/#.UN_k129pd2A. The Court struck down the death penalty as it was being applied, because it was being imposed in such an arbitrary manner. *See Furman*, 408 U.S. at 239-40 ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual

2009, New Mexico followed suit, becoming the second state to abandon the death penalty since *Furman* and the first "Wild West" state to do so.[67] Illinois and Connecticut also repealed their state death penalty statutes in 2011 and 2013, respectively.[68] These five states are the only ones to reject capital punishment since the Massachusetts Supreme Court struck down that state's death penalty statute as unconstitutional in 1984.[69] Accordingly, in the span of just over a decade, the United States has shifted from over 75% of jurisdictions endorsing capital punishment to just 66%.[70] In the prior two decades that 75% figure was contrastingly unshakeable.[71]

Because it is generally accepted that the death penalty is incompatible with rehabilitative goals,[72] one might conclude that an abandonment of the death penalty also marks a return to

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punishment in violation of the Eighth and Fourteenth Amendments."); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1237 (5th ed. 2009) (explaining that, in *Furman*, "a sharply divided Court held that the death penalty was so arbitrarily and randomly imposed that it violated the Eighth Amendment").

[67] *See* Dan Boyd, *Repealed: Richardson Signs Bill Abolishing Death Penalty in N.M.*, ALBUQUERQUE J. (Mar. 19, 2009), http://www.abqjournal.com/news/state/191028406892newsstate03-19-09.htm; *Death Penalty Is Repealed In New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16, *available at* http://www.nytimes.com/2009/03/19/us/19execute.html?_r=2&; Dave Maass, *Ranked Choices*, SANTA FE REP. (Mar. 25, 2009), http://www.sfreporter.com/santafe/article-4402-ranked-choices.html.

[68] *See* Daniela Altimari, *End of an Era: Governor Signs Measure Eliminating Capital Punishment*, HARTFORD COURANT, Apr. 26, 2012, at A1; *Ill. Tosses the Death Penalty: Gov. Quinn Makes It Official: Capital Punishment Abolished in the State*, CHI. TRIB., Mar. 10, 2011, at 6.

[69] *See* Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 124, 129 (Mass. 1984) (finding that the statute authorizing capital punishment violated the state constitution by infringing on defendants' rights against self-incrimination and rights to jury trials). Attempts to reinstate capital punishment in Massachusetts have been unsuccessful. *See Massachusetts*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/massachusetts-0 (last visited June 20, 2012); *see also* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 417-18 (2002) (noting that there have been several attempts to reinstate the death penalty in Massachusetts).

[70] Currently, seventeen states do not have the death penalty: Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See States With and Without the Death Penalty*, *supra* note 63. The District of Columbia also does not have the death penalty. *See id.* The remaining thirty-three states, as well as the federal government and military, do have the death penalty. *See id.* But Maryland appears to be on the verge of abandoning the death penalty as well. *See* Michael Dresser & Erin Cox, *House Votes to End Death Penalty*, BALT. SUN, Mar. 16, 2013, at 1A.

[71] *See id.*

[72] *See infra* Part II.

rehabilitation.[73] This is possible, but it is important to note that the death penalty's descent might also be attributable to today's uncertain economic climate. The United States has been struggling to recover from its most extreme economic downturn in decades,[74] and the death penalty is not only the most severe punishment imposed on offenders, but it is also, by far, the most expensive.[75] While the cost of capital punishment varies by jurisdiction, one expert has estimated that each capital trial may cost a million dollars more than a noncapital trial.[76] Economics may be the primary reason for the death penalty's abatement, but rehabilitation's reemergence may still play a role in the status of this ultimate punishment in the United States.

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[73] This logic may suffer from an inverse error ("fallacy of denying the antecedent"), though. Even if imposition of the death penalty means that there can be no rehabilitation ($p \rightarrow q$), this does not necessarily suggest that if the death penalty is not imposed, then there will be rehabilitation ($\sim p \rightarrow \sim q$). *See* SUSANNA S. EPP, DISCRETE MATHEMATICS WITH APPLICATIONS 58 (2010).

[74] *See* Dan Balz et al., *The Candidates Focus On Pocketbook Issues: McCain and Obama Debate How to Fix Financial Crisis*, WASH. POST, Oct. 8, 2008, at A1 (noting that President Obama referred to the economic crisis as the "worst . . . since the Great Depression"); Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet In Sight*, WALL ST. J., Sept. 18, 2008, at A1, *available at* http://online.wsj.com/article/SB122169431617549947.html (quoting economist Mark Gertler of New York University, who stated: "This has been the worst financial crisis since the Great Depression. There is no question about it.").

[75] *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 594 (2010) ("[C]apital sentencing schemes are more expensive than non-capital sentencing schemes."). The Death Penalty Information Center has summarized:

> There is no national figure for the cost of the death penalty. Every state study is dependent on that state's laws, pay scales, and the extent to which it uses the death penalty. Studies have been conducted by research organizations, public defender offices, legislative committees, and the media. Researchers have employed different approaches, using different assumptions. However, all of the studies conclude that the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison.

RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS: NATIONAL POLL OF POLICE CHIEFS PUTS CAPITAL PUNISHMENT AT BOTTOM OF LAW ENFORCEMENT PRIORITIES 14 (2009), *available at* http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf.

[76] *See id.* In California, a 2008 study estimated that the state was spending over $125 million per year more on its capital sentencing system than it would on a noncapital sentencing system. *See id.*

II. CAPITAL PUNISHMENT'S ASSERTED IRRELEVANCE TO REHABILITATION

Although rehabilitation is reemerging as an important penological goal or justification, rehabilitation has been largely overlooked in the capital context.[77] For generations, capital punishment has been premised on two primary goals or justifications for punishment: retribution and deterrence.[78] And repeatedly, courts have stated that the punishment of death clearly cannot serve the purpose of rehabilitation.[79] They have failed to clearly explain, though, why capital punishment is irrelevant to rehabilitation. For example, in *Rummel v. Estelle*,[80] the Court stated that "[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind . . . . It is unique in its rejection of rehabilitation of the convict as

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[77] The *Graham* Court drew on *Roper v. Simmons* — a capital case — in its analysis, but the *Roper* opinion, which struck down the juvenile death penalty, made little mention of rehabilitation as a penological goal. The Court expressed that it would be "misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." Roper v. Simmons, 543 U.S. 551, 570 (2005). But the *Roper* opinion stated, just as its predecessors did, that "there are two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes by prospective offenders." *Id.* at 571 (internal quotations omitted).

[78] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) (explaining that "capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes"); *Roper*, 543 U.S. at 571 ("We have held there are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'"); Gregg v. Georgia, 428 U.S. 153, 183 (1976) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."); *see also* Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 554 (2012) (explaining that the Court ordinarily examines the penological purposes of retribution and deterrence when determining, in its own independent judgment, whether a punishment is unconstitutionally cruel and unusual).

[79] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 995-96 (1991) (citing Justice Stewart's concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), that the death penalty "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice"); Towery v. Brewer, 672 F.3d 650, 653 (9th Cir. 2012) (per curiam) ("The penalty of death differs from all other forms of criminal punishment . . . . It is unique in its rejection of rehabilitation." (citing *Furman*, 408 U.S. at 306) (Stewart, J., concurring)); United States v. Moore, 643 F.3d 451, 455 (6th Cir. 2011) (quoting Supreme Court precedent); Ross v. State, 954 So.2d 968, 986 (Miss. 2007) (explaining that capital punishment "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice"); Burnett v. State, 311 S.W.3d 810, 816 n.4 (Mo. Ct. App. 2009) (quoting Supreme Court precedent).

[80] 445 U.S. 263 (1980).

a basic purpose of criminal justice."[81] The Court did not explain why capital punishment rejects rehabilitation, however.[82] The *Rummel* majority was quoting Justice Stewart's concurring opinion in the Court's seminal *Furman v. Georgia* decision,[83] which similarly does not explain the conclusion,[84] and the *Rummel* majority was also building on Justice Marshall's concurring opinion in the same case, in which he austerely espouses that "[d]eath, of course, makes rehabilitation impossible."[85] The Court repeated the presumption that "death differs . . . in its rejection of rehabilitation" once again in *Harmelin v. Michigan*;[86] and Justice Stevens embraced this sentiment when he stated in *Harris v. Alabama*[87] that, "[i]n capital sentencing decisions, . . . rehabilitation plays no role."[88] This mantra that capital punishment rejects rehabilitation, while regularly echoed by courts, remains inadequately supported.[89]

Scholars have agreed that the goal of rehabilitation cannot support capital punishment, but they, too, have neglected to clearly explain their reasoning.[90] One scholar has boldly stated that "[r]ehabilitation is obviously inapplicable" when dealing with the death penalty.[91] Another has off-handedly referred to capital punishment as "the one

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[81] *Id.* at 272 (quoting Justice Stewart's concurrence in *Furman*, 408 U.S. at 306). Justices Blackmun, Stewart, White, and Chief Justice Burger joined Justice Rehnquist in this opinion. *See id.*

[82] *See id.*

[83] *Furman*, 408 U.S. at 238 (1972); *see supra* text accompanying note 66.

[84] *See Furman*, 408 U.S. at 306 (Stewart, J., concurring).

[85] *Id.* at 346 (Marshall, J., concurring).

[86] 501 U.S. 957, 995 (1991). Justices O'Connor, Kennedy, Souter, and Chief Justice Rehnquist joined Justice Scalia in this opinion. *See id.* at 996.

[87] 513 U.S. 504 (1995).

[88] *Id.* at 517 (Stevens, J., dissenting).

[89] *See, e.g.*, Towery v. Brewer, 672 F.3d 650, 653 (9th Cir. 2012) (per curiam) (neglecting to explain why capital punishment "is unique in its rejection of rehabilitation"); United States v. Moore, 643 F.3d 451, 455 (6th Cir. 2011) (quoting the Supreme Court's mantra but failing to explain any reasoning behind it); Ross v. State, 954 So.2d 968, 986 (Miss. 2007) (stating that capital punishment "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice" but neglecting to support the assertion); Burnett v. State, 311 S.W.3d 810, 816 n.4 (Mo. Ct. App. 2009) (quoting with little explanation the Supreme Court notion that capital punishment rejects rehabilitation).

[90] *But cf.* Jeffrie G. Murphy, *Christianity and Criminal Punishment*, 5 PUNISHMENT & SOC'Y 261, 267-68 (2003) [hereinafter *Christianity*] (asserting that *forgiving* offenders may be compatible with executing them).

[91] Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 47 (1980); *see also, e.g.*, MARK TUSHNET, THE DEATH PENALTY 2 (1994) (indicating that rehabilitation is "irrelevant . . . in the death penalty debate").

punishment that can never rehabilitate."[92] Attempting some justification for this commonly-reached conclusion, though, one commentator has stated that "[i]t would be a sad joke to say the death penalty rehabilitates because the person that needs reformation receives no benefit."[93] This is the general extent, though, to which scholars have sought to justify the well-accepted principle.

At first blush, courts' and scholars' conclusion that capital punishment is irrelevant to rehabilitation seems to make sense: How can an offender be rehabilitated if he is being put to death? Once the offender is injected with a lethal dose of potassium chloride, or once the switch is thrown on the electric chair, the offender will have no opportunity to establish that he has, in fact, been rehabilitated. Further, the act of execution alone does not, in this world, magically transform a defendant, other than from life to death.[94] But, in modern-day sentencing, capital punishment involves not only the final act of execution, but also a significant stay on death row.[95] And capital inmates ordinarily spend approximately thirteen years on death row before their executions.[96] During this extensive period, they have little to do other than contemplate their deaths and how they arrived at this place.[97] This is a time during which one might see a transformation in capital offenders.[98]

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[92] Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 141 n.120 (1998).

[93] Lupe S. Salinas, *Is It Time to Kill the Death Penalty?: A View From the Bench and the Bar*, 34 AM. J. CRIM. L. 39, 57 (2006). This argument that the death row inmate receives no benefit is arguably at odds with the experience of several death row inmates who claim that they have been reformed. *See infra* Part III.B. Texas's infamous Karla Faye Tucker, for example, expressed before her execution that she had been reformed after being locked up. *See infra* text accompanying notes 128-141.

[94] According to some belief systems, death does transform an individual beyond from life to death. At the moment of death an individual is transformed into another life form or into a divine being. *See* CONTEMPORARY AMERICAN RELIGION 10 (Wade Clark Roof ed., 1999).

[95] *See* Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 302 (2012) [hereinafter *Wrongful Execution*].

[96] *See id.* at 302; Margaret Vandiver & David J. Giacopassi, *Geriatric Executions: Growing Old and Dying on Death Row*, 46 CRIM. L. BULL. 470 (2010).

[97] *See infra* Part IV.B (explaining how death row inmates have little to do as they wait to be executed).

[98] For a handful of stories of inmates becoming rehabilitated on death row, see *infra* Part III.B.

III. THE RELEVANCE OF DEATH AND REHABILITATION

Despite courts' and scholars' naked assertions that capital punishment is irrelevant to rehabilitation, the death penalty has long been thought to act as a catalyst for an offender's change in his character. It is commonly thought that a person facing death has the motivation to assess his life and to come to terms with his past wrongful actions.[99] This may be inspired by religious fear that he will otherwise not be accepted into heaven or the psychological forces associated with the seriousness and finality of death.[100] And this transformative force is especially present when capital offenders face extensive stays on death row to contemplate their impending deaths. This notion of death's transformative effect has long been held as true in both our societal and legal cultures.[101] Moreover, although the close association between rehabilitation and capital punishment has been lost over the years, vestiges of these ends' close alignment remain firmly rooted in modern legal doctrines.

A. The History of Capital Punishment

The history of the death penalty in America does not support the near-universal conclusion that capital punishment is irrelevant to rehabilitation. As Professor Stuart Banner has explained, death was imposed in the seventeenth and eighteenth centuries to encourage an offender to repent and rehabilitate himself.[102] Along with retribution

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[99] *See infra* Part III.A-B; *cf.* PEW RESEARCH CENTER, THE 2004 POLITICAL LANDSCAPE: EVENLY DIVIDED AND INCREASINGLY POLARIZED (2003), *available at* http://www.people-press.org/2003/11/05/part-9-other-issues-civil-liberties-immigration-technology-environment/ (reporting that 72% of Americans believe that criminals should be rehabilitated); Murphy, *Christianity*, *supra* note 90, at 262, 264, 270, 275 (explaining that Christianity significantly influences many individuals' moral outlooks today and that Christians are concerned with "what happens to the human soul — in this life and the next").

[100] *See, e.g.*, *infra* Part III.D.

[101] *See, e.g.*, *infra* Parts III.A-E.

[102] BANNER, *supra* note 13, at 16-17 (stating that "[c]apital punishment was . . . understood in the seventeenth and eighteenth centuries to facilitate the criminal's repentance," and that "[i]n this respect a death sentence was of inestimable value"); *see also* Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 664 (2010) (noting that there was a "consensus" during this period that the offender's salvation — "to be secured by the power of the impending execution to focus an offender's attention on his redemption" — was important). Scholars are somewhat inconsistent in clearly articulating the relationship between rehabilitation, reform, and repentance. Ordinarily, they use the terms "rehabilitation" and "reform" interchangeably, failing to distinguish between the two. *See infra* text accompanying notes 192-200. When

and deterrence, this was considered one of the "three important purposes" of capital punishment.[103] Repentance was key because it was thought to be a significant factor in determining the individual's "eternal fate after death."[104] If one were able to mentally prepare himself for his death with contrition, he could salvage his eternal life.[105] And little provoked repentance like the scheduled death of capital punishment.[106] The citizenry considered this practice as having a "unique[]" ability to "facilitate repentance."[107]

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referring to rehabilitation and repentance, scholars vary in how they view the relationship between these two ideas but generally agree that they are integrally related. *See, e.g.*, R.A. Duff, *Guidance and Guidelines*, 105 COLUM. L. REV. 1162, 1182-83 (2005) (suggesting that rehabilitation may be attained through repentance); Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 294-95 (2007) (suggesting that repentance is integral to rehabilitation); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 996 (2003) (using "repentance" and "rehabilitation" interchangeably when stating that, "[a]lthough the Quakers expected prison sentences to produce repentance, there was nothing rehabilitative about them"); Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 442 (2007) (suggesting that rehabilitation might be "thought to be present when remorse and repentance are present"); Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455, 457 (2007) (suggesting that repentance is a path to rehabilitation); John Tasioulas, *Repentance and the Liberal State*, 4 OHIO ST. J. CRIM. L. 487 488-89, 492 (2007) (explaining his robust understanding of repentance, which includes "resolv[ing] not to commit such a wrong again, "overcom[ing] moral defects," and thus "achiev[ing] genuine moral growth," and suggesting a close, overlapping relationship between repentance and rehabilitation).

[103] BANNER, *supra* note 13, at 16-23. Further, expiation was another reason capital punishment was imposed in the seventeenth and eighteenth centuries. *See id.* at 15. According to Professor Banner, criminals were sometimes moved to confess to capital crimes so that they could, in that way, pay their moral debts with their blood. *See id.*

[104] *Id.* at 16; *see also* Steiker & Steiker, *supra* note 102, at 663-64.

[105] *See* BANNER, *supra* note 13, at 16; Steiker & Steiker, *supra* note 102, at 663-64; *see also* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 3 n.6 (2012) ("Even men condemned to die were still valued as children of God, who could at least symbolically achieve reintegration into society."). As Professor Banner has explained, "[o]ne had to achieve a proper consciousness of God before it was too late." BANNER, *supra* note 13, at 16.

[106] BANNER, *supra* note 13, at 17, 28; *see also* Steiker & Steiker, *supra* note 102, at 663-64 (explaining that there was "a consensus about the importance of the criminal's salvation (to be secured by the power of the impending execution to focus an offender's attention on his redemption)"). Capital punishment was considered "of inestimable value" to the goal of offender repentance. BANNER, *supra* note 13, at 17.

[107] BANNER, *supra* note 13, at 23; *see also* JAMES BOSWELL, 2 THE LIFE OF SAMUEL JOHNSON, LL.D. 552 (1793) (quoting Samuel Johnson as stating that "when a man knows he is about to be hanged in a fortnight, it concentrates his mind wonderfully"). Not only did executions in early America encourage the offender's repentance, but they also facilitated the repentance of the citizenry at large. *See* BIBAS, *supra* note 105,

The offender's rehabilitation was so central to the reasoning behind capital punishment in early America that the authorities afforded capital offenders a rather significant period of time before the sentence was carried out so that the offenders had opportunity to repent.[108] This was before decade-long stays on death row were often deemed necessary to satisfy defendants' constitutional rights in the wake of the criminal procedural revolution of the 1960s and 1970s.[109] Allowing the offenders this time to repent came at a price, though — one that the value of repentance was deemed to outweigh.[110] First, feeding and housing the offender for these extra weeks was quite costly for the early colonial governments.[111] The local governments lacked steady incomes, thus feeding and housing these offenders was a noteworthy sacrifice for them.[112] Second, delaying the execution created a significant risk that the offender would escape custody.[113] This was not a rare occurrence during this time period — "[e]ighteenth-century records are [replete with accounts of] inmates escaping after being

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at 10-11. Citizens would attend public executions because they aroused their curiosity, but citizens also attended these public spectacles "to sympathize and learn." *Id.* Ministers would preach about temptation and sin, emphasizing the importance of the citizen observers recognizing their own sins as well. *See id.*

[108] *See* BIBAS, *supra* note 105, at 17-20; Steiker & Steiker, *supra* note 102, at 663 ("It was common to allow a period of several weeks or even months to elapse between sentencing and execution to facilitate the offender's repentance and to make arrangements for the edifying spectacle that the execution was expected to offer."). This period often amounted to several weeks. *See* BANNER, *supra* note 13, at 17.

[109] *See* BANNER, *supra* note 13, at 265; Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 31 n.169 (2007) (characterizing *Furman* as part of the criminal procedural revolution). Today, the average stay on death row is around thirteen years. *See* sources cited *supra* note 96. One commentator has suggested that such long stays on death row serve a purpose beyond satisfying constitutional criminal procedural requirements: it provides the necessary time for others to disconnect with the offender and treat him as if he is already dead so that "the clinical killing [can] take place without anyone having to feel any guilt or personal responsibility at all." BRUCE JACKSON & DIANE CHRISTIAN, DEATH ROW 30-31 (1980). The delay "exists to let the bureaucracy of death function without the burden of sin." *Id.* at 31.

[110] There was also another modest benefit to delaying punishment: providing the authorities with more time to advertise the public execution of the offender. *See* BANNER, *supra* note 13, at 17.

[111] *See id.*; Steiker & Steiker, *supra* note 102, at 663-64 (stating that "the simple housing and feeding of the condemned was a 'significant expense'" (citation omitted)).

[112] *See* BANNER, *supra* note 13, at 17 ("Simply housing and feeding a condemned criminal in jail during the interim was a significant expense for units of colonial government that never took in much money.").

[113] *See id.*; Steiker & Steiker, *supra* note 102, at 663-64 (explaining that the "cost of pursuing and recapturing condemned inmates who escaped from the often insecure jails" was quite expensive).

sentenced to death."[114] And those facing execution had little to lose by attempting escape.[115] Finally, delaying the execution weakened the retributive and deterrent values of the sentence.[116] For the public, delay attenuated the association between crime and punishment, diluting citizens' impressions that the crime merited that punishment and also that the punishment would actually be carried out.[117] Considering these disadvantages of delaying punishment, the authorities must have placed great value on the offender's opportunity to repent.

B. Anecdotal Effectiveness

In addition to historical support that capital punishment is relevant to rehabilitation, there is anecdotal evidence that death row inmates' characters may change during their stays on death row.[118] For example, there is the story of Paul Crump, a man sentenced to death

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[114] BANNER, *supra* note 13, at 17-18.

[115] *See id.* at 17.

[116] *See id.* at 16-17.

[117] *See id.* at 17. It is well accepted that a delay in imposing punishment detracts from the punishment's deterrence value. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58-59, 93-99 (Henry Paolucci trans., 1963) (1794) (explaining that effective deterrence rides on the certainty of punishment, the speed with which it is imposed, and its severity); JAMES Q. WILSON, THINKING ABOUT CRIME 134-35 (1975) (noting that the speed with which sentences are imposed is an important factor in the deterrent value of a punishment); Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 961 n.21 (1966) ("Threats of punishment in the distant future are not as a rule as important in the process of motivation as are threats of immediate punishment."); Lewis F. Powell, Jr., *Capital Punishment*, 102 HARV. L. REV. 1035, 1035 (1989) (stating that "years of delay between sentencing and execution . . . undermines the deterrent effect of capital punishment"). Some scholars have asserted that such a delay also dilutes the retributive value of a punishment. *See* James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 24 (2009) (suggesting that the speed with which punishment is imposed is also relevant to the retributive value of the punishment); Joan MacLeod Heminway, *Hell Hath No Fury Like an Investor Scorned: Retribution, Deterrence, Restoration, and the Criminalization of Fraud Under Rule 10B-5*, 2 J. BUS. & TECH. L. 3, 7 n.23 (2007) (suggesting that increasing the speed with which punishment is imposed on an offender may further the punishment's retributive purpose). *But see* Stephen P. Garvey, *Death-Innocence and the Law of Habeas Corpus*, 56 ALB. L. REV. 225, 262-63 (1992) ("With its focus on dispensing just deserts, retributivism is not immediately preoccupied with the speed at which punishment is inflicted. Its foundational justification is to impose deserved punishment, and only deserved punishment.").

[118] There are several stories of individuals being transformed on death row, but of course it is difficult to determine whether these individuals are actually transformed or just acting as if they have been reformed in the hope of achieving other goals.

for killing the chief security officer at a Chicago meatpacking plant in 1953.[119] After some time on death row, Crump is said to have transformed himself — from an "animalistic and belligerent" creature to a compassionate man who developed a deep friendship with the warden who kept him imprisoned.[120] The warden attributed the transformation to denying the death row inmate privileges, isolating him, "reduc[ing] the emphasis on punishment, listening to prisoner complaints, providing education and group counseling, and sharing "words of love."[121] Treating Crump as a human being in this way allowed Crump to discover his conscience and his humanity and positively contribute to prison life.[122] Also while on death row, Crump began reading and writing, and he authored a novel entitled *Burn, Killer, Burn*, which was later turned into a documentary.[123] Some viewed this as even further evidence that Crump had been rehabilitated.[124] Ultimately, Crump was considered the "quintessential" example of rehabilitation on death row.[125] As his prison warden put it, "[t]hrough the irony of living under prolonged death sentence, the old [death row inmate] was dying, just as surely as if he had been burned in the electric chair."[126] In other words, Crump had transformed his character.[127]

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[119] *See* Rudolph Bush, *Paul Crump, 72: Convict Became Author on Death Row*, CHI. TRIB., Oct. 17, 2002, http://articles.chicagotribune.com/2002-10-17/news/0210170036_1_mr-crump-death-row-parole-board; *Paul Crump, Killer Who Wrote Novel, Dies at 72*, N.Y. TIMES, Oct. 17, 2002, http://www.nytimes.com/2002/10/17/obituaries/17CRUM.html [hereinafter *Paul Crump*]; Kirsten Scharnberg, *One-Time Inmate on Death Row Back Before Court*, CHI. TRIB., Nov. 9, 2001, http://articles.chicagotribune.com/2001-11-09/news/0111090152_1_electric-chair-sentence-prison. The *Chicago Tribune* reported that Crump's case "focused national attention on prisoner rehabilitation." Bush, *supra*, at 9.

[120] Ronald Bailey, *Facing Death, a New Life Perhaps Too Late*, LIFE MAGAZINE, Jul. 27, 1962, at 28-29, *reprinted as Rehabilitation on Death Row*, *in* THE DEATH PENALTY IN AMERICA 556-63 (Hugo Adam Bedau ed., 1964). Prior to Crump's rehabilitation, he was described as "choked up with hatred[;] . . . [s]elf-preservation was the only law he knew." *Id.* at 556.

[121] *See id.* 557-61.

[122] *See id.* 560-62.

[123] *See* Bush, *supra* note 119; *Paul Crump*, *supra* note 119; Scharnberg, *supra* note 119, at 2.

[124] *See Paul Crump*, *supra* note 119 ("Those who backed Mr. Crump's efforts for parole, including the Rev. Billy Graham and the gospel singer Mahalia Jackson, viewed the book as proof that he had been rehabilitated.").

[125] Bush, *supra* note 119 (quoting Rob Warden, Executive Director, Center on Wrongful Convictions, Northwestern University School of Law).

[126] Bailey, *supra* note 120, at 560.

[127] Crump had his sentence commuted "to 199 years imprisonment." *Id.* The

Another story of transformation when facing death is that of Karla Faye Tucker. In 1983, Tucker and her boyfriend, who were high on drugs, broke into the home of their acquaintance, Jerry Dean, to scare him and steal motorcycle parts.[128] Tucker and her boyfriend ended up brutally murdering Dean, as well as the woman who was spending the night with him.[129] Tucker's weapon of choice was the pickax, making the murders especially heinous.[130] Understandably, it was believed that Tucker would be executed for her crimes.[131] While in jail awaiting trial, Tucker freed herself from drugs, which had been a lifelong companion, and also accepted responsibility for her crimes and became a born-again Christian.[132] Tucker regularly attended Bible classes and concentrated on improving her education.[133] In one commentator's words, "a remarkable change . . . had taken place"[134]:

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governor justified this action, stating that "[t]he embittered, distorted man who [committed] a vicious murder no longer exists . . . . Under these circumstances, it would serve no useful purpose to take this man's life . . . ." *Id.* at 563. Crump served approximately forty years in prison before being paroled in 1993. *See* Bush, *supra* note 119. Over eight years later, though, Crump found himself back before a judge after violating a restraining order procured by his sister. *See* Scharnberg, *supra* note 119. His troubles after being paroled have been reported as stemming from his diagnosed paranoid schizophrenia. *See id.*

[128] *See* Beverly Lowry, *The Good Bad Girl*, THE NEW YORKER, Feb. 9, 1998, at 63-64; Sam Howe Verhovek, *Execution in Texas: The Overview; Divisive Case of a Killer of Two Ends as Texas Executes Tucker*, N.Y. TIMES, Feb. 4, 1998, http://www.nytimes.com/1998/02/04/us/execution-texas-overview-divisive-case-killer-two-ends-texas-executes-tucker.html. Other sources suggest that Tucker and her boyfriend sought to simply "case the joint," see Interview by Larry King with Karla Faye Tucker (Jan. 14. 1998), (transcript available at http://edition.cnn.com/2007/US/03/21/larry.king.tucker/index.html), or else steal an entire motorcycle, Sue Anne Pressley, *Pro-Death Penalty But Chivalrous Texans Debate Fate of Karla Faye Tucker*, WASH. POST, Jan. 25, 1998, http://www.highbeam.com/doc/1P2-645284.html.

[129] *See* Lowry, *supra* note 128, at 63-66.

[130] *See id.* at 64, 66.

[131] *See* LINDA STROM, KARLA FAYE TUCKER SET FREE: LIFE AND FAITH ON DEATH ROW 47 (2000).

[132] *See* BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR 147-50, 198 (1992); STROM, *supra* note 131, at 47; Christy Drennan, *On Death Row, Pickax Murderer Finds a "New Life,"* HOUS. CHRON., Mar. 28, 1986, http://www.chron.com/CDA/archives/archive.mpl?id=1986_228093; Sam Howe Verhovek, *Texas, in First Time in 135 Years, Is Set To Execute Woman*, N.Y. TIMES, Feb. 3, 1998, http://www.nytimes.com/1998/02/03/us/texas-in-first-time-in-135-years-is-set-to-execute-woman.html; Interview by Larry King with Karla Faye Tucker, *supra* note 128. Although Tucker is said to have transformed herself prior to being placed on death row, the same power of death likely contributed to her transformation, as it was expected that she would be executed for her crimes. *See* STROM, *supra* note 131, at 47.

[133] *See* LOWRY, *supra* note 132, at 149, 191; Drennan, *supra* note 132, at 1.

[134] *See* STROM, *supra* note 131, at 22.

"[t]he cold-blooded killer who had hidden from authorities became a repentant and emotional woman who confessed to the murders she had committed, testifying during the punishment phase of her trial that even being pickaxed herself would be insufficient to atone for her crime." Some questioned whether Tucker's alleged transformation was just a "jail house conversion."[135] But Tucker had numerous supporters, including the prison chaplain, who claims she "knows about inmates *playing* church."[136] Insisting that Tucker's transformation was genuine, the chaplain even testified as a character witness at Tucker's trial — the only offender's trial at which the chaplain had ever testified.[137] Ultimately, Tucker was convicted and sentenced to death.[138] Her appeals were denied, and Texas Governor George W. Bush denied her request for reprieve.[139] Tucker was executed by lethal injection on February 3, 1998.[140] She was the first woman executed in Texas since the Civil War and only the second executed in the nation since the death penalty was reinstated after it was famously struck down in *Furman v. Georgia*.[141]

Stanley "Tookie" Williams III is another subject of reported rehabilitation on death row. Williams was the seventeen-year-old co-founder of the notorious Los Angeles Crips gang who was convicted of a quadruple murder in 1981.[142] At the age of twenty-five, he had walked into a 7-Eleven with a sawed-off shotgun and a few friends and executed the store's night clerk.[143] A couple of weeks later, he

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[135] *See, e.g.*, Interview by Larry King with Karla Faye Tucker, *supra* note 128 (asking Tucker whether this was the case).

[136] LOWRY, *supra* note 132, at 149-50 (emphasis added); Lowry, *supra* note 128, at 60 (explaining how Tucker had become a "media star" and that "[e]ven prosecutors were speaking up for her").

[137] *See* LOWRY, *supra* note 132, at 149-51.

[138] *See* Drennan, *supra* note 132, at 1.

[139] *See* Verhovek, *supra* note 128.

[140] *See* Sue Anne Pressley, *Texas Executes a Woman*, WASH. POST, Feb. 4, 1998, at A1, *available at* http://www.washingtonpost.com/wp-srv/national/frompost/dec98/woman9.htm; Verhovek, *supra* note 128.

[141] 408 U.S. 238 (1972) (per curiam); *see* Pressley, *supra* note 140; Verhovek, *supra* note 128; *supra* text accompanying note 66 (explaining that *Furman* struck down the death penalty because it was being arbitrarily imposed).

[142] *See* Evelyn Nieves, *Antigang "Role Model" Is Up for a Nobel and Execution*, N.Y. TIMES, Dec. 6, 2000, http://www.nytimes.com/2000/12/06/us/antigang-role-model-is-up-for-a-nobel-and-execution.html.

[143] *See* Williams v. Woodford, 384 F.3d 567, 578-79 (9th Cir. 2004); Kimberly Sevcik, *Has Stanley Williams Left the Gang?*, N.Y. TIMES, Aug. 10, 2003, http://www.nytimes.com/2003/08/10/magazine/has-stanley-williams-left-the-gang.html.

murdered the owners of a hotel, along with their daughter.[144] Unsurprisingly, Williams was sentenced to death.[145] While waiting lethal injection on San Quentin's death row, Williams seemed to undergo a personal transformation. Although he never admitted being guilty of the crimes for which he was convicted,[146] Williams described his former self as "a despicable human being without a conscience."[147] Further, Williams crusaded against the gang culture that he had helped establish and that had consumed his life prior to prison.[148] He published a series of children's books preaching an anti-gang message and started an internet project to further his cause.[149] For his work in dissolving the gang culture, Williams was nominated for a Nobel Peace Prize three times.[150] Even the Ninth Circuit acknowledged William's "good works and accomplishments since incarceration" and suggested that he was "a worthy candidate for the exercise of gubernatorial discretion"[151] — a very rare comment for a federal appellate court.[152] Despite this recommendation, California Governor Arnold Schwarzenegger denied Williams's clemency petition, and Williams was executed for his crimes on December 13, 2005.[153]

C. Prohibition on Executing the "Insane"[154]

Although there is little scientific or statistical evidence demonstrating the extent to which offenders facing death are actually transformed, this intuition that a death sentence promotes

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[144] *See Williams*, 384 F.3d at 579; Sevcik, *supra* note 143.

[145] *See Williams*, 384 F.3d at 581.

[146] *See* Nieves, *supra* note 142; Sevcik, *supra* note 143.

[147] Sevcik, *supra* note 143.

[148] *See* Nieves, *supra* note 142; Sevcik, *supra* note 143.

[149] *See supra* note 148 and sources cited therein. Williams also published books directed at a wider audience. *See, e.g.*, STANLEY TOOKIE WILLIAMS, BLUE RAGE, BLACK REDEMPTION: A MEMOIR (2004) (chronicling his life); STANLEY TOOKIE WILLIAMS, LIFE IN PRISON (2001) (describing his reality as a prison inmate).

[150] *See* Sevcik, *supra* note 143.

[151] Williams v. Woodford, 384 F.3d 567, 628 (9th Cir. 2004).

[152] *See* Henry Weinstein, *Death Upheld for Crips Founder*, L.A. TIMES, Sept. 11, 2002, http://articles.latimes.com/2002/sep/11/local/me-death11/2 (reporting that experts stated that "they were unaware of any previous appellate decision in which the judges made a similar clemency suggestion about a death row inmate").

[153] *See* Sarah Kershaw, *Execution Ignites New Fire in Death Penalty Debate*, N.Y. TIMES, Dec. 14, 2005, http://www.nytimes.com/2005/12/14/national/14tookie.html.

[154] Although I would prefer a more precise and sensitive term than "insane," I use this term because it is the one used by the Supreme Court in its seminal case on the matter, *Ford v. Wainwright*, 477 U.S. 399 (1986).

rehabilitation underlies several legal doctrines, making it central to our legal landscape. For example, in its 1986 death penalty case of *Ford v. Wainwright*,[155] the Court emphasized this idea of death row transformation or repentance.[156] In explaining its conclusion that the Eighth Amendment's Punishments Clause prohibits executing "insane"[157] individuals, the Court observed that it has long been determined that insane persons should not be executed.[158] One of the primary reasons for this common-law prohibition was that "it is uncharitable [and contrary to Christian ideals] to dispatch an offender 'into another world, when he is not of a capacity to fit himself for it.'"[159] The Court underscored that this common-law reason for the prohibition was equally pressing in modern times.[160] This was the case even though religion was now less central to everyday life than when this reasoning was first developed.[161] Accordingly, the Court

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[155] 477 U.S. 399 (1986).

[156] *See id.* at 407-10. Note that, for the purposes of this Article, I view the terms "rehabilitation" and "repentance" as interchangeable. *See supra* note 102 and sources cited therein.

[157] *See supra* note 154 (explaining why I use the term "insane" here).

[158] *See Ford*, 477 U.S. at 406.

[159] *See id.* at 407 (quoting Sir John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, *in* XI A COMPLETE COLLECTION OF STATE TRIALS & PROCEEDINGS FOR HIGH TREASON & OTHER CRIMES & MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1786 477 (T.B. Howell ed., 1816)); *see also* Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361, 371 (1994) ("One of the primary reasons offered for requiring that an individual be competent to face execution is based on religious principles."); Hawles, *supra*, at 477 (explaining that it would be "against Christian charity to send a great offender quick, as it is stiled, into another world, when he is not of a capacity to fit himself for it"). The *Ford* Court stated that this "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." *Ford*, 477 U.S. at 409. In addition to this concern about rehabilitation, though, the Court referenced other reasons underlying the common law prohibition on executing the insane. *See id.* at 407-08. First, the practice "simply offends humanity." *Id.* at 407. Second, it lacks a deterrent value because "it provides no example to others." *Id.* Third, "because madness is its own punishment," capital punishment serves no purpose under these circumstances. *Id.* Finally, the punishment fails to serve "the community's quest for 'retribution'" because executing an insane person is of "lesser value" than any crime that he could have committed. *Id.* at 408.

[160] *See Ford*, 477 U.S. at 409 ("The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. . . . [T]he 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.").

[161] *Compare* MARK CHAVES, AMERICAN RELIGION: CONTEMPORARY TRENDS 10-11, 113 (2011) (suggesting that religion in the United States has been very slowly declining since at least 1972), *and* THE PEW FORUM ON RELIGION & PUBLIC LIFE, "NONES" ON THE

determined that providing offenders with an opportunity to repent and rehabilitate themselves was important enough to second-guess the state-imposed punishment of death even though capital punishment has long been a part of the American penal landscape and is even enshrined in our Constitution through the Fifth Amendment's grand jury, double jeopardy, and due process protections for individuals facing capital punishment.[162]

Since *Ford* was decided, the Court has reaffirmed its rehabilitation-based reasoning for the prohibition on executing insane persons in its 2007 case of *Panetti v. Quarterman*.[163] Thus, even today, this important role for rehabilitation remains at the heart of capital punishment jurisprudence. Although several courts and scholars have asserted that the death penalty is completely irrelevant to rehabilitation,[164] legal reasoning in this context of executing individuals unable to make themselves "fit" for death suggests otherwise.

D. The Dying Declaration[165]

The notion that one repents when facing death is also the basis of the dying declaration hearsay exception of evidence law.[166] Although hearsay is generally inadmissible at trial, there has long been an

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RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 9 (2012), *available at* http://www.pewforum.org/uploadedFiles/Topics/Religious_Affiliation/Unaffiliated/NonesOnTheRise-full.pdf ("The number of Americans who do not identify with any religion continues to grow at a rapid pace. One-fifth of the U.S. public — and a third of adults under 30 — are religiously unaffiliated today, the highest percentages ever in Pew Research Center polling."), *with* PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA 3 (2003) ("[I]n eighteenth-century America . . . the idiom of religion penetrated all discourse, underlay all thought, marked all observances, gave meaning to every public and private crisis.").

[162] *See* U.S. CONST. amend. V. The first sentence of the Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." *Id.* The second sentence states that no one "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." *Id.* And the third provides that no one shall "be deprived of life, liberty, or property, without due process of law." *Id.* The Fourteenth Amendment similarly prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1.

[163] 551 U.S. 930, 957-58 (2007).

[164] *See supra* Part II.

[165] The "dying declaration" is also referred to as a "statement under belief of impending death." FED. R. EVID. 804(b)(2).

[166] *See* JOHN W. STRONG, MCCORMICK ON EVIDENCE 463 (5th ed. 1999) (relating that this hearsay exception is based on "[t]he notion of the special likelihood of truthfulness of deathbed statements").

exception for statements made by individuals on their death beds.[167] The underlying theory is that, when an individual believes that his death is near, his statement will be more trustworthy than if this were not the case because a dying person "would not meet his Maker with a lie on his lips."[168] Thus, it is believed that the thought of impending death will transform even an ordinarily untrustworthy source into an individual who will tell the truth.

This exception to the ordinary hearsay rule is traditionally rooted in deep religious beliefs, but as religion has become less relevant to many people's lives,[169] the dying declaration exception has survived based not only on this fear of punishment in the afterlife but also on the more general "powerful psychological forces bearing on the declarant at the moment of death" and the "sobering impact" that facing death registers.[170] Both of these elements are believed to compel individuals

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[167] *See, e.g.*, FED. R. EVID. 804(b)(2) (providing that a statement will not be excluded "[i]n a prosecution for homicide or in a civil action or proceeding" if "the declarant is unavailable as a witness," the declarant made the statement "while believing that [his] death was imminent," and the statement "concern[s] the cause or circumstances of what the declarant believed to be impending death"); *see also* STRONG, *supra* note 166, at 463 (outlining the exception to hearsay). Ordinarily, to establish a dying declaration exception to hearsay, one must show "that the declarant must have been conscious that death was near and certain when making the statement" and also that the declarant is dead or otherwise unavailable to testify himself. *Id.* at 463-64. Moreover, the exception is often available only in civil cases and criminal homicide cases. *See, e.g.*, FED. R. EVID. 804(b)(2) (providing that the exception is available "[i]n a prosecution for homicide or in a civil action or proceeding"); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 620 n.10 (7th ed. 2012).

[168] FED. R. EVID. 804(b)(2) advisory committee's note; *see also* GRAHAM, *supra* note 167, at 616-17 (explaining that declarants facing impending death are "unlikely to lie"); STRONG, *supra* note 166, at 463-64 (stating that the hearsay exception is based on the assumption that individuals facing impending death are less likely to lie than individuals who do not believe that their deaths are nigh). Note, though, that it is debatable whether the imminent fear of death actually leads a declarant to be more truthful. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 5 FEDERAL EVIDENCE 137 (3d ed. 2007) ("Whether it makes sense to suppose that awareness of impending death leads one to be more truthful in comments about the cause or circumstances may be debated.").

[169] *See supra* text accompanying note 161.

[170] Charles C. Goetsch, *Dying Declarations, Connecticut Common Law and the New Federal Rules of Evidence*, 50 CONN. B.J. 424, 428 (1976); Glen Weissenberger, *Federal Rules of Evidence 804: Admissible Hearsay From an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1107 (1987); *see also* FED. R. EVID. 804(b)(2) advisory committee's note; MUELLER & KIRKPATRICK, *supra* note 168, at 137, 141-42 ("In a more secular world, the thought persists that psychological forces produce a final truthful impulse . . . ."); STRONG, *supra* note 166, at 305 n.2 (stating that the modern theory behind the dying declaration exception to hearsay is based on the "powerful psychological pressures" of

confronting their own deaths to speak the truth even if they would otherwise be inclined to lie.[171] It is thus accepted that the threat of death has the power to transform a dishonest person into one who is reliable.

E. The Finality Interest in Habeas Corpus Law

The Supreme Court has more explicitly touted the importance of rehabilitation in the context of habeas corpus. The writ of habeas corpus is a time-honored protection against unlawful detainment.[172] The Constitution guarantees the availability of the writ in most circumstances,[173] but the Supreme Court has recognized Congress's power to define the scope of the writ, which it has most recently done

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impending death). The dying declaration exception to hearsay has been criticized, but it has proven to be "remarkably hardy." Goetsch, *supra*, at 425 (noting that the exception "still exists even though the religious sanctions which originally guaranteed its reliability are no longer viable and even though there is no certain way of knowing whether the psychological impact of approaching death is an adequate substitute"). In fact, the dying declaration exception has been "expanded beyond its traditionally narrow limits" in several ways. FED. R. EVID. 804(b)(2) advisory committee's note. For example, under the Federal Rules of Evidence, the exception is available in civil cases whereas, under the common law, it was available only in criminal homicide cases. *See id.* Further, the exception is now applicable when the declarant is unavailable for reasons other than death, whereas the declarant's death was a requirement under the common law. *See id.* Still, some question whether hearsay should be admitted into evidence considering that religion may play less of a role in a modern-day declarant's life. *See* STRONG, *supra* note 166, at 305 n.2. In fact, there is limited precedent suggesting that a dying declaration may be impeached by evidence that the declarant was not religious. *See id.*; *see, e.g.*, State v. Quintana, 644 P.2d 531, 534-35 (N.M. 1982) (stating that a dying declaration may be impeached "by showing that the deceased . . . did not believe in a future state of rewards or punishment"). Most courts and the Federal Rules of Evidence, however, suggest that this kind of impeachment is improper. *See* FED. R. EVID. 804(b)(2) advisory committee's note ("The rule . . . indulges its assumptions of special necessity and trustworthiness regardless of whether the declarant is an aetheist . . . ."); STRONG, *supra* note 166, at 305 n.2.

[171] *See* FED. R. EVID. 804(b)(2) advisory committee's note; Goetsch, *supra* note 170, at 428. *See generally* 5 J. WIGMORE, EVIDENCE §§ 1438-43, at 289-304 (1974) (outlining the history behind the dying declaration exception).

[172] *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1080-81 (1995); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process, and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1369-74 (2010); Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 958 (2012).

[173] *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) ("All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.").

in the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).[174] AEDPA, more than previous congressional limitations on habeas corpus, significantly limits the circumstances under which detained individuals may bring petitions for the writ.[175] Relying on AEDPA, courts have identified three overarching concerns that justify these limitations on bringing such a petition: federalism, comity, and finality.[176] The finality interest has been found to be crucial for a number of reasons, one of which is rehabilitation.[177] In *Kuhlmann v.*

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[174] *See* Forsythe, *supra* note 172, at 1080-82; Wiseman, *supra* note 172, at 958-59; *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in various sections of the U.S. Code).

[175] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1632-33 (2003); Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 411 (2010). *But cf.* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259 (2006) (arguing that, although AEDPA is considered to have been a major reform in habeas law, much of that reform had already taken place though judicial legislation during the previous three decades, meaning that the enactment of AEDPA really had little effect on habeas cases). Professors Carol and Jordan Steiker have asserted that:

> Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court-crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.

Steiker & Steiker, *supra*, at 411.

[176] *See, e.g.*, Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012) ("Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism."); Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" (citation omitted)); Williams v. Taylor, 529 U.S. 420 (2000) (noting that the purpose of AEDPA was to further the doctrines of "comity, finality, and federalism" (citations omitted)); *see also* Dretke v. Haley, 541 U.S. 386, 388 (2004) ("Out of respect for finality, comity, and the orderly administration of justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default.").

[177] *See* Kuhlmann v. Wilson, 477 U.S. 436, 452-53 (1986). The *Kuhlmann* Court explains that, in addition to rehabilitation, finality serves other goals:

> Availability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime, since the

Wilson, the Supreme Court stated that the finality of a punishment is important because it facilitates the rehabilitative process.[178] For an offender to undergo rehabilitation, he must first accept that he has been justly convicted and sentenced.[179] If the offender's conviction and sentence are continually under review by courts, the reasoning proceeds, that offender cannot effectively begin to rehabilitate.[180]

This interest in finality, which promotes rehabilitation, is especially pronounced in the capital context. For the last several decades, the Court has demonstrated concern about the long delays involved in capital cases and has therefore emphasized the finality interest, and based its habeas decisions on the principle, in the hope of minimizing these delays.[181] Further, in enacting AEDPA, Congress sought to

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> deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks. . . . Finality also serves the State's legitimate punitive interests. When a prisoner is freed on a successive petition, often many years after his crime, the State may be unable successfully to retry him. This result is unacceptable if the State must forgo conviction of a guilty defendant through the "erosion of memory" and "dispersion of witnesses" that occur with the passage of time that invariably attends collateral attack.

Id. Finality has also been argued to aid in sparing victims further pain, conserving government resources, and "establishing stability in the criminal justice system. . . ." *See* Ryan, *Wrongful Execution*, *supra* note 95, at 276-77.

[178] *See Kuhlmann*, 477 U.S. at 452-53.

[179] *See id.* ("[F]inality serves the State's goal of rehabilitating those who commit crimes because rehabilitation demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation." (internal quotations and alterations omitted)); Ryan, *Wrongful Execution*, *supra* note 95, at 276-77.

[180] *See Kuhlmann*, 477 U.S. at 452-53; Ryan, *Wrongful Execution*, *supra* note 95, at 276-77.

[181] *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2041-42 (2000) (explaining that the Court laments the long delays in capital habeas cases and often, as a result, "truncate[s]" capital petitioners' procedural rights in this context); *see also* Darden v. Wainwright, 477 U.S. 168, 204-05 & n.9 (1986) (Blackmun, J., dissenting) (suggesting that the "Court[ ]," or at least one of its Justices, allows the finality interest to cloud its judgment and distract it from the merits of capital petitioners' habeas claims); Anthony G. Amsterdam, *In Favorem Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 14-16 (1987) (arguing that, in the interest of avoiding excessive delays in executions, the Court has transformed from an entity stretching the law to protect the rights of capital defendants to one providing capital defendants with less regard than noncapital defendants). The desire to shorten stays on death row in the interest of finality is in tension with finality's promotion of rehabilitation. Limiting offenders' access to the writ of habeas corpus may further the certainty of punishment, and, collaterally, shorten offenders' stays on death row, but increasing offenders' stays on death row may provide them with greater opportunities to rehabilitate.

advance the finality interest by taking additional steps to reduce delays in executing sentences, especially in the capital context.[182] Moreover, the writ of habeas corpus has become most important to defendants in capital cases, as prevailing on habeas claims is exceptionally rare in noncapital cases.[183] Not only is finality, in terms of certainty of punishment, salient to the offender's rehabilitation, but the finality inherent in the particular punishment of death likely furthers the offender's surrender to the rehabilitative process. As Justice Brennan has explained, this punishment is "unusual . . . in its finality, and in its enormity."[184] More than an offender sentenced to any other punishment, an offender who receives the punishment of death faces the ultimate finality, which could compel his transformation.

IV. THE USEFULNESS OF RECOGNIZING THE RELATIONSHIP BETWEEN DEATH AND REHABILITATION

There is a strong case for capital punishment's relevance to rehabilitation. The final moments of punishment may not produce a desired transformation in the offender: an offender who has been injected with a lethal cocktail of sodium pentothal,[185] pancuronium bromide, and potassium chloride,[186] for example, spends his final moments of life unconscious.[187] However, the long delay that has

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[182] *See* Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" (citations omitted)). Professor James Liebman has pointed out that, in enacting AEDPA, Congress sought to make "the 'Death Penalty' more 'Effective.'" *See* Liebman, *supra* note 181, at 2044.

[183] *See* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793, 805, 809 (2009) ("Even including the Warren Court's heyday, habeas relief has always been extremely rare outside of the capital context.").

[184] Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan J., concurring).

[185] Sodium pentothal is also referred to as sodium thiopental. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 380 (1997).

[186] This is the typical three-drug cocktail used to carry out lethal injections in the United States. *See* Ryan, *Wrongful Execution*, *supra* note 95, at 286 n.171; *see also* Baze v. Rees, 553 U.S. 35, 43-44 & n.1 (2008) (explaining that most states employing the death penalty rely on this three-drug cocktail).

[187] *See* Meghan J. Ryan, *Judging Cruelty*, 44 UC DAVIS L. REV. 81, 126 n.253 (2010) (explaining that sodium thiopental is a sedative intended to render the patient unconscious). *But see Baze*, 553 U.S. at 53-59 (laying out the petitioners' argument that carrying out an execution using this three-drug cocktail created a significant risk that the defendant would suffer extreme pain during execution, because the sodium

become part of the modern death penalty may very well produce the desired transformation. Recognizing this potential transformation on death row accentuates courts' and scholars' lack of clarity in the meaning of rehabilitation and how understandings of rehabilitation have shifted from notions of individual character transformation to a focus on offenders' effects upon society more generally. Recognizing the relevance of death and rehabilitation also suggests that providing greater rehabilitative resources on death row is important to preserving death row offenders' constitutional dignity.

A. Rehabilitating the Meaning of Rehabilitation

The discord between courts' and scholars' presumption that capital punishment is irrelevant to rehabilitation and the several examples of how rehabilitation is closely tied to the historical roots of the death penalty, individual stories of death row inmates, and certain legal doctrines, highlights the importance of more carefully parsing what is meant by the term "rehabilitation" and also how understandings of rehabilitation have changed throughout time. Although early understandings of rehabilitation were deemed an integral part of capital punishment, and death was viewed as instigating rehabilitation, recent courts' and scholars' conviction that capital punishment is irrelevant to rehabilitation suggests that understandings of rehabilitation have shifted as time has passed.

The Oxford English Dictionary offers several definitions for the term "rehabilitation." One entry defines it as "improvement of the moral state of a person, the soul, etc."[188] It thus focuses on changing the character of an individual. Other definitions of "rehabilitation," though, seem to require more than just the transformation of an individual's character. A different *Oxford English Dictionary* definition for the term, for example, suggests that not only must character transformation take place but also that this transformation must be completed "in order to aid [the offender's] reintegration into society."[189] Other sources similarly reference the salience of societal reintegration to the enterprise of rehabilitation. For example, *Black's Law Dictionary* defines "rehabilitation" as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can

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pentothal sedative could be improperly administered and the paralytic effect of the pancuronium bromide would mask the resulting pain to the defendant).

[188] OXFORD ENGLISH DICTIONARY (3D ED. 2009).

[189] *Id.* The definition provides that "rehabilitation" means "[i]mprov[ing] the character, skills, and behaviour of an offender through training, counselling, education, etc., in order to aid reintegration into society." *Id.*

function in society without committing other crimes,"[190] and Professor Wayne LaFave defines it as treating an offender so as to "return him to society so reformed that he will not desire or need to commit further crimes."[191]

Ordinarily, courts and scholars do not carefully identify what they mean by "rehabilitation" and neglect to tease out the differences between definitions focusing on character reform and societal reintegration. Instead, most courts and scholars tend to discuss rehabilitation in a generic sense and routinely use the terms "rehabilitation" and "reformation" interchangeably.[192] However, at least one scholar has alluded to a distinction between an offender's character change and other aspects of rehabilitation. In an article arguing for the abolition of *Alford* and nolo contendere pleas, Professor Stephanos Bibas notes that rehabilitation differs from reformation.[193] He characterizes reformation as moral change in one's character[194] and suggests that rehabilitation is, in contrast, superficially changing an offender through scientific intervention.[195] Rehabilitation, he has explained, involves an "inva[sion of an offender's] brain or body" and "treat[s] the defendant as an automaton."[196] Although Professor Bibas

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[190] BLACK'S LAW DICTIONARY 1311 (8th ed. 2004).

[191] WAYNE R. LAFAVE, CRIMINAL LAW 28 (5th ed. 2010). Professor Paul Robinson describes it as removing from a potential offender the "desire or need to engage in criminal conduct." PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES & CONTROVERSIES 90 (3d ed. 2012).

[192] *See, e.g.*, LAFAVE, *supra* note 191, at 28 (stating that "[r]ehabilitation" is "also called correction or reformation"); IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 11 (1989) (failing to distinguish reform from rehabilitation); Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (stating that "[r]ehabilitation . . . is also called 'reform' or 'correction'" (citation omitted)); Richard T. Oakes, *Anthropomorphic Projection and Chapter Eight of the Federal Sentencing Guidelines: Punishing the Good Organization When It Does Evil*, 22 HAMLINE L. REV. 749, 762 (1999) (using "rehabilitation" and "reformation" interchangeably). The *Graham* and *Miller* Courts are no exception. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464-65 (2012) (vacillating between the terms "rehabilitation" and "reform"); Graham v. Florida, 130 S. Ct. 2011, 2027-30 (2010) (same).

[193] *See* Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1430 (2003).

[194] *See id.* Professor Bibas describes reformation as "operat[ing] by appealing to the defendant's moral sense, his conscience." *Id.*

[195] *See id.*

[196] *Id.*; *cf.* Ryan, *Science*, *supra* note 1, at 45 (arguing that the "New Rehabilitation" "focuses on changing the biochemical composition of an offender" rather than "on changing the character of [an] offender[]"). Professor Stephen Garvey distinguishes between "reformation" and "rehabilitation" in a slightly different manner. He argues that "moral reform" attempts to transform the offender through punishment, whereas

does not expand much on this idea but instead focuses on his primary topic — plea-bargaining — modern-day treatment of sexual offenders with medroxyprogesterone acetate (MPA),[197] otherwise known as "chemical castration," is likely one such example of "invading" an offender's body.[198] By injecting sexual offenders with this steroidal progestin, authorities are treating offenders at the biochemical level rather than attempting to transform the character of the offender more broadly.[199] This difference between treating an offender's character and treating his biochemical composition, though, has remained largely unnoticed, and both courts and scholars continue to refer to both concepts as "rehabilitation."[200]

The definitions of rehabilitation that focus on the character of the offender are more consistent with the evidence of capital punishment's relevance to rehabilitation. The historical understanding of the death penalty focused on the religious conversion of the defendant.[201] Present-day tales of inmates' transformations on death row chronicle paths of personal transformation through religious study and personal reflection.[202] And the modern-day doctrines built on the rehabilitative value of death are similarly based on the idea of character reform. *Ford*

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rehabilitation seeks the offender's transformation "as an adjunct to punishment." Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 764-65 (1998). Similar to Professor Bibas, though, he asserts that moral reform better "respects the offender's autonomy [because] the offender is free to reject or ignore punishment's educative message." *Id.* at 765. In Professor Bibas's words, moral reform does not treat the offender like "an automaton." Bibas, *supra* note 193, at 1430.

[197] "The trade name for MPA is Depo-Provera." Ryan, *Science*, *supra* note 1, at 42 n.257. Its use in sexual offenders is intended to lower the offenders' sexual desires and physical abilities to achieve erections by reducing the offenders' testosterone levels. *See id.* at 42.

[198] *See id.* at 42 (arguing that chemical castration is an example of the "New Rehabilitation," which focuses on biochemically altering criminal offenders rather than attempting to transform their individual characters). Chemical castration has been classified by others, though, as incapacitative rather than rehabilitative. *See, e.g.*, John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 599 (2006) ("[T]he avowed purpose of chemical castration is . . . to maim [sex offenders], and thus incapacitate them.").

[199] *See* Ryan, *Science*, *supra* note 1, at 42.

[200] *See, e.g.*, LAFAVE, *supra* note 191, at 28 (using the terms "rehabilitation" and "reformation" interchangeably); *see also supra* note 192 and sources cited therein (referencing additional authors using the terms interchangeably). *But see* Ryan, *Science*, *supra* note 1, at 45-48 (identifying the distinction between treating an offender's character and treating his behavior through biochemical intervention).

[201] *See supra* Part III.A.

[202] *See supra* Part III.B.

v. Wainwright's[203] explanation for why "insane" persons may not be executed was rooted in religious beliefs.[204] The dying declaration exception to hearsay was established on the basis of religious doctrine and is today grounded in broader notions of the psychological forces related to dying that similarly prompt the character transformation of a declarant.[205] Even the Court's explanation in the habeas context for why the finality of punishments is so important is based on the idea that an offender will be able to begin working on changing his character once he has accepted his condemnation.[206]

In contrast to this traditional focus on character, courts' and scholars' unexplained presumption that the death penalty is completely irrelevant to rehabilitation is likely due to their premise that an offender's reintegration into society is essential to rehabilitation.[207] That explains the line of reasoning for this view that rehabilitation could never be achieved if the offender has been put to death.[208] Focusing on this societal component of rehabilitation suggests that rehabilitation is utilitarian in nature; it is meant to benefit society.[209] And indeed, commentators regularly classify rehabilitation as a utilitarian approach to punishment.[210] This

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[203] 477 U.S. 399 (1986).

[204] *See supra* Part III.C.

[205] *See supra* Part III.D.

[206] *See supra* Part III.E.

[207] The *Graham* and *Miller* Courts allude to this presumption in their parallel argument that life without parole cannot serve a rehabilitative purpose. *See* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (stating that "rehabilitation could not justify [the] sentence [of life without parole]" because this punishment "forswears altogether the rehabilitative ideal"); Graham v. Florida, 130 S. Ct. 2011, 2029-30 (2010) ("A sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation. The penalty forswears altogether the rehabilitative ideal.").

[208] *See supra* Part II.

[209] Utilitarianism seeks "to augment the total happiness of the community." THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., 1970).

[210] *See, e.g.*, Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 589-90 (2012) (stating that the "utilitarian worldview . . . justifies punishment based on the social benefits—such as deterrence, rehabilitation, or incapacitation of offenders—that it produces"); Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 77 (2011) (characterizing rehabilitation as a utilitarian theory of punishment); Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1942 (2010) (stating that "[u]tilitarian avoidance of crime has traditionally been sought through the mechanisms of general and special deterrence, incapacitation of the dangerous, and rehabilitation"); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 908 (2011) (classifying rehabilitation

understanding of rehabilitation, though, detracts from the character transformation component of rehabilitation that was central to early understandings of capital punishment and remains significant in modern stories of death-row rehabilitation and justifications for various legal doctrines.[211] It thus ignores the personhood aspect of rehabilitation.[212]

By neglecting the character component of rehabilitation, punishment policymakers seem to have ushered in a "New Rehabilitation," which focuses on transforming an offender through biochemical interventions rather than through broader efforts to coax the offender to reshape his entire person.[213] Manifestations of this age of the New Rehabilitation can be seen in the chemical castration of sexual offenders, use of pharmaceuticals to aid in offender substance abuse treatment programs, and the forcible medication of offenders to render them competent to stand trial and competent for execution.[214] Consistent with courts' and scholars' typical understanding of rehabilitation,[215] these new methods focus on the effects that rehabilitated offenders will have on society rather than on whether the offenders' characters have been transformed. Chemical castration, for example, is considered to benefit society by sparing the offender's potential victims, because it inhibits the offender's physical ability to consummate future sexual crimes.[216] This does not necessarily mean that the offender's character has changed so that he no longer values committing these crimes. Similarly, forcible medication for execution has the alleged benefit of allowing the government to carry out a punishment deemed justified by the people, however this does not mean that the offender has become completely sane or competent so that he can fully come to grips with this reality. Instead, commentators

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as a utilitarian theory).

[211] *See supra* text accompanying notes 201-206.

[212] This personhood aspect of rehabilitation may still be consequentialist in nature by focusing on the offender's change for the better. It may just be less concerned about maximizing *society's* happiness. There also seems to be a more deontological aspect to focusing on the offender as an individual, though. In addition to potentially providing a benefit to the offender as a result of his rehabilitation, see *supra* note 209, focusing on an offender's personhood suggests that the offender should have the opportunity to rehabilitate himself, regardless of the outcome.

[213] *See* Ryan, *Science*, *supra* note 1, at 45-48.

[214] *See id.*

[215] *See supra* text accompanying note 207 (concluding that courts and scholars ordinarily view rehabilitation as requiring societal reintegration of the offender).

[216] *See* Ryan, *Science*, *supra* note 1, at 42.

have argued that forcibly medicated individuals experience an "'artificial' or 'synthetic' sanity,"[217] which is of a different species.[218]

Courts' and scholars' modern focus on the societal reintegration component of rehabilitation has remained wholly unexplained. If offenders' reintegration into society is so singularly important that transforming an offender's character is no longer relevant,[219] then it is important to understand the meaning of societal reintegration in this context. What is the advantage of concentrating rehabilitation on societal reintegration? Is it for the sake of society or the offender?[220]

Society could potentially benefit from an offender's return into its fold if the offender positively contributes to society either by becoming a productive member of its labor force, becoming an inspiration to others, or donating his time or resources in some other way. An offender's return could also benefit society because the return could demonstrate to society that the government possesses the power to reform criminals and therefore provide hope to society. For this to be effective, though, society must be willing to accept that offenders who have served their sentences are once again valuable members of society. This raises questions about the propriety of continuing to limit offenders' rights — such as the right to vote or to bear arms[221] — or to brand them as offenders — through sexual offender registration laws[222] or making criminal records publicly available[223] — once they

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[217] Singleton v. Norris, 319 F.3d 1018, 1034 (8th Cir. 2003) (Heaney, J., dissenting).

[218] *See* Byers, *supra* note 159, at 377, 379 (explaining that the antipsychotic drugs often used to forcibly medicate offenders to render them competent for execution "do not cure mental illness," but instead just "provide relief 'for the more severe symptoms of mental illness,'" and can deleteriously affect the offender's mental functioning by decreasing his capacity to learn, remember, and reason (citation omitted)).

[219] *See supra* Part II.

[220] *Cf.* Salinas, *supra* note 93, at 57 (suggesting that, for capital punishment to be relevant to rehabilitation, the offender must benefit from the rehabilitation).

[221] *See, e.g.*, CAL. PENAL CODE § 29900 (West 2012) ("[A]ny person who has been previously convicted of any [offense such as murder, rape, arson, or robbery] and who owns or has in possession or under custody or control any firearm is guilty of a felony."); N.Y. PENAL LAW § 265.01 (McKinney 2011) ("A person is guilty of criminal possession of a weapon in the fourth degree when . . . [h]e possesses a rifle, shotgun, antique firearm, black powder rifle, black powder shotgun, or any muzzle-loading firearm, and has been convicted of a felony or serious offense . . . .").

[222] *See, e.g.*, CAL. PENAL CODE § 290 ("Every person [convicted of a sexual offense defined in the Act], for the rest of his or her life while residing in California, or while attending school or working in California . . . shall be required to register . . . .").

[223] *See* COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 36-38 (2007) (reporting that public availability of criminal records has stymied ex-

have reintegrated into society. These collateral consequences of conviction label these individuals as different — as offenders — and limit these individuals' abilities to reenter society and to be seen as useful and valuable by other members of society. Beyond societal acceptance of offenders, any potential benefits of reintegrating rehabilitated offenders back into society also hinge on the offenders not re-offending. Such a recidivist event would naturally diminish, or even completely negate, the fruits society reaped from reintegration and may very well suggest that the offender was never rehabilitated in the first place.

If rehabilitation requires the return of the offender to society for the sake of the offender, himself,[224] rather than for the benefit of society, what is the reason for this requirement? One plausible explanation seems to be to allow the offender to test whether he has really transformed so that he will no longer commit crimes. While this might be useful to some offenders, return to society may not always be necessary for all offenders to truly to know that they have been reformed.[225] Another explanation for the required return of the offender to society would be that, if the offender is "cured," he is entitled to be returned to society. That may certainly be the case, but entitlement to release is a separate issue from whether there has been true rehabilitation. And, in the death penalty context, the offender's release would likely undermine the force that is creating the reform in the first place: the near certainty of death.[226]

Even aside from an offender's reintegration into society — which is not possible in the capital context — there may still be value to the offender's character reform, alone. Evidence of rehabilitation on death row may certainly be valuable to the offender. From a psychological standpoint, such a transformation may allow the offender to more calmly or confidently confront death.[227] From a religious viewpoint,

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offenders' attempts to reintegrate into society by, for example, making it difficult for them to gain lawful employment).

[224] *See* Salinas, *supra* note 93, at 57.

[225] For example, Karla Faye Tucker emphatically shared her belief that she was reformed while in prison and indicated that she did not need to prove this to herself by, for example, testing her convictions outside the prison walls. *See supra* Part III.B.

[226] Of course, up until shortly before their executions, capital offenders often have the possibility that they will be granted clemency, thus death will not always be entirely certain.

[227] *See* Frances Raday, *Secular Constitutionalism Vindicated*, 30 CARDOZO L. REV. 2769, 2776 (2009) ("[T]he magnetic pull of religion has been documented by sociologists who explain that religions offer social solidarity, psychological comfort, ways of coping with the unknown and death; they are inculcated by ritual, repetition,

such a transformation may lead him into a better world or eternal salvation.[228] An offender's character reform on death row can even provide a benefit to society even though the offender will not have the opportunity to return to society. A death row inmate's rehabilitation can express to society that even the worst offenders are capable of change. If even they can change, then lesser offenders may be inspired to similarly transform, and society may be more willing to accept them into its fold once these lesser offenders have served their sentences. This could, in turn, reinforce the rehabilitation of these lesser offenders.[229]

Considering that there are various components of rehabilitation, courts and scholars need to be more careful when discussing rehabilitation and evaluating whether it is a useful and appropriate tool in the context of criminal punishment. An offender's reintegration into society may provide several benefits to society, and it also may benefit the particular offender being reintegrated. Beyond societal reintegration, though, an offender's character change is valuable. Thus the historical focus on the character change component of rehabilitation in the capital context remains relevant today. Further, anecdotes of character change in death row inmates and the vestiges of character-change-rehabilitation in legal doctrines continue to make some sense despite courts' and scholars' repeated proclamations that capital punishment is completely irrelevant to rehabilitation.[230]

B. Death Row Dignity and Rehabilitation

Capital punishment's relevance to rehabilitation throughout the ages reveals how important it has been to allow even the death row offender to transform himself. A death-row offender's repentance was extremely important to society in early America,[231] there are several stories of the worst offenders transforming themselves on death row,[232] and several legal doctrines are based on the idea that offenders change

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music and fear of transcendental as well as temporal punishment.").

[228] *Cf.* Part III.A, C-D (explaining how religious salvation is often a central aspect of rehabilitative notions).

[229] *Cf.* Lanny A. Breuer, *The Attorney General's Sentencing and Corrections Working Group: A Progress Report*, 23 FED. SENT'G REP. 110, 113 (2010) ("Our research clearly indicates that offender reentry programs that reduce recidivism have the potential to reduce crime significantly while at the same time reducing total criminal justice spending.").

[230] *See supra* Part II.

[231] *See supra* Part III.A.

[232] *See supra* Part III.B.

themselves when facing death.[233] The shift in how courts and scholars view rehabilitation — from an offender-centric view of the penological theory to one that focuses more on societal reintegration — has led them to lose sight of the individual offender.[234]

One casualty of migrating away from focusing on the individual offender is neglecting the importance of the offender's dignity. But the offender's human dignity is an essential value protected by our Constitution. The Cruel and Unusual Punishments Clause of the Eighth Amendment places several constitutional limitations on capital punishment, and a major theme running throughout the Punishments Clause case law is the importance of the dignity of the capital offender. In one of the Court's earliest modern cases interpreting the Eighth Amendment, the Court stated that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[235] And, throughout the decades, the Court has consistently repeated this sentiment emphasizing the importance of human dignity.[236]

Despite the Court's focus on human dignity, it has not clearly defined the parameters of "dignity," nor has it clearly articulated how this underlying concept of dignity has led to its resolution of Eighth Amendment cases. Instead, the Court most often highlights that the Punishments Clause is animated by this concept of dignity, and then it looks to how many jurisdictions have embraced the particular punishment at issue[237] and whether the Court believes, in its own

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[233] *See supra* Parts III.C-E.

[234] *See supra* Part IV.A.

[235] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[236] *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Respect for [human] dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."); Roper v. Simmons, 543 U.S. 551, 560 (2005) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."); Hope v. Pelzer, 536 U.S. 730, 738 (2002) ("The use of the hitching post under these circumstances violated the 'basic concept underlying the Eighth Amendment, which is nothing less than the dignity of man.'" (quoting *Trop*, 356 U.S. at 100, alterations omitted)); Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'" (quoting *Trop*, 356 U.S. at 100-01)).

[237] *See, e.g.*, *Kennedy*, 554 U.S. at 421 (stating that the Court is "guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions'"); *Roper*, 543 U.S. at 563 (explaining that an examination of legislative enactments is the starting point for determining whether a punishment is unconstitutionally cruel and unusual); *Atkins*, 536 U.S. at 312 ("We have pinpointed that the 'clearest and most reliable objective evidence of

independent judgment, that the punishment is unconstitutionally cruel and unusual.[238] The Court has stated more generally, though, that the concept of dignity precludes imposing excessive or disproportionate punishments, as well as the unnecessary and wanton infliction of pain.[239] These broad strokes have led the Court to conclude that the Eighth Amendment does not generally prohibit capital punishment.[240] It does, however, prohibit executing "insane" and "mentally retarded" persons,[241] as well as juveniles;[242] it precludes the punishment of denationalization for the crime of desertion;[243] and

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contemporary values is the legislation enacted by the country's legislatures.'" (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989))). In its recent Punishments Clause case of *Miller v. Alabama*, 132 S. Ct. 2455 (2012), though, the Court seems to eschew this method of state-counting at least in certain types of cases. *See id.* at 2471 (explaining that counting statutes is less relevant when the Court's decision "does not categorically bar a penalty for a class of offenders [and instead] mandates only that a sentence follow a certain process . . . before imposing a particular penalty").

[238] *See, e.g.*, *Kennedy*, 554 U.S. at 434 ("The Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (alterations omitted)); *Roper*, 543 U.S. at 564 ("We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles."); *Atkins*, 536 U.S. at 313 ("Thus, in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (citations omitted)).

[239] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (stating that, in order to comport with "the dignity of man," a punishment must not be excessive, meaning that it "must not involve the unnecessary and wanton infliction of pain" and "must not be grossly out of proportion to the severity of the crime").

[240] *See id.* at 169 ("We now hold that the punishment of death does not invariably violate the Constitution.").

[241] *See Atkins*, 536 U.S. at 311, 321 (concluding that "mentally retarded" individuals may not constitutionally be executed and referencing the statement made in *Trop* that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man"); Ford v. Wainwright, 477 U.S. 399, 406 (1986) (concluding that executing "insane" individuals fails to comport "with the fundamental dignity that the [Eighth] Amendment protects"). Just as I would prefer to use a more precise and sensitive term than "insane" when referring to individuals affected by the Court's ruling in *Ford v. Wainwright*, *see supra* note 154, I would also prefer to use a more precise and sensitive term than "mentally retarded," but I use this term because it is the one used by the Court in *Atkins v. Virginia*.

[242] *See Roper*, 543 U.S. at 561. In *Roper v. Simmons*, the Court stated that, "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." *Id.*

[243] *See* Trop v. Dulles, 356 U.S. 86, 87-90 (1958). In *Trop v. Dulles*, the Court stated that denationalization involves the "total destruction of the individual's status in organized society" and is "more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 101. Moreover, "[t]he civilized nations of the world are in virtual unanimity that

it protects against prison overcrowding and tying inmates to hitching posts in a painful and degrading manner.[244]

Not surprisingly, scholars describe this concept of human dignity as vague and amorphous,[245] yet they continue to assert the importance, and even preeminence, of the concept in constitutional and international law.[246] Many scholars trace modern notions of human

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statelessness is not to be imposed as punishment for crime." *Id.* at 102.

[244] *See* Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) (emphasizing that even prisoners retain their human dignity and stating that "[r]espect for that dignity animates the Eighth Amendment prohibition"); Hope v. Pelzer, 536 U.S. 730, 738, 745 (2002) (explaining that using a hitching post as the authorities in the case did violated the core of the Eighth Amendment — the dignity of man — because it constituted the gratuitous infliction of wanton and unnecessary pain and was painful, degrading, dangerous, and unnecessary).

[245] *See, e.g.*, Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 67 (2011) (acknowledging that the concept of dignity is "ethereal" and "inherent[ly] vague[]"); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 772-73, 778 (2006) (characterizing the Court's use of the concept of human dignity in the Eighth Amendment context as "weak and meaningless"); David A. Hyman, *Does Technology Spell Trouble With a Capital "T"?: Human Dignity and Public Policy*, 27 HARV. J.L. & PUB. POL'Y 3, 4, 18 (2003) (stating that the idea of dignity is "subjective"); Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRITISH MED. J. 1419, 1420 (2003) (describing dignity as a "useless concept"); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 712 (2008) (arguing that "in the judicial interpretation of human rights there is no common substantive conception of dignity"); Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC, May 28, 2008, http://www.tnr.com/article/the-stupidity-dignity (describing the concept of human dignity as a "mess" and just plain stupid).

[246] *See* Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145 (Michael J. Meyer & William A. Parent eds., 1992) (asserting that "[h]uman dignity is perhaps the premier value underlying the last two centuries of moral and political thought" and arguing that, although the concept is literally absent from the Constitution, punishments prohibited under the Eighth Amendment are prohibited *because* they constitute an affront to human dignity); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438-45 (1986) (suggesting that the concept of human dignity is the animating principle behind the entire Constitution); President Barack Obama, State of the Union Address (Jan. 24, 2012) (transcript *available at* http://usatoday30.usatoday.com/news/washington/story/2012-01-24/state-of-the-union-transcript/52780694/1) ("We will stand for the rights and dignity of all human beings — men and women; Christians, Muslims, and Jews."); President George W. Bush, State of the Union Address (Jan. 29, 2002), (transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html) (referencing the "non-negotiable demands of human dignity"); *cf.* Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848-49 (1983) (explaining that human dignity is "a basic value accepted in a broad sense by all peoples" and that "it has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be

dignity to Immanuel Kant's determination that dignity is intrinsic in all rational human beings.[247] Possessing such dignity, an individual should never be treated as merely a means to an end,[248] and an individual's autonomy should be preserved.[249] Even if this more

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defined"). *But cf.* James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1219, 1221 (2004) (asserting that "protecting people's dignity is quite alien to the American tradition" — at least in the sense of protecting people from the shame and humiliation that is "threatened primarily by the mass media").

[247] *See, e.g.*, Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational* Discourse, 35 B.C. INT'L & COMP. L. REV. 331, 358 (2012) ("Kantian ethics have become a crucial part of the grammar and semantics of the study of human dignity."); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 677-78 (2008) (recounting that "[t]he late eighteenth century brought a new vision of human dignity, when Immanuel Kant articulated what is considered to be one of the more cogent explanations of the meaning of dignity in the modern era" and explaining that "Kant . . . believed that human beings have dignity because they have reason"); Izhak Englard, *Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1918-23 (2000) ("Immanuel Kant (1724-1804) adds a new, important dimension to the notion of human dignity."); Glensy, *supra* note 245, at 76 (stating that Kant is "regarded as the father of the modern concept of dignity" and that his idea of dignity is "primarily derived from sentience, or the ability of humans to form a reasoned thought"); Goodman, *supra* note 245, at 748, 777 (stating that "Immanuel Kant is generally thought responsible for our understanding of human dignity" and that Kant believed that "we possess human dignity because of our ability to reason"); *cf.* Schachter, *supra* note 246, at 849-50 (referencing Kant in explaining his understanding of human dignity).

[248] *See* Barroso, *supra* note 247, at 359 (quoting one formulation of Kant's categorical imperative: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means"); Castiglione, *supra* note 247, at 678; Glensy, *supra* note 245, at 76 (drawing on Kant's work to conclude that "individuals should always be protected from any instrumentalization by the state"); Goodman, *supra* note 245, at 749 ("Kant's 'categorical imperative' or 'formula of ends' required that people 'act in such a way that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means.'" (citations omitted)); *see also* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 38 (Mary Gregor ed., 2000) ("*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.*").

[249] *See* Barroso, *supra* note 247, at 360 ("Dignity, in the Kantian view, is grounded in autonomy."); Glensy, *supra* note 245, at 76 (stating that "dignity is grounded in a concept of autonomy that holds at its core a valued moral center that is equal for everyone (men and women)"); Jeffrie G. Murphy, *The Elusive Nature of Human Dignity*, 9 THE HEDGEHOG REV. 20, 22 (2007) [hereinafter *Human Dignity*], *available at* http://www.accessmylibrary.com/article-1G1-172052358/elusive-nature-human-dignity.html (noting that Kant found dignity to be "grounded in human *autonomy*—an attribute of persons that he sometimes conceptualized as a radical freedom of the will, as 'noumenal freedom,' whereby rationality exercises a kind of contra-causal influence

elaborate concept of dignity is clearer, translating the notion to legal applications has continued to prove difficult.[250] Yet some scholars conclude that it is this Kantian notion of dignity that the Justices have adopted and incorporated into their Eighth Amendment dignity analyses.[251]

Understanding the concept of human dignity has been especially difficult in the context of capital punishment.[252] Several scholars have concluded that the Court, although espousing commitment to the concept of human dignity, has not allowed dignity to prevail in its Eighth Amendment cases because it has routinely upheld the practice of capital punishment.[253] However, drawing on the Kantian construct of dignity to support this assertion is difficult, as Kant indeed supported the death penalty.[254] Scholars have also criticized the

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on human actions"); *see also* KANT, *supra* note 248, at 43 ("*Autonomy* is therefore the ground of the dignity of human nature and of every rational nature." (emphasis original)).

[250] *See* Thomas E. Hill, *In Defense of Human Dignity: Comments on Kant and Rosen*, *in* UNDERSTANDING HUMAN DIGNITY, PROCEEDINGS OF THE BRITISH ACADEMY SERIES 6 (Christopher M. McCrudden ed. 2013) ("A theory with a vague, 'squishy,' indeterminate idea at its core . . . frustrates the efforts of well-meaning followers to use it in practical contexts.").

[251] *See, e.g.*, Glensy, *supra* note 245, at 86-89 (asserting that it is Kant's view of dignity that animates the Supreme Court Justices in these cases).

[252] *See* Goodman, *supra* note 245, at 776 ("The role of human dignity is troubling in the death penalty cases.").

[253] *See, e.g.*, Barroso, *supra* note 247, at 365-66 ("Although grounded in American historical tradition, it is difficult to argue that the death penalty is compatible with respect for human dignity, as it is a complete objectification of the individual, whose life and humanity succumb to the highly questionable public interest in retribution."); Goodman, *supra* note 245, at 775-76 & n.243 (stating that, "[g]enerally, human dignity has not prevailed in outweighing government interests in death penalty cases" and citing in support of this statement various Eighth Amendment cases in which the Court has upheld the death penalty).

[254] *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans. 1887) ("Even if a civil society resolved to dissolve itself with the consent of all its members . . . the last murderer lying in the prison ought to be executed before the resolution was carried out."); *see also* George P. Fletcher, *Searching for the Rule of Law in the Wake of Communism*, 1992 B.Y.U. L. REV. 145, 161 (1992); Nelson T. Potter, Jr., *Kant and Capital Punishment Today*, 36 J. VALUE INQUIRY 267, 267 (2002) ("Immanuel Kant was emphatically in favor of the death penalty for the crime of murder, as anyone who knows anything about Kant is likely to know."). Professor George Fletcher explains:

> Kant's philosophy is foundational in generating our modern notions of respect for life and human dignity. Yet in Kant's view, the death penalty is perfectly compatible with the notion that each human being has an absolute value. Indeed the precise function of punishment is to underscore and vindicate the value called into the question by the crime. [For example,]

Court's death penalty jurisprudence for turning the concept of dignity on its head by exempting irrational beings ("insane" and "mentally retarded" individuals, for example) from execution but allowing rational beings — those possessing dignity in Kant's view[255] — to be executed.[256] However, other scholars have asserted that if the practice of exempting incompetent individuals from execution has any justification, it is out of the respect for the offenders' human dignity.[257] They explain that even an individual condemned to death is a person who should be treated with respect and not treated merely as an object.[258] Affording this human dignity to the condemned invites providing him with some measure of autonomy, but if the individual is unable to exercise that autonomy — because of his incompetency, for example — he is denied the dignity to which he is entitled.[259]

Autonomy is central to modern understandings of human dignity.[260] Everyone — even a death row offender — is entitled to this self-determination.[261] Although the government clearly cannot grant the

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> [b]ecause homicide calls into question the value of life, the fitting response is, as the argument goes, the death penalty.

Id.

[255] *See supra* text accompanying note 247.

[256] *See* Goodman, *supra* note 245, at 776-77; Murphy, *supra* note 249, at 22 (noting that a significant problem stems from Kant's conception of autonomy (which grounds his conception of human dignity) "as a capacity to understand moral reasons and to be motivated by them," because some human beings — such as "small children, the mentally disabled, and those suffering from dementia" — lack this capacity); *cf.* Hill, *supra* note 250, at 11 (intimating that Kant's suggestion that "virtually all flesh and blood human beings" are rational was "a quasi-empirical belief" — "Kant thought it fit real human beings as he knew them").

[257] *See* Bonnie, *supra* note 27, at 277 ("If this prohibition [on executing mentally ill individuals] has any continuing justification in the contemporary context, I believe it must be found in respect for the dignity of the condemned."); *see also* Lyn Suzanne Entzeroth, *The Illusion of Sanity: The Constitutional and Moral Danger of Medicating Condemned Prisoners in Order to Execute Them*, 76 TENN. L. REV. 641, 657 n.118 (2009) ("Another compelling reason for protecting the mentally ill from execution is to protect and provide dignity to the condemned individual who is to be put to death.").

[258] *See* Bonnie, *supra* note 27, at 277; Entzeroth, *supra* note 257, at 657 n.118 (quoting Professor Bonnie); *see also* Ford v. Wainwright, 477 U.S. 399, 421 (1986) (Powell, J. concurring) (suggesting that it is "simply cruel," and a violation of human dignity, to not allow condemned inmates "the opportunity to prepare, mentally and spiritually, for their death"); *cf. supra* text accompanying note 248 (referencing Kant's conclusion that individuals should never be used as merely means).

[259] *See* Bonnie, *supra* note 27, at 277 (linking the objectification of death row inmates with deficits in autonomy).

[260] *See supra* text accompanying note 249 (explaining how Kant's understanding of dignity is rooted in the idea of autonomy).

[261] If death row offenders are not "rational," however, one might argue that they

inmate's wishes to not be put to death or to be released from prison (as an exercise of the inmate's choice rather than a judicial or executive clemency decision), the government is in a position to allow the inmate to decide who should be present at his execution, the contents of his last meal, and his final words.[262] And, indeed, the government often grants the death row inmate these small requests[263] that provide him with some acknowledgment of his autonomy and thus his dignity as a human being.[264] Scholars have suggested that

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are not entitled to such dignity. *See supra* note 247 and accompanying text (explaining that Kant's idea of dignity is based on individuals' abilities to reason).

[262] *See* Bonnie, *supra* note 27, at 277; *see also* Entzeroth, *supra* note 257, at 657 n.118 (quoting Professor Bonnie); *infra* note 264 (quoting Professor Bonnie's reasoning that these decisions should be afforded to death row inmates to preserve their human dignity).

[263] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 43.20 (West 2006) (providing that up to five individuals chosen by the condemned, so long as they are not convicts, may attend his execution); Avi Brisman, *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 GEO. J. ON POVERTY L. & POL'Y 49, 62 (2008) ("One of the few instances in which prisoners can select what they eat is when they are on death row and are afforded the opportunity to pick their last meal."); Larry Keller, *Bundy's Execution Cheered Death Also Brings Cries of Protest*, S. FLA. SUN-SENTINEL, Jan. 24, 1989, at 1A (reporting that Ted Bundy's last words were: "Jim and Fred, I'd like you to give my love to my family and friends"). *But see* Allan Turner, *Last-Meal Requests Come to an End on Texas Death Row*, HOUS. CHRON., Sept. 23, 2011, http://www.chron.com/news/houston-texas/article/Last-meal-requests-come-to-an-end-on-Texas-death-2184484.php (reporting that Texas stopped its practice of allowing death row inmates to choose their last meals after one inmate ordered an especially elaborate meal).

[264] *See* Bonnie, *supra* note 27, at 277 (suggesting that these decisions are central to the concept of dignity). Professor Bonnie argues that, if the prohibition on exempting incompetent defendants from execution "has any continuing justification in the contemporary context," *id.*, it must be grounded in the notion of human dignity:

> The prisoner has a right, even under imminent sentence of death, to be treated as a person, worthy of respect, not as an object of the State's effort to carry out its promises. As Justice Powell suggested, a person under the shadow of death should have the opportunity to make the few choices that remain available to him. He should have the opportunity to decide who should be present at his execution, what he will eat for his last meal, what, if anything, he will utter for his last words, and whether he will repent or go defiantly to his grave. A prisoner who does not understand the nature and purpose of the execution is not able to exercise the choices that remain to him. To execute him in this condition is an affront to his dignity as a person and to the "dignity of man," the core value of the Eighth Amendment.

Id. (referring to Justice Powell's concurrence in *Ford v. Wainwright*, 477 U.S. 399 (1986)). Another scholar is "both sympathetic and skeptical," though, of Professor Bonnie's argument. She states:

allowing a death row inmate to make as many choices as possible preserves the inmate's dignity in accordance with the requirements of the Eighth Amendment.[265]

If the dignity guarded by the Eighth Amendment is built on preserving the autonomy of an individual — even one condemned to death — then these death row offenders should be provided with the opportunity to properly prepare themselves for death.[266] This includes having the chance to rehabilitate themselves so that they are in the proper state of mind prior to death. Despite the Court's focus on dignity, death row inmates are often not provided with the rehabilitative services that might assist them in transforming themselves in a meaningful way.[267] The majority of inmates on death row suffer from mental disabilities, lower than average intelligence, or, nearly half not having graduated from high school, below-average

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> At perhaps a primitive level, I have a hard time believing that a constitutional amendment that the Supreme Court has said allows the State to turn living, breathing human beings into corpses — things — somehow is so concerned for human dignity that it cares whether the humans it intends to make into objects can exercise meaningful choices at the end of their lives. If you think so little of a man that you're willing to kill him, can you credibly be said to care whether he can pick between a cheeseburger and an omelet three hours before he dies?

Pamela A. Wilkins, *Competency for Execution: The Implications of a Communicative Model of Retribution*, 76 TENN. L. REV. 713, 755 n.270 (2009).

[265] *See* Bonnie, *supra* note 27, at 277; *see also* Entzeroth, *supra* note 257, at 657 n.118 (quoting Professor Bonnie); Schachter, *supra* note 246, at 850 (explaining how preserving an individual's dignity involves respecting the individual's choices); *supra* note 264 (quoting Professor Bonnie's reasoning for why affording death row inmates this autonomy preserves their dignity).

[266] *Cf. Ford*, 477 U.S. at 421 (Powell, J., concurring) ("[M]ost men and women value the opportunity to prepare, mentally and spiritually, for their death."); Murphy, *Christianity*, *supra* note 90, at 275 (explaining that, at least "from a Christian point of view, 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").

[267] *See* Avi Brisman, *"Docile Bodies" or Rebellious Spirits?: Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals*, 43 VAL. U. L. REV. 459, 470-71 (2009). Moreover, even though death row inmates are often not provided with rehabilitative services and opportunities, rehabilitation while on death row is one factor that governors might consider in making clemency decisions. *See* Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 73, 93 (2009) (explaining that the American Bar Association's Death Penalty Moratorium Implementation Project recommends that rehabilitation be considered in making clemency decisions, suggesting that rehabilitation has often been considered in determining whether to grant clemency in California, but noting that evidence of rehabilitation has not had a significant effect on clemency decisions in the state).

education.[268] States vary in how they treat their death row inmates, but generally death row inmates are not offered much in terms of rehabilitative services.[269] They ordinarily have very few opportunities to shore up their educations or develop their job skills, and they often have restricted opportunities to worship as well.[270] Security concerns are often cited for the reason that death row inmates are not provided with these opportunities. Society's need to distance itself from these individuals, though, in order to put them to death, likely also explains this separation of death row inmates. However, the importance of dignity suggests that these offenders, especially, should have the choice to rehabilitate themselves, and exercising this choice requires that rehabilitative resources be available on death row.[271] Further, the

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[268] *See* Brisman, *supra* note 267, at 469-70; Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 199-201, 206 (2002); Tracy L. Snell, Bureau of Justice Statistics, U.S. DEP'T OF JUSTICE, NCJ 231676 Capital Punishment—2009 Statistical Tables 9 (Dec. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp09st.pdf.

[269] *See* Brisman, *supra* note 267, at 470-71; George Lombardi et al., *Death-Sentenced Inmates: The Missouri Experience and Its Significance*, 61(2) FED. PROBATION 3, 3-4 (1997) (explaining how most death row environments provide inmates with very limited outside contact and services); Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201, 213 (1994) ("[R]ehabilitation programs are not available to death-row inmates."); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 869 (1983) ("[D]eath row inmates . . . have no access to 'rehabilitative' programs . . . ."); *Time on Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/time-death-row (last visited Dec, 25, 2012) (stating that, during their decade-plus stays on death row, death row inmates "are generally isolated from other prisoners, excluded from prison educational and employment programs, and sharply restricted in terms of visitation and exercise, spending as much as 23 hours a day alone in their cells").

[270] *See* LOWRY, *supra* note 132, at 191 ("People on Death Row do not train for a future profession. They do not learn skills to help them readjust when they return to civilization. They are not there to learn skills or become educated or expect to return to civilization."); ROGER SMITH, PRISONERS ON DEATH ROW 58-59 (2007) (explaining that, because death row inmates are considered especially dangerous, "inmates on Arizona's death row are not allowed to assemble for religious worship," and that religious worship is limited to individual chats with volunteers who are not allowed to provide inmates with religious literature); Brisman, *supra* note 267, at 470-71; Stanley L. Brodsky, *Professional Ethics and Professional Morality in the Assessment of Competence for Execution: A Response to Bonnie*, 14 LAW & HUM. BEHAV. 91, 94 (1990) ("Death row inmates typically have restricted opportunities for work, education, recreation, visitation, worship, and friendships with other prisoners."); *Time on Death Row*, *supra* note 269.

[271] *Cf.* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) ("It has long been recognized that the right to counsel is the right to the *effective* assistance of counsel."

resources made available to death row inmates should not be limited to religious services. Certainly, the focus on character reform exhibited in the historical reasoning for capital punishment, stories of death-row inmates transforming themselves, and the rationales of several modern legal doctrines revolve around spiritual reformation ignited by religious convictions. But personal transformations may also sprout from the confidence and understanding gained from developing skills and advancing one's education.[272] Providing a greater array of rehabilitative services to death row inmates, then, would allow these offenders to take control of their individual preparations for death and thus embrace them as individuals, rather than as objects, by providing them with greater autonomy.[273]

C. *Another Justification for Capital Punishment?*

Recognizing capital punishment's relevance to rehabilitation highlights the need to more carefully probe the meaning of rehabilitation and showcases the importance of ensuring the dignity of capital offenders, but it also may be invoked by death penalty proponents as another justification for capital punishment. Currently, death penalty backers rely primarily on the theory of retribution to justify capital punishment: capital offenders are the worst offenders and therefore deserve the worst punishment — execution.[274] Death

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(emphasis added)). Whether the Eighth Amendment's focus on dignity actually *requires* that rehabilitative services be provided to death row inmates is an interesting question that deserves fuller consideration at some future time.

[272] *See* AUDREY BAZOS & JESSICA HAUSMAN, CORRECTIONAL EDUCATION AS A CRIME CONTROL PROGRAM, UCLA SCHOOL OF PUB. POL'Y AND SOC. RESEARCH 5-6 (Mar. 2004), *available at* http://www.ceanational.net/PDFs/ed-as-crime-control.pdf.

[273] Exactly what types of rehabilitative services should be available on death row is an issue worthy of further exploration, which is beyond the scope of this Article.

[274] *See* Paul G. Cassell, *In Defense of the Death Penalty*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 199 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (citing the public's "clear . . . acceptance of the death penalty as just punishment"); Randall Peerenboom, *Out of the Pan and Into the Fire: Well-Intentioned But Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991, 1101 n.349 (2004) ("Proponents often argue that capital punishment is justified on retributive grounds . . . ."); Louis P. Pojman, *Why the Death Penalty Is Morally Permissible*, *in* DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE, *supra*, at 54-73 (explaining that the tradition of capital punishment is based on retributive and deterrent principles); Steiker & Steiker, *supra* note 102, at 676 (stating that retributivism "has become perhaps the most significant justification for the death penalty in recent years"); *see also* Spaziano v. Florida, 468 U.S. 447, 461 (1984) ("[T]he primary justification for the death penalty is retribution.").

penalty advocates also often rely on the theory of deterrence in promoting capital punishment.[275] This argument, though, has less force because empirical evidence is inconclusive as to whether the threat of capital punishment actually deters would-be offenders.[276] It is less often that capital punishment proponents rely on the theory of

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[275] *See* Cassell, *supra* note 274, at 189 (suggesting that general deterrence is a more convincing justification for the death penalty than incapacitation); Pojman, *supra* note 274 at 54-55, 58-73 (stating that deterrence is the second traditional justification for capital punishment); Steiker & Steiker, *supra* note 102, at 676 (stating that deterrence, along with retribution, is one of the "most prominent 'pro-death penalty' positions of the current era").

[276] *See* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 843 (2005) ("The U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect. The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to whether executions raise or lower the homicide rate, we remain profoundly uncertain."); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255, 260-61 (2006) (arguing that more recent studies suggesting that capital punishment has a deterrent effect "are fraught with numerous technical and conceptual errors"); James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 323 n.335 (2011) ("To date, no convincing empirical support for the proposition that the death penalty deters murders has been provided. Each time a new study suggesting a deterrent effect is published, contrary analyses appear to knock it down."); Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L & CRIMINOLOGY 489, 504 (2009) ("[T]he vast majority of the world's top criminologists believe that the empirical research has revealed the deterrence hypothesis for a myth."). But for empirical studies suggesting that capital punishment furthers deterrence goals, see Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence From a "Judicial Experiment,"* 44 ECON. INQUIRY 512, 531 (2006) ("This article provides evidence for the deterrent effect of capital punishment by analyzing the moratorium on executions as a controlled judicial experiment."); Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence From Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 344 (2003) ("Our results suggest that capital punishment has a strong deterrent effect; each execution results, on average, in eighteen fewer murders—with a margin of error of plus or minus ten."); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 474 (2003) (finding that "[e]ach additional execution decreases homicides by about five, and each additional commutation increases homicides by the same amount, while one additional removal from death row generates one additional homicide"); Joanna Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 205-06 (2005) (asserting that capital punishment has a deterrent effect if states conduct a "threshold number" of executions); Joanna M. Shepherd, *Murders of Passion, Execution Delays and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 317 (2004) (concluding that "capital punishment indeed deters murders.").

incapacitation in supporting the death penalty.[277] As Justice Stevens explained in his concurrence in *Baze v. Rees*,[278] "[w]hile incapacitation may have been a legitimate rationale [for capital punishment] in 1976, the recent rise in statutes providing for life imprisonment without the possibility of parole demonstrates that incapacitation is neither a necessary nor a sufficient justification for the death penalty."[279] In recent decades, rehabilitation has been even less accepted as a justification for imposing death — because capital punishment has been deemed completely irrelevant to rehabilitation.[280]

Although recognizing the relevance of capital punishment to rehabilitation may, at first blush, suggest that the penological purpose provides another justification for capital punishment, this may not truly be the case. Just like with the asserted justification of incapacitation,[281] there may be other ways to achieve rehabilitation other than through the fear of death, rendering rehabilitation as an

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[277] *See* Steiker & Steiker, *supra* note 102, at 676 (stating that retribution and deterrence are the primary arguments laid out in support of the death penalty). *But see* Cassell, *supra* note 274, at 187 ("Perhaps the most straightforward argument for the death penalty is that it saves innocent lives by preventing convicted murderers from killing again.").

[278] 553 U.S. 35 (2008).

[279] *Id.* at 78 (Stevens, J., concurring); *see also* Ring v. Arizona, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring) (noting "the continued difficulty of justifying capital punishment in terms of its ability . . . to incapacitate offenders"); California v. Ramos, 463 U.S. 992, 1023 (1983) (Marshall, J., dissenting) (arguing that "[c]apital punishment simply cannot be justified as necessary to keep criminals off the streets," that "[l]ife imprisonment and, if necessary, solitary confinement would fully accomplish the aim of incapacitation," and that this was "implicitly acknowledged in *Gregg*, where the joint opinion of Justices Stewart, Powell, and Stevens relied entirely on retribution and deterrence as possible justifications for the death penalty and mentioned incapacitation only in passing as 'another purpose that has been discussed'" (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976))); *cf. Spaziano*, 468 U.S. at 461-62 ("Although incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding."). *But see* Atkins v. Virginia, 536 U.S. 304, 349-50 (2002) (Scalia, J., dissenting) (criticizing the majority for "conveniently ignor[ing] incapacitation as a legitimate justification for capital punishment). In *Baze*, the Court upheld the primary method of executing capital punishment — through the lethal injection of a three-drug cocktail. *See Baze*, 553 U.S. at 61-63. In expanding on his assertion that incapacitation is no longer necessary or sufficient to justify capital punishment, Justice Steven explains that "a recent poll indicates that support for the death penalty drops significantly when life without the possibility of parole is presented as an alternative option. And the available sociological evidence suggests that juries are less likely to impose the death penalty when life without parole is available as a sentence." *Id.* at 78-79 (Stevens, J., concurring).

[280] *See supra* Part II.

[281] *See supra* note 279 and accompanying text.

insufficient justification for capital punishment. Certainly, putting the fear of death into an offender and then not following through with the threat would generally be ineffective for reasons similar to those laid out in scholars' defenses of utilitarianism: it would be difficult to keep quiet a practice of threatening death that was never imposed.[282] Accordingly, the offenders subject to this practice would likely not effectively believe that they were being put to death and thus any rehabilitation spurred by the fear of death would cease to occur. But this does not mean that there is no other way to inspire true rehabilitation in an offender — even in the worst of offenders. The renewed interest in the rehabilitation of criminal offenders has brought about new innovations in the area. Today, for example, some offenders have the opportunity to undergo behavioral or cognitive therapy or participate in intense substance abuse rehabilitation programs.[283] In fact, a new emphasis on rehabilitation may spur even further innovations in the science of rehabilitation, and the fact that

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[282] *See* William Lyons, *Deterrent Theory and Punishment of the Innocent*, 84 ETHICS 346, 346 (1974) (stating that, "if the state or its legislature ever resorted to punishing the supposedly guilty, when it in fact knew that the person concerned was innocent, there would always be the chance that this would be found out" and that this "chance would be sufficient grounds for not engaging in such punishments because if this punishment of the innocent ever came to light, it would break down all trust and respect for law"); T. L. S. Sprigge, *A Utilitarian Reply to Dr. McCloskey*, 8 INQUIRY 264, 275 (1965) (asserting that the suggestion that a sheriff might frame an innocent man with the utilitarian goal of putting an end to riots is "absurd" because the facts of this plan would very likely become known to the citizenry and not promote utility); *see also* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 348 (2003) ("As many commentators have explained, consequentialist approaches would most likely oppose punishment of the innocent person [because] such punishment would fail in its purpose and have serious adverse consequences if word got out, which is likely."); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 212 (2000) ("Utilitarian penology could not recommend a government policy of publicly and deliberately punishing innocent people because this would impose needless suffering, create perverse incentives, and destroy public security. Utilitarian penology could not recommend a government policy of secretly framing the innocent, because a system of criminal justice could only advance its primary aim of public security if it was sufficiently transparent in design to guarantee the public that such acts would be discovered and punished."); Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just Punishment"*, 96 NW. U. L. REV. 843, 872 & nn.146-47 (2002) (quoting Binder & Smith); *cf.* John Rawls, *Two Concepts of Rules*, 64 THE PHILOSOPHICAL REV. 3, 12 (1955) (explaining that the hazards of creating an institution in which innocent people may be punished when the authorities believe that it is in society's interest "are very great").

[283] *See* Ryan, *Science*, *supra* note 1, at 27. Note, though, that these approaches may treat only the offenders' behaviors, rather than their underlying characters. *See id.*

even the worst offenders have the potential for reform may shake support for capital punishment in the United States.

CONCLUSION

Rehabilitation's reemergence as an important penological goal, along with the Court's erosion of the historical divide between capital and non-capital sentences, raises the question of how rehabilitation applies in the capital context. Courts and scholars continue to adhere to the view that death is completely irrelevant to rehabilitation.[284] This may be true if one understands rehabilitation as purely a function of an offender's effects upon society. This view that death is irrelevant to rehabilitation, though, overlooks another aspect of rehabilitation on which capital punishment and various legal doctrines are based. That is the character-transformation component of rehabilitation.[285] This aspect of rehabilitation was integral to the imposition of capital punishment in early America, and it is the type of rehabilitation that the public refers to when talking about the death-row transformations of individuals such as Paul Crump, Karla Faye Tucker, and Stanley "Tookie" Williams III.[286] It is also the form of rehabilitation on which the prohibition on executing insane individuals, the dying declaration exception to hearsay, and the finality principle of habeas corpus jurisprudence are based.[287] By losing sight of the character-transformation component of rehabilitation, we lose sight of death row inmates as human beings.[288] But ensuring that even these worst offenders retain their human dignity is a constitutional command.[289] By providing the condemned with greater rehabilitative services on death row, we can provide them with true opportunities to reform themselves, thus affirming their worth as human beings.[290] Allowing for character transformation even on death row is valuable not only for the sake of the offender, but also because it expresses to society that even the worst offenders can be reformed.[291] This may encourage the public to actively participate in other offenders' reintegration into

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[284] *See supra* Part II.

[285] *See supra* Part IV.A.

[286] *See supra* Parts III.A-B.

[287] *See supra* Parts III.C-E.

[288] *See supra* Parts IV.A-B.

[289] *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[290] *See supra* Part IV.B.

[291] *See supra* Part IV.A.

society, which could aid in reducing recidivism and improving the rehabilitation of other offenders overall.[292]

[292] *See supra* Part IV.A.

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