

Arbitrariness and the California Death Penalty

Matthew C. Altman*

I. INTRODUCTION

Most critics of the death penalty claim that it is “cruel and unusual,” and thus unconstitutional, because of the pain caused in the process of executing someone, or because it is excessive and unnecessary to reduce crime. Several recent botched executions lend support to the first claim, and statistical comparisons continue to show that the death penalty is not an effective deterrent. Although recently the Supreme Court has in several rulings limited capital punishment—for example, making mentally impaired defendants and defendants under eighteen ineligible for execution, and limiting capital cases to crimes that cause a person’s death¹—the Court has refused to rule it out entirely.

A new argument against the death penalty’s constitutionality has recently emerged, however. In July 2014, the U.S. District Court for the Central District of California, in a decision written by Judge Cormac J. Carney, ruled in *Jones v. Chappell* that the death penalty as it exists in California is cruel and unusual because of the length of time that inmates spend on death row, uncertain of when or whether they will be executed.² Judge Carney’s order thus vacated Jones’s death sentence and invalidated California’s death penalty. Subsequently, the state of California appealed Judge Carney’s ruling to the Ninth Circuit, and the Ninth Circuit reversed the district court’s judgment in *Jones v. Davis*, although it did so on technical or procedural grounds.³

The principles underlying Jones’s appeal and the District Court’s ruling are not addressed in the Ninth Circuit’s opinion, so the idea that systematic delays present a constitutional challenge continues to resonate with death penalty opponents. In this paper, I argue against the substantive claims made by Judge Carney and conclude that the kind of arbitrariness surrounding the death penalty in California does not in fact violate the Eighth Amendment. I explain why delays in administering the death penalty do not undermine the appeal to either deterrence or retribution, and I argue that the death penalty is not arbitrarily enforced in a morally or legally objectionable sense. The death penalty in California is not cruel and unusual, at least not for the reasons that Judge Carney gives. I suggest at the

* Associate Professor of Philosophy, Central Washington University, Ellensburg, Washington.

¹ See *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

² See *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014).

³ *Jones v. Davis*, 806 F.3d 538, 539 (9th Cir. 2015).

end of the paper that other problems, including concerns about time on death row during the appeals process, provide better reasons for opposing the death penalty on both constitutional and moral grounds. Thus, death penalty abolitionists would do better not to repeat the argument regarding delays in the post-conviction process that forms the basis of *Jones v. Chappell*.

II. THE CASE OF *JONES V. CHAPPELL* (2014)

The District Court's ruling in *Jones v. Chappell* states that, in effect, the death penalty does not actually exist in California.⁴ In fact, since 1978, only 13 of more than 900 inmates on death row in California have been executed.⁵ Judge Carney explains why: with capital convictions, California, like most other states, requires a direct appeal to the state Supreme Court, in which the inmate challenges the claims made at trial.⁶ The inmate must wait years until a state-appointed lawyer is assigned to him or her—an average of three to five years in California—and then the appointed counsel must research the case, study case law, file an opening brief, wait for the state to file a responsive brief, and file a reply brief—a process that usually takes another few years.⁷ And if the state Supreme Court hears the case, it is usually two or three years before the case is scheduled and a judgment is made. The direct appeal is often followed by collateral review of habeas corpus issues by the state Supreme Court and federal appeals courts, possibly up to and including the U.S. Supreme Court. At each step in the process, there are similar delays in appointing counsel, in researching the case and petitioning the court, and in the court's review of the case. The complete federal habeas review process takes about ten years. Because of the numerous delays, those who are sentenced to death in California are effectively given a different punishment, according to Judge Carney: "For all practical purposes . . . a sentence of death in California is a sentence of life imprisonment with the remote possibility of death—a sentence no rational legislature or jury could ever impose."⁸ Whether someone is actually executed depends not on whether someone committed a horrific crime, but whether appeals are made and reviewed in a timely manner. Unfortunately, California has

⁴ See *Chappell*, 31 F. Supp. 3d at 1062.

⁵ CAL. DEP'T OF CORR. & REHAB., *Inmates Executed, 1978 to Present*, www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Oct. 11, 2016); *Chappell*, 31 F. Supp. 3d at 1053.

⁶ *Chappell*, 31 F. Supp. 3d at 1056.

⁷ CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 122 (Gerald Uelman ed., 2008), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs>; see also Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697 (2007).

⁸ *Chappell*, 31 F. Supp. 3d at 1062.

been unable to implement an efficient review process because of an underfunded death penalty system, especially budget cuts to public defenders' offices.⁹

In his ruling in *Jones v. Chappell*, Judge Carney draws heavily on the U.S. Supreme Court's decision in *Furman v. Georgia*, which created a de facto moratorium on the death penalty.¹⁰ In *Furman*, the Court held 5-4 that the discretion afforded to the jury led to arbitrary sentences, often sentences that were too severe (because the same effect could be produced by lesser sentences) and that offended our common sense of justice.¹¹ Thus, under the contemporary laws that allowed the jury wide latitude, the death penalty amounted to cruel and unusual punishment. Justice Stewart put it this way: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹² In other words, if a jury has broad discretion, people who deserve the death penalty could go free and people who do not deserve it could receive it. This would not further the aims of either retribution or deterrence because there would be no correlation between guilt and punishment. Some justices were particularly troubled by the presence of racial bias.¹³ If juries are basing their sentencing decisions on the race of the defendant rather than the relevant facts of the case, then the decision is being reached arbitrarily. This amounts to cruel treatment of the accused because it is not giving the person what he or she deserves based on his or her actions, and thus "it does not comport with human dignity."¹⁴

According to Judge Carney, the death penalty in California has reached the same point. Whether someone is executed depends on the speed with which counsel can be assigned and the courts can process an inmate's appeals, not on his or her degree of guilt: "Inordinate and unpredictable delay has resulted in a death penalty system in which . . . arbitrary factors, rather than legitimate ones like the nature of the crime or the date of the death sentence, determine whether an individual will actually be executed."¹⁵ This is unnecessary and cruel primarily

⁹ CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, *supra* note 7 at 132.

¹⁰ *Furman v. Georgia*, 408 U.S. 238, 239 (1972). It was only a de facto moratorium because, although five justices agreed on a per curiam opinion that the death penalty violated the Constitution, they could not agree on the reasoning—each of the five majority justices produced his own opinion—so there was no controlling opinion in the case. In response to the ruling, the states with capital punishment revised their sentencing processes to ensure that the death penalty was not applied capriciously, and the Court reaffirmed the constitutionality of the death penalty shortly thereafter in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

¹¹ *See Furman*, 408 U.S. 238.

¹² *Id.* at 309 (Stewart, J., concurring).

¹³ *Id.* at 249–51 (Douglas, J., concurring), 364–65 (Marshall, J., concurring).

¹⁴ *Id.* at 270 (Brennan, J., concurring).

¹⁵ *Jones v. Chappell*, 31 F. Supp. 3d 1050 at 1069 (C.D. Cal. 2014).

because it does not give the defendant what he or she deserves (retribution) and it does not serve as an effective warning to other would-be murderers (deterrence).¹⁶

The District Court's ruling was overturned by the Ninth Circuit Court of Appeals in November 2015.¹⁷ The panel of judges ruled that Jones's appeal to the District Court amounted to a novel constitutional rule and was therefore barred under *Teague v. Lane*.¹⁸ The *Teague* ruling seeks to ensure that state convictions are not always uncertain, which they would be if new constitutional theories could be advanced post-conviction; if new constitutional theories could be devised after any conviction, then no sentence would be final.¹⁹ Since "[t]he Supreme Court has never held that execution after a long tenure on death row is cruel and unusual punishment,"²⁰ finding in favor of Jones in this case would apply a new constitutional requirement that was not compelled by existing precedent at the time of his conviction.²¹

In a concurring opinion, Judge Paul J. Watford claimed, contrary to the panel, that the rule announced by the District Court was substantive rather than procedural, and thus it was not precluded by *Teague*.²² However, Watford denied Jones's claim because he had not exhausted the appeals process prior to the District Court's review.²³ Watford noted that Jones had raised a "so-called *Lackey* claim" to the California Supreme Court,²⁴ contending that, *in his own case*, the

¹⁶ The Supreme Court has repeatedly held that the death penalty must further the penological goals of retribution and deterrence. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citation omitted) ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Atkins v. Virginia*, 536 U.S. 304, 318–19 (2002); *Roper v. Simmons*, 543 U.S. 551, 571 (2005); *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) ("[C]apital 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.").

¹⁷ *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

¹⁸ *Id.* See *Teague v. Lane*, 489 U.S. 288 (1989).

¹⁹ "The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith*, 497 U.S. 227, 234 (1990).

²⁰ *Allen v. Ornoski*, 435 F.3d 946, 958 (9th Cir. 2006).

²¹ It should be noted that both Jones's attorneys and Carney claimed that they were not appealing to a new rule, but rather were drawing on the principles outlined in *Furman*. For example, Jones's attorneys wrote: "Mr. Jones's claim is not barred by *Teague* . . . because the prohibition against arbitrariness in capital punishment is a well-established principle dictated by *Furman* and therefore not a new rule." Petitioner-Appellee's Answering Brief at 12, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373).

²² *Jones v. Davis*, 806 F.3d 538 at 553 (9th Cir. 2015) (Watford, J., concurring).

²³ *Id.*

²⁴ *Id.* See *Lackey v. Texas*, 514 U.S. 1045 (1995).

post-conviction delay rendered his death sentence cruel and unusual.²⁵ However, the District Court granted relief based on a theory that California's post-conviction review process rendered *all* capital convictions unconstitutional because of its arbitrariness.²⁶ Thus, the District Court should not have granted him relief based on that claim, prior to filing a new habeas petition with the California Supreme Court.

The Ninth Circuit in *Jones v. Davis* did not consider the merits of Jones's claim that delays in the post-conviction review process render the death penalty unconstitutional. Instead, it considered only whether Jones proposed a new constitutional rule: "*Teague* requires an analysis of the underlying legal theory of the claim—albeit to determine its novelty rather than its ultimate persuasiveness."²⁷ The court also noted that "judicial economy may outweigh constitutional-avoidance concerns,"²⁸ meaning that the *Teague* issue was more easily resolvable and provided the basis for a less tenuous ruling than the deeper constitutional issues raised by the District Court. Given the outpouring of support for Jones's appeal—abolitionist groups submitted several amicus briefs and death penalty opponents throughout the country lauded the District Court's ruling—we ought also to examine Judge Carney's holding that the death penalty in California violates the principles set out in *Furman*.

III. RETRIBUTION AND RESENTMENT

I will begin with Judge Carney's opinion that the death penalty in California does not serve a retributive purpose because it is arbitrarily enforced. In *Jones v. Chappell*, Judge Carney stated that there is no common thread between those who are executed and those who are not.²⁹ Prisoners who die of old age on death row do not commit less heinous offenses or undergo character conversions at a higher rate than those who are executed. Rather, Judge Carney concluded, "[selection for execution] will depend upon a factor largely outside an inmate's control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly the inmate proceeds through the State's dysfunctional post-conviction review process."³⁰ Thus, he concluded that there is no correlation between guilt and execution—one's execution does not depend on one's crime—so retribution is not served by capital punishment.

²⁵ *Davis*, 806 F.3d at 553 (Watford, J., concurring).

²⁶ *Id.* at 542 (majority opinion).

²⁷ *Id.* at 544.

²⁸ *Id.* at 545.

²⁹ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1062 (C.D. Cal. 2014).

³⁰ *Id.*

As mentioned earlier, Judge Carney's opinion often draws on the *Furman* case for support. However, the arbitrariness described in *Furman* is different from the kind of arbitrariness that is introduced when there is a delay in administering the death penalty. The people who are on death row in these cases have been found by a jury, following the stricter guidelines that were judged to be constitutionally permissible in *Gregg v. Georgia*, to be guilty of a capital offense. Thus, both those who are executed and those who die on death row while waiting on the courts deserve to be executed. Those who are executed consequently are not receiving harsher punishments than they deserve. And, although those who are not executed may be getting lighter sentences than they deserve, this does not introduce any injustice, given that the delays are caused by an appeals process that is designed to protect their rights.³¹

An appropriate analogy would be if you are speeding in your car and the cars around you are also speeding, but you are the one who is pulled over and given a ticket. You may envy the others or be angry at the officer, but you cannot really resent the officer or the other drivers. As Thomas Nagel defines it, resentment (as opposed to merely disliking something) involves a judgment that someone has wronged you, that he or she is being unreasonable in treating you that way.³² In this case, resentment toward the officer would be misplaced, because, all things being equal, you cannot claim that you do not deserve the ticket. Of course, there are bad reasons to single you out that may warrant the feeling of resentment. For example, if the officer stopped you because you are black and the other drivers are white, then that is not a good reason to treat you differently, and the decision to stop you instead of others is unjust. But if he or she chose randomly among a group of speeding cars—one officer can only handle one driver at a time, after all—then the arbitrariness of your being stopped, although it may be bad luck for you, actually ensures that the law is being applied fairly. Similarly, the mere fact that executions are not carried out with any discernible or rational pattern does not

³¹ See *Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998) (citation omitted) (“We believe that delay in capital cases is too long. But delay, in large part, is a function of the desire of our courts, state and federal, to get it right, to explore exhaustively, or at least sufficiently, any argument that might save someone’s life [W]e do not see how the present situation even begins to approach a constitutional violation.”); *People v. Seumanu*, 355 P.3d 384, 442 (Cal. 2015) (internal brackets omitted) (quoting *People v. Anderson*, 25 Cal. 4th 543, 606 (2001)) (“[S]uch delays are the product of ‘a constitutional safeguard, not a constitutional defect, because they assure careful review of the defendant’s conviction and sentence.’”). The State of California made this point in its opening brief to the Ninth Circuit: “California provides capital defendants with substantial opportunities to challenge their convictions—and resources for doing so—for the precise purpose of ensuring that the death penalty will *not* be ‘arbitrarily’ imposed. Providing that sort of careful, individualized review through direct appeal and state habeas proceedings takes time.” Appellant’s Opening Brief at 2, *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014) (No. 14-56373).

³² THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 82–83 (1970); see also Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14–34 (1988).

matter as long as the selection process is not based on unjustifiable criteria, all of the people who are executed have been found guilty as a result of a justified legal process, and those people are only executed after the appeals process has been completed. Under our legal system, we can say that the other people on death row should be executed, but we cannot say that the people who are executed should not be. Yet Judge Carney's ruling excludes everyone from being executed, rather than ensuring that everyone is executed who deserves to be.

This is a different kind of arbitrariness than we have in *Furman*. In his concurring opinion, Justice Stewart wrote, "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom *the sentence of death* has in fact been imposed."³³ Stewart's concern was that juries had too much discretion and were determining punishment based on variable or irrelevant factors.³⁴ Justices Douglas and Marshall worried specifically that juries were basing their sentencing decisions on racial prejudice, sentencing black defendants to death who did not deserve it and giving lighter sentences to white defendants who deserved the death penalty.³⁵ This is a clear case of injustice. If there is such bias in sentencing—and the evidence seems to indicate that there is, since the race of the victim and the race of the defendant are major factors in whether someone is sentenced to death³⁶—then that would be a reason to challenge the death penalty's constitutionality, as Justice Blackmun did in his dissenting opinion in *Collins v. Collins*.³⁷ But, as the Ninth Circuit noted in its ruling,³⁸ this has nothing to do with

³³ *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring) (emphasis added).

³⁴ *Id.*

³⁵ *Id.* at 249–51 (Douglas, J., concurring), 364–65 (Marshall, J., concurring).

³⁶ Non-white defendants are much more likely to receive the death penalty: 42% of the people on death row are black, even though they comprise only about 13% of the general population. See AMNESTY INT'L, UNITED STATES OF AMERICA: DEATH BY DISCRIMINATION - THE CONTINUING ROLE OF RACE IN CAPITAL CASES 1 (2003), <https://www.amnesty.org/en/documents/AMR51/046/2003/en/> (last visited Sept. 27, 2016). The strongest correlation between race and capital charges and convictions, however, is with regard to the race of the victim: 76% of the victims in death penalty cases are white, even though they account for only about 50% of murder victims. See DEATH PENALTY INFO. CTR., FACTS ABOUT DEATH PENALTY 1, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>. A black defendant who kills a white person is nine times more likely to be executed than a white defendant who kills a black person. *Id.* at 2. See also *Race and the Death Penalty*, AM. CIVIL LIBERTIES UNION, www.aclu.org/capital-punishment/race-and-death-penalty (last visited Sept. 27, 2016). For racial disparities in California's death sentencing in particular, see Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005).

³⁷ *Collins v. Collins*, 510 U.S. 1141, 1151–55 (1994) (Blackmun, J., dissenting).

³⁸ *Jones v. Davis*, 806 F.3d 538, 550–51 (9th Cir. 2015) (“[U]nlike the prisoners in *Furman*, Petitioner does not allege arbitrariness *at sentencing*. Instead, he alleges that the State ‘arbitrarily’ determines when to *carry out* a lawfully and constitutionally imposed capital sentence.”).

delays in the appeals process and the arbitrariness of whose appeals make their way through the courts, which is the issue in *Jones v. Chappell*, and it does not entail that those who are executed do not deserve the punishment. Inmates who are executed are not getting more than they deserve, even though some inmates—those who are not executed—are getting less than they deserve. But again, this is not because of some morally unjustifiable reason that would elicit resentment rather than envy or anger.

Judge Carney's reasoning is not particularly clear here. Drawing on the language of previous cases, he claims that, because of its arbitrary implementation, capital punishment in California does not adequately express society's "moral outrage"³⁹ and does not provide victims' families with "moral and emotional closure."⁴⁰ The first claim is debatable. One could draw on Justice Brennan's concurring opinion in *Furman* to rebut it. He says that there is no evidence that death serves the purpose of reinforcing society's moral values more than imprisonment does, and that "it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values."⁴¹ Judge Carney's assumption seems to be that the death penalty without significant delays would properly express our moral outrage, and that the death penalty in California does not accomplish this end *because of* the arbitrariness introduced by the delays. Although Justice Brennan concedes that a community's values cannot be reinforced if executions are rarely carried out, he also calls into question the assumption that it would be reinforced without the arbitrariness and delays. That is, it is unlikely that spending much or all of the remainder of one's life on death row, not knowing whether the execution will ever be carried out, expresses society's moral outrage less forcefully than a speedy execution would. It certainly is not so much less of a punishment as to render it ineffective as retribution.

Judge Carney's second claim, that the delay in carrying out a death sentence does not allow the victim's family to achieve "closure," rests on the faulty premise that a speedy execution *would* provide closure.⁴² There are several organizations of victims' families that oppose the death penalty, such as Murder Victims' Families for Human Rights, and studies indicate that families suffer during the extended appeals process and often experience a traumatic sense of loss after the execution.⁴³ Indeed, two such organizations, Murder Victims' Families for

³⁹ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

⁴⁰ *Ceja v. Stewart*, 134 F.3d 1368, 1373 (9th Cir. 1998).

⁴¹ *Furman v. Georgia*, 408 U.S. 238, 303 (1972) (Brennan, J., concurring).

⁴² *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1069 (C.D. Cal. 2014).

⁴³ See, e.g., Marilyn Peterson Armour & Mark S. Umbreit, *Assessing the Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*, 96 MARQ. L. REV. 1 (2012); Corey Burton & Richard Tewksbury, *How Families of Murder Victims Feel Following the*

Reconciliation and California Crime Victims for Alternatives to the Death Penalty, submitted an amicus brief to the Ninth Circuit in support of Jones's case, claiming that, instead of bringing "some form of psychological relief to the families of the victims . . . the imposition of the death penalty has the opposite effect of prolonging and exacerbating the terrible pain and grief experienced by co-victims."⁴⁴ The idea that executing the murderer provides closure to the victim's loved ones is a politically useful myth, but it typically does not hold true in reality. Judge Carney's opinion also does nothing to further the Eighth Amendment argument. Whether a family feels satisfied with a punishment does not determine whether it is cruel, or else gruesome torture would be constitutionally permissible if the victim's family were particularly bloodthirsty.

IV. EXPECTATIONS AND DETERRENCE

Judge Carney also claims that delays and uncertainty make the death penalty ineffective and unnecessary as a deterrent.⁴⁵ Although it is true in general that a certain punishment is a more effective deterrent than an uncertain punishment—the courts have long recognized this⁴⁶—the argument that a delay in administering the death penalty undermines its deterrent effect depends on several faulty assumptions. First, there is no convincing evidence that the death penalty without a delay deters, and no convincing evidence that the delay and uncertainty are crucial in removing that as a justification. Although a few studies seem to show that the death penalty has some effect on rates of violent crime⁴⁷—more on that later—numerous statistical analyses indicate that the death penalty does not deter more than life in prison. Comparisons of violent crime rates in states with and without the death penalty,⁴⁸ comparisons of countries with and without the death penalty,⁴⁹ and surveys of experts from the American Society of Criminology, the

Execution of Their Loved One's Murderer: A Content Analysis of Newspaper Reports of Executions from 2006-2011, 1 J. QUAL. CRIM. JUST. & CRIMINOLOGY 53 (2013). See also *The Closure Myth*, EQUAL JUSTICE USA, <http://ejusa.org/learn/victims-families/> (last visited Sept. 27, 2016).

⁴⁴ Brief of Amici Curiae Murder Victims' Families for Reconciliation and California Crime Victims for Alternatives to the Death Penalty in Support of Appellee at 1, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015) (No. 14-56373).

⁴⁵ *Chappell*, 31 F. Supp. 3d at 1063–64.

⁴⁶ See, e.g., *United States v. Panico*, 308 F.2d 125, 128 (2d Cir. 1962); *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991).

⁴⁷ See *infra* note 56.

⁴⁸ See *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DEATH PENALTY INFO. CTR., www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates (last visited Sept. 27, 2016); Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report; States with No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES (Sept. 22, 2000), www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html?pagewanted=all.

⁴⁹ See AMNESTY INT'L, NOT MAKING US SAFER: CRIME, PUBLIC SAFETY AND THE DEATH PENALTY (Oct. 10, 2013), www.amnesty.org/en/documents/ACT51/002/2013/en/.

Academy of Criminal Justice Sciences, and the Law and Society Association indicate that increasing the number of executions, or decreasing the time spent on death row before execution, does not produce a general deterrent effect.⁵⁰ There is no discernable deterrent effect when comparing the same state before and after prohibition (e.g., before and after the *Furman* decision)⁵¹ or before and after highly publicized death sentences and executions;⁵² and when comparing socioeconomically and geographically similar states or bordering counties in neighboring states with and without the death penalty.⁵³ With regard to the more specific question, a study and review of the literature by William Bailey has found that the speed and certainty of execution has no impact on its deterrent effects.⁵⁴ Given all of this data, one cannot claim that the death penalty fails to deter (and is therefore excessive) *because* of the delay; it likely fails to deter regardless of how quickly it is carried out.

Second, even without the delay, the death penalty—and indeed other punishments—is always uncertain, so it is unlikely that having this delay makes capital punishment markedly more uncertain in the mind of the criminal. Hugo Adam Bedau explains the problem:

Most capital crimes are committed in the heat of the moment. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended. Many capital crimes are committed by the badly emotionally-damaged or mentally ill. In such cases, violence is inflicted by persons unable to appreciate the consequences to themselves as well as to others.

Even when crime is planned, the criminal ordinarily concentrates on escaping detection, arrest, and conviction. The threat of even the severest punishment will not discourage those who expect to escape detection and

⁵⁰ See Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1 (1996); Michael L. Radelet & Traci L. Lacoek, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489 (2009).

⁵¹ Ruth D. Peterson & William C. Bailey, *Murder and Capital Punishment in the Evolving Context of the Post-Furman Era*, 66 SOC. FORCES 774 (1988). See also William C. Bailey & Ruth D. Peterson, *Murder, Capital Punishment, and Deterrence: A Review of the Literature*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 135 (Hugo Adam Bedau ed., 1997).

⁵² Robert H. Dann, *The Deterrent Effect of Capital Punishment*, 29 FRIENDS SOC. SERV. SERIES 1 (1935); Leonard D. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L. & CRIMINOLOGY 338 (1958).

⁵³ See THORSTEN SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* (1959).

⁵⁴ William C. Bailey, *Deterrence and the Celerity of the Death Penalty: A Neglected Question in Deterrence Research*, 58 SOC. FORCES 1308 (1980).

arrest. It is impossible to imagine how the threat of any punishment could prevent a crime that is not premeditated.⁵⁵

Few criminals believe that they will be caught, so from the point that a crime is planned, there is at least a lack of certainty regarding the punishment (and at most a belief that one will not be punished). And murders committed in the heat of the moment or by people who are mentally unbalanced are done without a serious consideration of the possible consequences. Even if a criminal is caught, what follows is a plea agreement or a trial, which results in uncertainty about whether he or she will be found guilty, how much he or she will be punished (if at all), and whether any possible appeal will be successful. If mere uncertainty rendered a punishment cruel, then that would undermine the justification of all punishments, not only the death penalty. It is likely that a delay in administering the death penalty caused by further appeals makes the punishment even more uncertain, but it is unlikely that this delay crucially impacts the deterrent effect of the death penalty. In short, if a potential murderer is not deterred by the prospects of life on death row, he or she is not likely to be deterred by the threat of execution.

Of course, none of this proves that the death penalty fails to deter violent criminals. Supporters of the death penalty could claim, for example, that states with the death penalty would have even higher crime rates without the death penalty: the people there are more violent, so they need harsher punishments just to make the crime rates comparable with other states. In addition, they may cite studies that seem to indicate that the death penalty does deter.⁵⁶ If we take these

⁵⁵ Hugo Adam Bedau, *The Case Against the Death Penalty*, AM. CIVIL LIBERTIES UNION, www.aclu.org/case-against-death-penalty (last visited Sept. 27, 2016). Former U.S. District Court and U.S. Court of Appeals Judge H. Lee Sarokin makes a similar point:

In my view deterrence plays no part whatsoever. Persons contemplating murder do not sit around the kitchen table and say I won't commit this murder if I face the death penalty, but I will do it if the penalty is life without parole. I do not believe persons contemplating or committing murder plan to get caught or weigh the consequences. Statistics demonstrate that states without the death penalty have consistently lower murder rates than states with it, but frankly I think those statistics are immaterial and coincidental. Fear of the death penalty may cause a few to hesitate, but certainly not enough to keep it in force, and the truth is that there is no way of ever knowing whether or not the death penalty deters.

H. Lee Sarokin, *Is It Time to Execute the Death Penalty?*, HUFFINGTON POST (Jan. 15, 2011), www.huffingtonpost.com/judge-h-lee-sarokin/is-it-time-to-execute-the_b_809553.html.

⁵⁶ Two recent comparisons of crime rates in individual states before and after moratoriums on the death penalty seem to indicate that the death penalty does have a deterrent effect. See Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203 (2005); Hashem Dezhbakhsh & Joanna M. Shepherd, *The Deterrent Effect of Capital Punishment: Evidence from a "Judicial Experiment"*, 44 ECON. INQUIRY 512 (2006). See also Roy D. Adler & Michael Summers, *Capital Punishment Works*, WALL ST. J. (Nov. 2, 2007), www.wsj.com/articles/SB119397079767680173. For a detailed critique of studies that seem to show that the death penalty deters, see generally DETERRENCE AND THE DEATH PENALTY (Daniel S. Nagin & John V. Pepper eds., 2012); *An Examination of the Death Penalty in the United States: Hearing*

studies seriously, we are left to conclude, in light of the other studies mentioned above, that the evidence is inconclusive regarding the deterrent effects of the death penalty.

Even if we only acknowledge that the deterrence issue has not been settled, however, that is enough to upset Judge Carney's ruling in *Jones v. Chappell*. For *Jones*, the question is not whether the death penalty deters, or even whether it is reasonable to believe that the death penalty does not deter. The question is whether the evidence presented to Judge Carney was sufficient to prove that the death penalty does not deter *because of the delay*. Judge Carney struck down an existing law in California based on this proposition, but the evidence in support of the proposition is entirely lacking.

V. THE CRUELTY OF AWAITING EXECUTION ON DEATH ROW

A stronger reason for the unconstitutionality of the death penalty that Judge Carney did not address in *Jones v. Chappell*, but that is also based on the delays, has to do with the living conditions on death row. Death row was not originally designed for long-term incarceration, so, arguably, languishing on death row is itself cruel, rather than (or in addition to) the act of execution itself. Cells in California's death row are about four feet across, nine feet long, and seven feet from floor to ceiling. Most death row inmates must remain in their cells for twenty-three hours a day or more, and recreational activities for death row inmates have decreased recently, as they have been denied materials for pursuing hobbies. This is both physically and mentally debilitating, as one former death row inmate attests: "There was room enough only for push-ups, sit-ups, and squats, insufficient to exercise all the body's muscles. We were allowed out of our cells and into the hallway—one at a time—for only fifteen minutes twice a week for a shower."⁵⁷ In addition, although some death row prisoners are allowed visitors, most do not receive any, and there are tight restrictions on who can come and when. Journalist Nancy Mullane claims that the prisoners she interviewed in California "hadn't seen a 'free' person who wasn't an officer or an administrator with the prison in more than a decade."⁵⁸ Physical confinement and social isolation for years at a time are not done as a temporary measure (for example, to protect other prisoners from an out-of-control inmate), but are experienced by some of these prisoners for years, until they die of natural causes. This produces

Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 109th Cong. 63 (2006) (statement of Jeffery A. Fagan, Ph.D., Columbia Law School), <https://www.gpo.gov/fdsys/pkg/CHRG-109shrg29599/pdf/CHRG-109shrg29599.pdf>.

⁵⁷ Wilbert Rideau, *My Life on Death Row*, PROGRESSIVE (Apr. 7, 2011), www.progressive.org/news/2011/04/160190/my-life-death-row (Rideau describing his time on death row in Louisiana, prior to his release after being retried for a lesser crime).

⁵⁸ Marina Koren, *What Life Is Like on California's Death Row: A Journalist Shares Her Experience Interviewing the State's Worst Offenders*, NAT'L JOURNAL (Apr. 28, 2014), www.nationaljournal.com/domesticpolicy/what-life-is-like-on-california-s-death-row-20140428.

great emotional stress and anxiety, called the “death row phenomenon,” and these reactions often give rise to a mental illness known as “death row syndrome.”⁵⁹ Psychological suffering becomes part of the punishment.

Although most death row inmates continue their appeals for as long as they can—to forestall death, because they are innocent, or for other reasons—a statistically significant number of inmates forego ordinary appeals and willingly take their punishment, allowing them some measure of control over their fate and an escape from years alone in a small cell. Some people have claimed that this amounts to state-assisted suicide, which allows prisoners, many of whom are clinically depressed or mentally ill, to avoid acknowledging what they have done.⁶⁰ Since the death penalty was reinstated in 1976, there have been 141 such “execution volunteers.”⁶¹ In addition, the suicide rate of death row inmates is about ten times the rate of suicide in the United States as a whole and about six times the rate of suicide in the U.S. general prison population.⁶² For all of these inmates, death—sometimes a very painful death—is preferable to life on death row.⁶³

The physically and psychologically injurious conditions on death row are, of course, compounded by the uncertainty of not knowing when, or whether, one is actually going to be executed. Thus, the arbitrariness of who is executed and the delays caused by the dysfunctional justice system create conditions under which inmates are subjected to something like torture; death row inmates are physically confined and socially isolated for years, in ways that the general prison population is not, and they are constantly subjected to the threat of execution, which may never be carried out. This is a much more traditional argument against the death

⁵⁹ Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. INT'L L. 833 (2000), www.ejil.org/pdfs/11/4/556.pdf; Karen Harrison & Anouska Tamony, *Death Row Phenomenon, Death Row Syndrome and Their Affect on Capital Cases in the US*, INTERNET J. CRIMINOLOGY 1–2 (2010), www.internetjournalofcriminology.com/Harrison_Tamony_%20Death_Row_Syndrome%20_IJC_No_v_2010.pdf. The “death row phenomenon” is referenced several times in *United States v. Burns*, [2001] 1 S.C.R. 283, 307, 352–53 (Can.), a decision by the Supreme Court of Canada that prohibited extraditing individuals to places where they may face the death penalty. See also *Pratt v. AG for Jamaica* [1993] 2 AC 1 (PC); *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989).

⁶⁰ See John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 940 (2005).

⁶¹ *Information on Defendants Who Were Executed Since 1976 and Designated as “Volunteers,”* DEATH PENALTY INFO. CTR. (Aug. 13, 2015), www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers.

⁶² See David Lester & Christine Tartaro, *Suicide on Death Row*, 47 J. FORENSIC SCI. 1108 (2002).

⁶³ See Amy Smith, *Not “Waiving” but Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237 (2008), www.bu.edu/pilj/files/2015/09/17-2SmithArticle.pdf; Bryan Robinson, *Death-Row Inmates Prefer Death to Life*, ABC NEWS (Jan. 7, 2003), <http://abcnews.go.com/US/story?id=90935>.

penalty than the one Judge Carney gives: The punishment is cruel because of the physical and mental suffering involved; it is unusual because inmates are treated in ways that are not acceptable to much of American society, and certainly to much of the world; and overall, it is, as Justice Brennan says in *Furman*, “degrading to human dignity.”⁶⁴

VI. CONCLUSION: BETTER REASONS TO OPPOSE CAPITAL PUNISHMENT

The irony of my approach in this paper is that traditional arguments *against* the death penalty are actually being used to criticize Judge Carney’s ruling that the death penalty is cruel and unusual. For example, I have claimed that the delay does not undermine the death penalty’s deterrent effect because there is no deterrent effect without the delay, that life in prison expresses society’s moral outrage as well as execution does, that arbitrariness is wrong when it is racially motivated but not when it is due to delays in the appeals process, and so on. If my arguments are accepted, then the Ninth Circuit could have struck down the District Court’s ruling on more than procedural grounds. The court could have rejected the substance of the challenge, which would have upset abolitionist groups who see post-conviction delays as their new, best hope for challenging the constitutionality of the death penalty.

I have shown that such an abolitionist strategy is misguided. One can, and indeed should, oppose the death penalty for other, more compelling reasons, reasons that do not depend on a comparison between the death penalty as it is applied in California and the death penalty as it would ideally be applied. Instead, one can claim that the death penalty, with or without California’s delays, does not serve the aims of either retribution or deterrence more than life in prison does, that executions are excessively painful, that capital cases are corrupted by racial bias, and that a modern, liberal democracy should not be executing its own citizens—all of which support the claim that the death penalty violates the Eighth Amendment. To achieve their long-term goals, opponents of capital punishment should hold fast to these arguments. They should not embrace the ruling in *Jones v. Chappell*.

⁶⁴ *Furman v. Georgia*, 408 U.S. 238, 291 (1972) (Brennan, J., concurring).