Unjustified Punishment: The Eighth Amendment and Death Sentences in States that Fail to Execute

Elizabeth Brilliant*

INTRODUCTION

The death penalty remains legal in twenty-eight states.[1] However, three such states have placed moratoria on the use of the death penalty, and only seven carried out executions in 2019.[2] Individuals incarcerated in states that have enacted death penalty moratoria do not have their death sentences carried out in a timely and expeditious manner; instead, these incarcerated individuals sit on death row until they are either exonerated or die of natural causes.[3] Individuals

DOI: https://doi.org/10.15779/Z38X34MS5W

* J.D. Candidate 2021, University of California, Berkeley, School of Law.

1. *State by State*, DEATH PENALTY INFO. CTR. (2019), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/6MZ6-RXQD].

2. *Executions Overview*, DEATH PENALTY INFO. CTR. (2019), https://deathpenaltyinfo.org/executions/executions-overview [https://perma.cc/Q8TN-Q8MM].

3. *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row [https://perma.cc/4JZU-RA92].

on death row in these states sit on death row for over two decades on average.[4] This Article argues that capital sentencing in states that fail to execute individuals on death row, particularly in states with moratoria on the death penalty, violates the Eighth Amendment to the U.S. Constitution.

In Part I, I argue that indefinite incarceration on death row under the threat of execution without a likelihood of actual execution amounts to cruel and unusual punishment. In Part II, I examine the penological purposes for the death penalty, explain that none of these purposes are met in states that fail to conduct timely executions, and conclude that the death penalty is unjustified and unconstitutional in such contexts. In Part III, I examine the decisions of capital juries and find that capital sentences in states that do not execute individuals on death row impermissibly shift and lessen juror responsibility in violation of the Eighth Amendment. Finally, in Part IV, I conclude that issues with jury decision-making and sentencing in such states cannot be remedied by means other than the end of capital trials in these states.

There are deeply racist elements to the death penalty that compound all of the impacts and issues addressed in this Article. Other work has discussed the impacts of race and bias on prosecutorial decision-making, jury processes, sentencing, and other aspects of the carceral system.[5] While the racialization of the criminal legal system generally, and the death penalty specifically, is inextricable from any full analysis, this Article does not address the specific impacts of race and bias. Due to space constraints and for clarity of argument, this Article focuses on the following proposition: even if the system treated all individuals equally, the practices mentioned in this Article would still be unconstitutional.

I.
INDEFINITE INCARCERATION UNDER THREAT OF EXECUTION IS CRUEL AND UNUSUAL

Indefinite incarceration pursuant to a death sentence, as distinct from a sentence of life imprisonment without the possibility of parole, is cruel and unusual punishment in direct violation of the Eighth Amendment.[6] In states that

4. *Id.*

5. Ample scholarship provides examples of the stark inequalities within the justice system. *See, e.g.*, German Lopez, *Report: black men get longer sentences for the same federal crimes as white men*, VOX (Nov. 17, 2017), https://www.vox.com/identities/2017/11/17/16668770/us-sentencing-commission-race-booker [https://perma.cc/K5Y4-ACNB]. For examples of more detailed discussions of some of the issues directly plaguing the jury system, see generally Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994); BERKELEY LAW DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS (June 2020), available at https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/K95V-4ZTX].

6. *See* U.S. Const. amend. VIII; Scinto v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016) ("The Eighth Amendment prohibits the infliction of 'cruel and unusual punishments.' This prohibition

fail to execute, either in practice or due to a moratorium, indefinite incarceration under a death sentence essentially functions as life imprisonment without the possibility of parole (LWOP).[7] Despite this equivalent function, two key differences remain between the extended incarceration pursuant to a death sentence and an actual LWOP sentence. First, conditions of confinement for individuals on death row are harsher than conditions of the general prison population. Second, individuals with death sentences continue to live with the threat of execution, regardless of whether they are in a state with a moratorium or not.

The harsh conditions of death row confinement inflict considerable trauma and sustained mental health problems on individuals incarcerated on death row.[8] A recent survey by the American Civil Liberties Union (ACLU) found that "93 percent of states lock up their death row prisoners for twenty-two or more hours per day."[9] Most prisoners on death row spend these twenty-two hours a day in tiny concrete cells.[10] The adverse and permanent impacts of solitary confinement over time are well known and include, but are not limited to, panic attacks and anxiety, nervousness, fear, lack of impulse control, severe depression, appetite and weight loss, heart palpitations, headaches, sleep problems, self-mutilation, paranoia, hallucinations and illusions, hyperresponsivity, and lower levels of brain function, concentration, and memory.[11] A prison psychologist cited in an ACLU report noted that "[i]t's a standard psychiatric concept, if you put people in isolation, they will go insane. . . . Most people in isolation will fall apart.'"[12]

'proscribes more than physically barbarous punishments.' It also encompasses 'the treatment a prisoner receives in prison and the conditions under which he is confined.') (quoting U.S. Const. amend. VIII; Estelle v. Gamble, 429 U.S. 97, 102 (1976); Helling v. McKinney, 509 U.S. 25, 31 (1993)).

7. In enacting a moratorium, Oregon governor John Kitzhaber stated that the death penalty has become an "extremely expensive" life sentence for all but those who drop their appeals. Helen Jung, *John Kitzhaber moratorium on death penalty leaves inmate Gary Haugen and Oregon lawmakers wondering what's next*, OREGONLIVE (Jan. 10, 2019), https://www.oregonlive.com/pacific-northwest-news/2011/12/kitzhaber_moratorium_on_death.html [https://perma.cc/8BD8-XWHH].

8. *See* Kathleen M. Flynn, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 296 (1997) (citing studies finding that "prolonged death row incarceration undermines a prisoner's sanity and contributes to the total devastation of the inmate's personality").

9. ACLU, A DEATH BEFORE DYING: SOLITARY CONFINEMENT ON DEATH ROW 5 (2013), https://www.aclu.org/report/death-dying-solitary-confinement-death-row?redirect=death-dying-solitary-confinement-death-row-report **[**https://perma.cc/G7VZ-J96T**].**

10. *Id.*; *see also* Robert Johnson, *Solitary Confinement Until Death by State-Sponsored Homicide: An Eighth Amendment Assessment of the Modern Execution Process*, 73 WASH. & LEE L. REV. 1213, 1216-18, 1221 (2016) (detailing specific conditions for incarcerated individuals on death row).

11. ACLU, A DEATH BEFORE DYING, *supra* note 9, at 6-7; *see also* Porter v. Clarke, 923 F.3d 348 (4th Cir. 2019); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J. L. & POL'Y 325, 335-38 (2006); Elena Blanco-Suarez Ph.D., *The Effects of Solitary Confinement on the Brain*, THE PSYCHOLOGY TODAY (Feb. 27, 2019), https://www.psychologytoday.com/us/blog/brain-chemistry/201902/the-effects-solitary-confinement-the-brain [https://perma.cc/DVU6-HBX2].

12. ACLU, A DEATH BEFORE DYING, *supra* note 9, at 7; ACLU, ABUSE OF THE HUMAN RIGHTS OF PRISONERS IN THE UNITED STATES: SOLITARY CONFINEMENT 2,

These harsh conditions have serious repercussions, as "[a]pproximately 50% of all prison suicides occur in solitary confinement units."[13]

In addition to the harsh conditions that individuals incarcerated on death row endure, the anticipation of execution adds another layer of psychological trauma.[14] This anticipation has led many individuals on death row to develop a condition coined "death row syndrome" and to ultimately volunteer for execution, finding death preferable to life on death row.[15] As Gary Haugen, an individual on death row in Oregon, explained it after Oregon declared its death penalty moratorium, "I'm in . . . limbo . . . I didn't ask for this. I'm ready to go."[16] Other incarcerated individuals have described this waiting process as "living death."[17]

Courts have repeatedly recognized that the conditions and the treatment of individuals incarcerated on death row can violate the Eighth Amendment. The U.S. Supreme Court has held that "the Eighth Amendment protects against future harm to inmates" and "requires that inmates be furnished with basic human needs, one of which is 'reasonable safety.'"[18] This is because, in the Court's view, it is "cruel and unusual punishment to hold convicted criminals in unsafe conditions."[19] Clearly, the extreme treatment of individuals incarcerated on death row and the effects of solitary confinement detailed above render death row conditions unsafe because of the serious psychological toll experienced by

---

https://www.aclu.org/sites/default/files/field_document/ACLU_Submission_to_HRC_16th_Session_on_Solitary_Confinement.pdf [https://perma.cc/9KWB-UXG9].

13. *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcommittee on the Constitution, Civil Rights and Human Rights of the Senate Judiciary Committee*, 112th Cong. 8 (2012) (written testimony of Professor Craig Haney), available at https://www.judiciary.senate.gov/imo/media/doc/12-6-19HaneyTestimony.pdf [https://perma.cc/9K2P-VUQP].

14. *See* Joachim Herrmann, *The Death Penalty in Japan: An "Absurd" Punishment*, 67 BROOK. L. REV. 827, 848 (2002) ("The life of the convict on death row is totally dominated by the uncertainty of whether and when the execution will be carried out. The essence of the convict's life is reduced to waiting to be killed. The permanent fear of being forced to die at the hands of another is an exquisite psychological torture that creates severe emotional, mental, and also physical suffering. Convicts have become insane; they have been driven to commit suicide."); *see also* Flynn, *supra* note 8, at 297 (noting that "death row prisoners suffer extreme psychological anguish in anticipation of death.").

15. *See generally* 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). Lawyers have defined "death row syndrome" as a condition encompassing the psychological effects of death row. *See id.* at 238, 242-44. For examples of several incarcerated individuals who have volunteered for execution, see *Texas killer Barney Fuller Jr., who asked to be executed, is put to death*, CBS NEWS (October 6, 2016), https://www.cbsnews.com/news/texas-killer-barney-fuller-jr-who-asked-to-be-executed-is-put-to-death/ [https://perma.cc/2TQA-7QD5]; Michelle Rindels, *In Nevada, death penalty has evolved from frontier spectacle to rare rite of volunteers asking to die*, THE NEVADA INDEPENDENT (Jul. 11, 2018), https://thenevadaindependent.com/article/in-nevada-death-penalty-has-evolved-from-frontier-spectacle-to-rare-rite-of-volunteers-asking-to-die [https://perma.cc/GU8E-356R].

16. Jung, *supra* note 7.

17. Johnson, *supra* note 10, at 1220.

18. Helling v. McKinney, 509 U.S. 25, 33 (1993) (citing DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 199-200 (1989)).

19. *Id*. (citing Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982)).

these individuals.[20] Several federal district and appellate courts have held that the use of solitary confinement in certain cases and the existence of other extreme conditions on death row can violate the Eighth Amendment.[21] For example, the Fourth Circuit affirmed the District Court for the Eastern District of Virginia's specific finding that the reliance on solitary confinement in Virginia's death row "created, at the least, a significant risk of substantial psychological and emotional harm."[22]

Lawyers, scholars, and courts nationwide have expressed concern and outrage at death row conditions and have argued that in some cases these conditions constitute cruel and unusual punishment.[23] The temptation to allow solitary confinement for individuals on death row rests on the assumption that these conditions are not permanent and that individuals on death row will at some point be executed. However, in states that fail to execute individuals because of sentencing practice or moratoria, these conditions can become permanent and unsafe, creating a risk of harm in violation of the Eighth Amendment.

II.
INDEFINITE INCARCERATION UNDER SENTENCES OF DEATH UNDERMINE THE PENOLOGICAL JUSTIFICATION OF THE DEATH PENALTY[24]

In justifying and upholding criminal punishments, the Supreme Court has consistently relied on several penological purposes of punishment, including

---

20. *See* ACLU, A DEATH BEFORE DYING, *supra* note 9, at 6-7. Robert Johnson goes as far as to argue that death row conditions are not only unsafe but also constitute psychological and physical torture. *See Johnson*, supra note 10, at 1227-33.

21. *See, e.g.*, Woods v. Edwards, 51 F.3d 577, 581 (5th Cir. 1995) (holding that the "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment"); Howard v. Adkison, 887 F.2d 134, 137 (8th Cir. 1989) (holding that incarcerated persons "are entitled to reasonably adequate sanitation, personal hygiene, and laundry privileges, particularly over a lengthy course of time"); McBride v. Deer, 240 F.3d 128, 1292 (10th Cir. 2001) (noting that feces covered cells violate the Eighth Amendment).

22. Porter v. Clarke, 923 F.3d 348 (4th Cir. 2019), *aff'g* 90 F. Supp. 3d 518, 532 (E.D. Va. 2018).

23. *See, e.g.*, Gates v. Cook, 376 F.3d 323, 338 (5th Cir. 2004) (finding that housing incarcerated persons in filthy cells violates the Eighth Amendment); ACLU, A DEATH BEFORE DYING, *supra* note 9; Amir Vera, *Pennsylvania outlaws solitary confinement for death row inmates*, CNN (Nov. 19, 2019), https://www.cnn.com/2019/11/19/us/aclu-pennsylvania-solitary-confinement-settlement/index.html; *Facing Prison – Conditions Court Challenge, South Caroline Moves Its Death Row to a New Facility*, DEATH PENALTY INFO. CTR. (Jul. 16, 2019), https://deathpenaltyinfo.org/news/facing-prison-conditions-court-challenge-south-carolina-moves-its-death-row-to-a-new-facility [https://perma.cc/CN72-4B8D]; *Texas Prisoners File Lawsuit Over Death-Row Conditions During Pandemic*, DEATH PENALTY INFO. CTR. (May 5, 2020), https://deathpenaltyinfo.org/news/texas-prisoners-file-lawsuit-over-death-row-conditions-during-pandemic [https://perma.cc/VXN4-8LYS]; Amir Vera, *Pennsylvania Outlaws Solitary Confinement for Death Row Inmates*, CNN (Nov. 19, 2019), https://www.cnn.com/2019/11/19/us/aclu-pennsylvania-solitary-confinement-settlement/index.html [https://perma.cc/56EU-W86B].

24. To reiterate, for purposes of this Article, this Section assumes that assessments of the purposes of punishment are rationally and equally applied across all cases. Of course, this is not the reality. Understandings of an individual's need to be incapacitated or ability to reform are greatly

incapacitation, rehabilitation, deterrence, and retribution. According to the Supreme Court in *Gregg v. Georgia*, "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence."[25] However, scholars and courts alike have acknowledged that these purposes cannot be served where death sentences are not carried out quickly or at all.[26] And, the Supreme Court has said that if the death penalty does not fulfill the penological purposes of deterrence and retribution, "it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment."[27] Adopting this reasoning, capital sentencing is both unjustified and unconstitutional in states that fail to carry out the death penalty consistently either by practice or due to moratoria.

A. Incapacitation and Rehabilitation

Death sentences as practiced in states that fail to carry out the death penalty in a timely manner reject incapacitation and rehabilitation as justifications for the death penalty. According to the rationale that leads to a death sentence—that is, that the incarcerated individual cannot be rehabilitated and is deserving of death—the incarcerated person should not be kept alive as their dangerous and denounced behavior should not continue. Rehabilitation does not cohere as justification for punishment in the context of the death penalty.[28] By sentencing an individual to death, juries implicitly assume and assert that that individual is beyond rehabilitation and must be fully incapacitated from criminal activity through capital punishment. Under this justification, a punishment that assumes that the individual may be able to reform their behavior is inappropriate. Total incapacitation justified by the impossibility of rehabilitation may then support the use of the death penalty where it is carried out swiftly and it fully

impacted by biases held by prosecutors, judges, juries, and other stakeholders in the criminal legal system. For an example of existing discussions of the biased nature of the purposes of punishment see Justin Levinson, Robert J. Smith, & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 8 39 (2019).

25. Gregg v. Georgia, 96 S. Ct. 2909, 2929-30 (1976).

26. *See* Coleman v. Balkcom, 101 S. Ct. 2994, 2996 (1981) (Rehnquist, J., dissenting from denial of certiorari) (stating that "There can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution"); Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 230 (2012) ("Extending the time between sentence and execution undercuts two of the most pressing pro-death-penalty arguments: deterrence and retribution"); *Flynn*, supra note 8, at 304 ("Without the swift imposition of penalties, the deterrent value of punishment erodes.").

27. Atkins v. Virginia, 122 S. Ct. 2242, 2251 (2002) (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982); see also Furman v. Georgia, 92 S. Ct. 2726, 2764 (1972) (White, J., concurring) ("A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.").

28. *See* Rummel v. Estelle, 100 S. Ct. 1133, 1138 (1980) (stating that the death penalty "is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice"); *Furman*, 92 S. Ct. at 2781 (Marshall, J., concurring) ("Death, of course, makes rehabilitation impossible; life imprisonment does not.").

incapacitates the individual. Such incapacitation, however, may not occur in practice.

In states that fail to execute individuals on death row, either by practice or due to moratoria, criminal behavior can continue because the jury's sentence is not carried out by the state. Individuals on death row in states such as California, where executions rarely, if ever, take place, are not incapacitated. Most individuals on death row in California die on death row rather than by an actually imposed death penalty.[29] Individuals on death row are thus little more incapacitated by a death sentence than they would have been by LWOP. Therefore, regardless of whether incarcerated individuals are, or are not, given an opportunity for rehabilitation and reform, extended delays in the imposition of the death penalty contradict the rationale for the jury's decision to impose a death sentence. The only aspect of a death sentence in these states that actually incapacitates the incarcerated individual is the requirement that such individuals live on death row. Living on death row separates incarcerated individuals to a much more extreme degree than is done within general prison populations. Individuals are not only removed from society but also from the general prison population. Even so, a risk remains to guards and other individuals on death row that cannot be justified if states never execute these individuals.

While a punitive justification behind a jury's decision to impose a death sentence hinges on the impossibility of rehabilitation, death row conditions in states under moratoria in practice provide for a possibility of rehabilitation. Whether sentenced to death or LWOP, incarcerated individuals sit in prison for years. And, despite juries' and courts' dismissal of any likelihood for rehabilitation of such individuals, numerous cases demonstrate the positive changes in death row incarcerated individuals' behavior and character during their decades in prison.[30] Such changes evidence the possibility for reform and rehabilitation for death-sentenced individuals.[31] Moreover, these anecdotes

29. *See* Sarah Kaufman, *Here's how many death row inmates die while waiting to die*, THE WEEK (Sept. 4, 2015), https://theweek.com/articles/575450/heres-how-many-death-row-inmates-die-waiting-die [https://perma.cc/Y3XZ-RDB3]; *Coronavirus Prison Fatalities Surpass Two Decades of Executions; COVID-19 Has Killed More California Death Row Prisoners Than the State Has Executed in 27 Years*, DEATH PENALTY INFO. CTR. (Aug. 31, 2020), https://deathpenaltyinfo.org/news/coronavirus-prison-fatalities-surpass-two-decades-of-executions-covid-19-has-killed-more-california-death-row-prisoners-than-the-state-has-executed-in-27-years [https://perma.cc/3J2R-ESRC].

30. *See, e.g.*, Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1232, 1249-53 (2013) (discussing numerous individuals on death row who have gone through significant character transformations, finding friendship, compassion, spirituality, and purpose on death row); *Rehabilitation on Death Row*, WASH. POST (Jan. 26, 1991), available at https://www.washingtonpost.com/archive/opinions/1991/01/26/rehabilitation-on-death-row/a9a899df-39df-4184-8937-e65d4ff4084a/ [https://perma.cc/HPG7-Y668]; Jeffrey D. Colman, *From Death Row to Rehabilitation and Redemption*, AM. BAR ASS'N (Jul. 1, 2013), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2012_13/summer/from_death_row_to_rehabilitation_and_redemption/ [https://perma.cc/UJ5Q-WS7E].

31. *See* Ryan, *supra* note 30.

caution against the imposition of a death sentence on an individual who, despite being sentenced to death, will sit in prison for the rest of their life. Such sentences are unjustified as these individuals, who are not fully incapacitated, are given the opportunity and time for reform and oftentimes succeed in doing so.[32] However, by being kept in the excruciating death row conditions, such individuals face great impediments to rehabilitation, such as limited access to resources and extreme conditions that, as described in Part I, can lead to severe mental health conditions.

Thus, because death sentences in states that do not carry out the death penalty fail to incapacitate individuals fully while simultaneously hindering possible rehabilitation, neither penological purpose is served by these death sentences.

B. Deterrence

Legal scholars and practitioners consistently question the deterrent effect of the death penalty. The theory of deterrence assumes that the threat of being executed deters individuals from committing capital offenses.[33] Although the death penalty may be successful in deterring capital offenses, the relevant question is whether it deters these offenses at a rate that is sufficiently and significantly higher than the rate at which LWOP deters. Otherwise, an LWOP sentence would sufficiently serve the purposes that the death penalty purports to serve, leaving the death penalty unjustified. Is the death penalty worth the unique costs and lengthy time associated with capital litigation and the negative effects on incarcerated individuals? Even if justified generally, the death penalty's deterrent effect is minimal in states that fail to execute and thus is certainly unjustified under a deterrent theory in those cases.

The deterrent effect of the death penalty is unfounded. Many early studies suggesting that the imposition of a death sentence rather than LWOP significantly deters potential perpetrators have since been questioned or debunked.[34] Scholars have instead explicitly argued that no evidence exists supporting the conclusion that the death penalty has a deterrent effect.[35] Efforts

---

32. *See id.*

33. *Deterrence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/deterrence.

34. *See, e.g.*, Baze v. Rees, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring) ("Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment."); Michael L. Radlet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1 (1996); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

35. *See, e.g.*, *The Death Penalty and Deterrence*, AMNESTY INT'L, https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/the-death-penalty-and-deterrence/; *Murder Rate of Death Penalty States Compared to Non-Death Penalty States*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-

to deter homicide through death sentencing often ignore the complex contexts during which homicide may take place. A significant number of murders are not premeditated, as they take place in the heat of the moment or occur under the influence of drugs, alcohol, and mental illness.[36] Thus, many perpetrators of homicide and other crimes are unlikely to be focused on the threat of execution versus that of life imprisonment without the possibility of parole at some future date.

Regardless, any deterrent effect of the death penalty is significantly lessened where executions are not carried out swiftly or at all.[37] In *Jones v. Chappell*, the district court found that the "reasonable expectation of an individual contemplating a capital crime in [a state with long delays and rare executions] is that if he is caught, it does not matter whether he is sentenced to death – he realistically faces only life imprisonment.[38] Under such a system, the death penalty is about as effective a deterrent to capital crime as the possibility of a lightning strike is to going out in the rain."[39] Arguments made by Jeremy Bentham–the founder of utilitarianism, a theory of punishment that encompasses deterrence–support the finding in *Jones*. Bentham theorized that the deterrent effect of a punishment is diminished the more time that passes between the imposition of the punishment and the perpetration of the crime.[40] The prescribed punishment in these cases itself–death at the hands of the state–is never imposed.

---

death-penalty-states-compared-to-non-death-penalty-states (finding that between 1990 and 2018, rates of murder have remained lower in states without the death penalty); BRENNAN CENTER FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE 43-45, https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline; John Donohue, *Does the Death Penalty Deter Killers*, NEWSWEEK (Aug. 19, 2015), https://www.newsweek.com/does-death-penalty-deter-killers-364164.

36. *The Case Against the Death Penalty*, ACLU, https://www.aclu.org/other/case-against-death-penalty.

37. *See, e.g.*, Harmelin v. Michigan, 111 S. Ct. 2680, 2698 (1991) ("[D]eterrent effect depends not only upon the amount of the penalty but upon its certainty . . . ."); United States v. Panico, 308 F.2d 125, 128 (2d Cir.1962) ("There can be little doubt that the effectiveness of punishment as a deterrent is related not only to the quality of the possible punishment but to the certainty and promptness as well."), *vacated on other grounds*, 84 S. Ct. 19 (1963).

38. It must be noted of course that while the punishments are similar enough to make their justifications essentially indistinguishable in many aspects, the sentences themselves in practice have major differences. Part I points to some of the distinctions between conditions on death row and those experienced by those with LWOP sentences.

39. Jones v. Chappell, 31 F. Supp. 3d 1050, 1064 (C.D. Cal. 2014), *rev'd on other grounds sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015). The reversal of *Jones v. Chappell* was not based on the district court's reasoning but rather on the fact that the claim was prohibited by *Teague v. Lane*. *See Jones*, 806 F.3d at 543.

40. *See* JEREMY BENTHAM, THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 173 (J.H. Burns & H.L.A. Hart, eds., Oxford Univ. Press 1970) (1789); *see also Harmelin v. Michigan*, 111 S. Ct. 2680, 2698 (1991) (finding that the "d]eterrent effect depends not only upon the amount of the penalty but upon its certainty"); STEPHEN STANKO ET AL., LIVING IN A PRISON: A HISTORY OF THE CORRECTION SYSTEM WITH AN INSIDER'S VIEW 57 (2004) ("Deterrence is dependent upon the severity, speed, and swiftness of the punishment.").

C. Retribution

Although the theory of retribution has been used to justify punishment, retribution is an even weaker justification for the death penalty here than deterrence. Justices rarely use retribution as a justification for punishment. Although some of the values underlying retribution appear in various cases, several opinions have explicitly dismissed retribution as a valid justification for punishment.[41] For example, in his concurrence in *Furman v. Georgia*, Justice Marshall asserts, "retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance."[42] In his concurrence in *Baze v. Rees*, Justice Stevens concludes that "society has moved away from public and painful retribution."[43]

Even if retribution were an adequate justification for the death penalty, it fails to support death sentences that are rarely, if ever, carried out. The retributivist rationale behind the death penalty lies in the idea that execution is proportional to the crime committed.[44] However, in states that fail to execute, the punishment is not death, but time served on death row, which can function similarly to LWOP. In his dissent to the denial of certiorari in *Coleman v. Balkcom*, Justice Rehnquist asserted,"[t]here can be little doubt that delay in the enforcement of capital punishment frustrates the purpose of retribution."[45] Ninth Circuit Court of Appeals Judge Fletcher expressed a similar sentiment in his concurrence in *Ceja v. Stewart*, finding, "the ability of an execution to provide moral and emotional closure to a shocked community diminishe[s] as the connection between crime and punishment [becomes] more attenuated and more arbitrary."[46] If the retributive effect of an execution is diminished due to a delay, it is essentially nonexistent where executions are never carried out.[47]

41. *See, e.g.*, Williams v. New York, 69 S. Ct. 1079, 1084 (1949) ("Retribution is no longer the dominant objective of the criminal law.").

42. Furman v. Georgia, 92 S. Ct. 2726, 2779 (1972) (Marshall, J., concurring).

43. Baze v. Rees, 128 S. Ct. 1520, 1548 (2008) (Stevens, J., concurring).

44. *See Furman*, 92 S. Ct. at 2759 (1972) (Brennan, J., concurring).

45. Coleman v. Balkcom, 101 S. Ct. 2994, 2996 (1981) (Rehnquist, J., dissenting from the denial of certiorari).

46. Ceja v. Stewart, 134 F.3d 1368, 1374 (9th Cir. 1998) (Fletcher, J., dissenting).

47. *See* Lewis Powell, *Capital Punishment, Commentary*, 102 HARV. L. REV. 1035, 1041 (1989) ("The retributive value of the death penalty is diminished as imposition of sentence becomes ever farther removed from the time of the offense."); *Furman*, 92 S. Ct. at 2760 (Brennan, J., concurring) ("The asserted public belief that murderers . . . deserve to die is flatly inconsistent with the execution of a random few."); *Furman*, 92 S. Ct. at 2763 (White, J., concurring) ("[W]hen imposition of the [death] penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied.").

III.
CAPITAL SENTENCING BY JURIES IN STATES THAT FAIL TO EXECUTE INDIVIDUALS ON DEATH ROW IS ARBITRARY AND CAPRICIOUS

Despite moratoria orders and states' failures to execute individuals on death row, capital trials continue, and juries are forced to decide whether to sentence individuals to death. However, in states that do not execute individuals on death row these sentences function not as death sentences but as life sentences on death row. Jurors in these cases, who are tasked with the great responsibility of determining whether a defendant will enter the general prison population or sit on death row, can have varying understandings of the status of the death penalty in these states. Some jurors may believe that an individual sentenced to death will in fact be executed. Alternatively, other jurors may consider a death sentence as purely symbolic, believing an individual will never actually be executed. Additionally, other jurors may find a sentence of death useless, opting instead for life imprisonment without the possibility of parole, as it functions similarly to a death sentence in these contexts. The presence of jurors with such different understandings of what a capital sentence means renders capital sentencing in these states unpredictable, inaccurate, and impermissible.

The Eighth Amendment prohibits this unpredictability, requiring that sentences not be inflicted arbitrarily or capriciously. In accordance with this standard, the Supreme Court has consistently called for reliability in capital sentencing, striking down sentencing schemes that can, or do, lead to arbitrary decision-making. The Court is concerned with the arbitrary and unequal application of the death penalty, an issue that exists where individuals are given too much discretion or where clear standards fail to exist. In upholding jury discretion as consistent with this need for reliability, the Court has presumed that jurors do not act independently or arbitrarily because they understand their "awesome responsibility" and act in full accordance with it.[48] However, where jurors doubt this responsibility and believe that their sentencing decisions carry little weight, if any at all, juror discretion can become a dangerous mechanism inconsistent with the Eighth Amendment's "need for reliability."[49]

Such a concern was addressed in part by *Caldwell v. Mississippi*, where the Supreme Court held, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[50] In that case, the prosecutor downplayed the jury's responsibility in sentencing, suggesting to jurors that their sentence would be reviewed by an

48. *See* Caldwell v. Mississippi, 105 S. Ct. 2633, 2639 (1985); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

49. *See, e.g.*, Iseral v. Commonwealth, No. 2001-SC-0602-MR, 2003 WL 22227193, at *13 (Ky. Sept. 18, 2003); Theodore Eisenberg et. al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 342–45 (1996).

50. *Caldwell*, 105 S. Ct. at 2639.

appellate court who would ultimately determine the appropriate sentence.[51] The Court found that the prosecutor's suggestions "present[ed] an intolerable danger that the jury will in fact choose to minimize the importance of its role."[52] In finding this suggestion unconstitutional, Justice Marshall acknowledged the "several reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility."[53]

States have applied *Caldwell* to their individual sentencing schemes and procedures.[54] For example, in *People v. Ramos* and *People v. Morse*, the California Supreme Court considered whether jurors' responsibility was lessened and confused by post-conviction procedures and practices within the state of California.[55] In *Ramos*, the court found jurors' consideration of a governor's ability to commute sentences post-conviction "tend to diminish the jury's sense of obligation."[56] The court held that jurors' consideration of these procedures rather than the actual facts of the case and character of the defendant is inconsistent with the Eighth Amendment, which requires individualized determination in each case.[57] In *Morse*, the California Supreme Court acknowledged both the difficulty and the complexity of the jury's role, arguing that it should not be further complicated and confused by introducing other considerations.[58] Citing to *Morse*, the court in *Ramos* recognized the state's immense interest in ensuring that jurors do not "engage in erroneous speculation based on incorrect preconceptions."[59]

As in *Ramos* and *Morse*, jury determinations in moratorium states and states that fail to execute are inconsistent with the Eighth Amendment. Jurors with a knowledge of a state's execution practices may make sentencing decisions with an underlying assumption that a death sentence will never be fully carried out, a "preconception" that mirrors those in *Ramos* and *Morse* as it introduces an impermissible consideration into sentencing decisions.[60] A survey of potential jurors in California, a state which has not carried out an execution since 2006, looked at the impact of these preconceptions and found that "67% [of jurors]

51. *Id.* at 2636.
52. *Id.* at 2642.
53. *Id.* at 2641.
54. *See, e.g.*, Ward v. Commonwealth of Kentucky, 695 S.W.2d 404, 408 (Ky. 1985) ("It is the responsibility of each juror to decide whether the defendant will be executed, and they shall not be informed, either directly or by implication, that this responsibility can be passed along to someone else.").
55. People v. Ramos, 30 Cal. 3d 553, 553 (1982) (en banc); People v. Morse, 60 Cal. 2d 631, 643 (1964).
56. *Ramos*, 30 Cal.3d 553, at 593 (citing *Morse*, 60 Cal. 2d at 652).
57. *Id.* at 595–96.
58. *Morse*, 60 Cal.2d at 643 (1964).
59. *Ramos*, 30 Cal.3d at 592–93 (citing *Morse*, 60 Cal.2d at 643).
60. *Id.*

were less likely to sentence a person to death, while 23% were more likely to sentence a person to death."[61]

These figures suggest a shift in jurors' understandings of their role and their responsibility when sentencing individuals to death. Rather than sentencing defendants to death as the Supreme Court has prescribed–based on the relevant aggravating and mitigating factors–jurors may decide that a death sentence has no point in certain cases. Alternatively, jurors may act in accordance with the concerns expressed in *Caldwell.* A shift in role conception may lead jurors to use sentencing to "'send a message' of extreme disapproval for the defendant's acts" without believing the defendant actually deserves to be executed.[62] Either way, the California survey indicates jurors are failing to make the type of individualized determinations required by the Eighth Amendment. Instead, juries rely on external factors irrelevant to the case at issue, which is prohibited under *Ramos* and *Morse*. The reality of executions in the states at issue brings impermissible considerations, such as the likelihood of execution, into deliberation, which further skews the reliability and efficacy of death sentencing and makes it certain that the accuracy and efficacy of death sentences should be questioned.

IV.
CAPITAL TRIALS MUST CEASE IN STATES THAT FAIL TO EXECUTE

Unfortunately, there is no constitutionally appropriate device that could remedy this Eighth Amendment problem. The only solution in these states is to end capital sentencing and ensure that jurors need not make the kinds of decisions discussed in Part III.

In these cases, jurors will continue to doubt that death sentences will be carried out in states that fail to execute individuals either by practice or by statute. In several cases in these states, jurors have been instructed to assume that if they sentence a defendant to death, the sentence will be carried out.[63] Further, jurors are often instructed that they must limit their deliberations to evidence and instructions in the case.[64] However, there is good reason to doubt the effectiveness of such instructions. In *Bruton v. U.S.*, the Supreme Court doubted

61. Brandon Garrett et. al., *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417, 427 (2017).

62. Caldwell v. Mississippi, 105 S. Ct. 2633, 2641 (1985).

63. *See, e.g.*, Judicial Council of California Criminal Jury Instructions No. 766 (2020) ("In making your decision about penalty, you must assume that the penalty you impose, death or life without the possibility of parole, will be carried out.").

64. *See, e.g.*, Judicial Council of California Criminal Jury Instructions No. 767 (2020) ("Base your decision only on the evidence you have heard in court and on the instructions that I have given you. Do not speculate or consider anything other than the evidence and my instructions."); Alabama Judicial System, Penalty Proceedings—Capital Cases I.B.8.a (2017) ("In determining punishment, you must avoid any influence of passion, prejudice, or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence and testimony you have seen and heard and the law on which I have instructed you.").

the efficacy of instructions ordering jurors to disregard information they learned about a co-defendant at trial.[65] In that case, the Court found, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[66] This is one of those contexts.

State courts have also looked at *Bruton* type issues in the *Caldwell* context. The Pennsylvania Supreme Court specifically addressed whether jury instructions can cure a lessening of jury responsibility in a death penalty case in *Commonwealth v. Jasper*.[67] The court there reviewed a case in which the trial court implied that even if the jury imposed the death penalty, it may not be carried out.[68] The prosecutor argued that this did not violate *Caldwell,* as the jury was instructed three separate times that the sentence the jury chose would be the actual sentence.[69] However, the Pennsylvania Supreme Court disagreed, finding that the three instructions were not enough to cure the issue as the jury may still believe the imposed punishment would "not be carried out, thus removing from the jury the responsibility for imposing the death penalty."[70] The court ultimately held, "when remarks about the appellate process minimize the jury's sense of responsibility for the verdict of death, the sentence of death must be reversed."[71]

The reasonings of the courts in *Bruton* and *Jasper* apply to juries' death penalty determinations in states that rarely or never execute. Even though prosecutors, the trial court, and witnesses were at fault for the introduction of information in *Bruton* and *Jasper*, which is not necessarily the case with regard to information on execution practices, the holdings still apply.[72] The true issue is not how information was introduced to the jury, but whether juror responsibility had been shifted or lessened and whether jury instructions could have cured this change in responsibility. As noted above, responsibility in these cases is shifted due to the belief that if the jury sentences an individual to death, the state simply will not carry out the sentence. Jury instructions will not fully remedy this issue, as juries cannot pretend that practices and moratoria simply do not exist and will not play a role later on in the case. The death penalty is the most severe punishment, and the risks are simply too high that jurors will act, as in *Bruton*, "as if there had been no instruction at all."[73] Rather than take the risk that individuals will be unreliably, arbitrarily, and unconstitutionally sentenced to death, these states should cease to bring and try additional capital cases.

65. Bruton v. United States, 88 S. Ct. 1620, 1621, 1628 (1968).
66. *Id.* at 1627.
67. Pennsylvania v. Jasper, 737 A.2d 196, 196–97 (Pa. 1999).
68. *Id.*
69. *Id.* at 197.
70. *Id*.
71. *Id*.
72. *See id.* at 282–83; Bruton v. United States, 88 S. Ct. 1620, 1621 (1968).
73. *Bruton*, 88 S. Ct. 1620 at 1628.

CONCLUSION

The death penalty remains legal in numerous states that fail to execute individuals either because of practice or due to an existing moratorium. Nonetheless, capital trials continue. However, with no certainty that death sentences will be carried out, the continued allowance of capital sentencing is unconstitutional. Individuals on death row are forced to endure a punishment that differs from that with which they were sentenced–instead of imminent death, they face indefinite time on death row, living in extreme conditions with the constant threat of execution looming. The purposes of punishment that justify the continued use of the death penalty are not served in such a scheme. Further, jurors who are aware that death sentences will not be carried out cannot responsibly, reliably, and in good faith sentence defendants to death in accordance with statutory requirements, even where juror instructions provide guidance. The only constitutionally permissible judicial solution in states that fail to execute individuals on death row is to prohibit new capital trials and capital sentencing.