

No. 14-56373

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERNEST DEWAYNE JONES,

Petitioner/Appellee,

v.

RON DAVIS,

Respondent/Appellant.

**BRIEF OF AMICI CURIAE EMPIRICAL SCHOLARS CONCERNING
DETERRENCE AND THE DEATH PENALTY IN SUPPORT
OF PETITIONER/APPELLEE**

Appeal from the United States District Court
for the Central District of California
The Honorable Cormac J. Carney
United States District Judge
No. 09 Cv. 2158 CJC

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I. Interest of *Amici Curiae*

Amici curiae are leaders in the field of quantitative social science and criminal justice policy. Pursuant to Fed. R. App. P. 29(a), they file this brief to affirm that the finding of the district court that the California death penalty system has not served a deterrent effect beyond that supplied by life imprisonment is consistent with 250 years of criminological thinking and the empirical evidence on the impact of capital punishment and the attributes of California's capital punishment regime.

Philip J. Cook, Ph.D., is ITT/Sanford Professor of Public Policy, and Professor of Economics and Sociology, at Duke University, and a leading figure in the economics of crime. He is a Fellow in the American Society of Criminology and the Academy of Experimental Criminology. He has served on numerous expert panels of the National Academy of Sciences ("NAS"), including the panel issuing the 2012 National Research Council report DETERRENCE AND THE DEATH PENALTY. <http://sanford.duke.edu/people/faculty/cook-philip-j>.

John J. Donohue is the Carlsmith Professor at Stanford Law School and a leading authority in empirical legal studies. He has written extensively on issues relating to criminal justice matters, including major econometric studies on deterrence and the death penalty. He holds a J.D. (Harvard) and a Ph.D. in

economics (Yale), and has previously held chaired professorships at Yale and Northwestern. He was elected to the American Academy of Arts and Sciences, has edited the *American Law and Economics Review*, has served as the President of the American Law and Economics Association and the Society for Empirical Legal Studies, and is now on the Committee on Law and Justice of the NAS.

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Jeffrey Fagan is the Sulzbacher Professor of Law at Columbia Law School, Professor of Epidemiology at Columbia University, and a Senior Research Scholar at Yale Law School. He has published extensively on crime and justice, including empirical research on deterrence and capital punishment. He is a Fellow of the American Society of Criminology and previously served on the Committee on Law and Justice of the NAS. He holds a Ph.D. in social policy and engineering, has served on the NSF National Consortium on Violence Research, and has testified on deterrence and capital punishment before federal and state legislatures and gubernatorial commissions. http://www.law.columbia.edu/fac/Jeffrey_Fagan.

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Richard Lempert is the Eric Stein Distinguished University Professor of Law & Sociology, *emeritus* at the University of Michigan. He has served as Division Director for the Social and Economic Sciences at the National Science Foundation and as Chief Scientist in the Human Factors/Behavioral Sciences Division of the Science and Technology Directorate of the Department of Homeland Security. He has chaired the Law and Justice Committee of the NAS, and served as editor of the *Law & Society Review* and as President of the Law & Society Association. He has written on deterrence, capital punishment, and statistics and the law.

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Richard Rosenfeld, Ph.D., is the Founders Professor of Criminology and Criminal Justice at the University of Missouri-St. Louis. He has published widely on crime trends, crime statistics, and criminal justice policy, is a Fellow and former president of the American Society of Criminology, and currently serves on the Science Advisory Board of the Office of Justice Programs, United States Department of Justice. <http://www.umsl.edu/ccj/faculty/rosenfeld.html>.

Franklin E. Zimring is the William Simon Professor of Law and director of the criminal justice research program at the University of California at Berkeley. He is the co-author of *Deterrence: The Legal Threat in Crime Control*, and served on the National Academy’s first panel on deterrence and incapacitation from 1976 to 1979. He is a Fellow of the American Society of Criminology and the American Academy of Arts and Sciences.

<https://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=127>.

II. Summary of the Argument

The United States Supreme Court has held that, for a death-penalty regime to be constitutional, it must serve a legitimate penological interest by advancing the goal of deterrence or retribution. Unless imposing the death penalty “*measurably contributes* to one or both of these goals, it ‘is nothing more than the purposeless and needless imposition of pain and suffering,’ and hence an unconstitutional punishment. *Enmund v. Florida*, 458 U.S. 782, 798 (1982).” *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002) (emphasis added).

In *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1061-62 (C.D. Cal. 2014), the district court vacated defendant Jones’s death sentence, holding that the inherent arbitrariness that singled out such a tiny handful of condemned prisoners for

execution after years of “inordinate and unpredictable delay” has “resulted in a system that serves no penological purpose.” *Id.* at 1062, 1069. The court’s finding that the California death penalty system does not further, let alone “measurably contribute” to, any deterrence goal is strongly supported by the best empirical evidence concerning capital punishment’s impact on crime, particularly given the unique California death penalty system that, since 1978, has cost the state’s taxpayers approximately \$4 billion to impose 937 sentences of death out of roughly 100,000 murders, while executing only 13 inmates who spent an average of 17 years and 8 months on death row.

The scope for the death penalty to deter murder in the United States is modest at best in that its use is generally limited to a handful of extreme and aberrational killings that are the crimes least likely to be deterrable by the uncertain prospect of being captured, convicted, and sentenced to death. Any incremental deterrent effect of the death penalty could only operate on those who would kill if they anticipated spending the rest of their lives in prison as a consequence but would refrain from killing if they expected that many years hence, an average of 25 years or more in California, the State would execute them. Moreover, data from abolitionist States reveal that few individuals commit murder in the absence of the death penalty, which means that even if the deterrent effect

existed, it could only deter a few, while brutalization effects could potentially influence vastly more individuals. In addition, the high costs of operating a death-penalty regime that tries to limit arbitrariness and the inevitable risk of executing the innocent, drain resources that could be effectively employed to reduce crime. In light of these characteristics, it is not surprising that the prestigious National Research Council (“NRC”), after scrutinizing the recent research, concluded in a 2012 report titled *DETERRENCE AND THE DEATH PENALTY* that no credible evidence of a deterrent effect has been found anywhere in the United States, even in states like Texas that have employed the death penalty relatively frequently and with relatively little delay.

California’s costly death-penalty regime could hardly be less consistent with deterrence concerns, for it shrinks the percentage of those sentenced to death who are actually executed to an almost vanishingly small number, typically decades after the offense. All economists and criminologists accept that deterrence is a function not merely of the severity of a sanction, but also of its certainty and speed. The most recent murder that led to a California execution was committed 33 years ago. Over the period since 1978, during which roughly 6,000 criminals were justifiably killed by California’s police and citizens, the State’s 13 executions are little more than background noise in the risks facing potential murderers.

Consequently, the highly tenuous argument that capital punishment in the United States provides a greater deterrent benefit than that afforded by life imprisonment is particularly implausible in California.

III. Argument

A. ***Jones v. Chappell*: California's death penalty is dysfunctional and devoid of deterrent effect.**

In *Jones*, the district court vacated Jones's sentence of death, stating:

Inordinate and unpredictable delay has resulted in a death penalty system in which very few of the hundreds of individuals sentenced to death have been, or even will be, executed by the State. . . . And it has resulted in a system that serves no penological purpose. Such a system is unconstitutional.

31 F. Supp. 3d at 1069. A major factor in the court's decision was the determination that California's capital regime was so plagued by delay and dysfunction that it deprived the death penalty of any deterrent effect it might otherwise have had. *Id.* at 1053.

1. **Infrequent executions and delay in California's death penalty system.**

From 1978 through 2014, California sentenced 937 defendants to death, while only 13 were executed.¹ *Jones*, 31 F. Supp. 3d at 1053. California death

¹Death Penalty Information Center, *Death Sentences in the U.S. from 1977 by State and by Year*,

(continued...)

row inmates have been far more likely to die from causes other than execution (94 deaths). The number of inmates executed in California is only a third of the number who have been removed from death row by order of a federal court and not resentenced to death (39 versus 13). *Id.* Lengthy death row tenure is the rule in California and not the exception, but California’s multistage litigation, although lengthy, is not frivolous. As the district court noted: “60 percent of all [death row] inmates whose habeas claims have been finally evaluated by the federal courts were each granted relief from the death sentence by the federal courts.” *Id.* at 1055. The vast majority of those sentenced to death in California will not be executed, but will leave death row after their sentence has been vacated or die of other means. *Id.*

The district court found that delay in California’s death penalty system is evident at all three stages of the post-sentencing capital process: direct appeal, state collateral review, and federal collateral review. The State’s under-funding of the system—and not a dearth of qualified lawyers willing to represent death row inmates—poses the greatest problem for timely appointment of counsel on direct appeal and for state habeas. *Id.* at 1056-57. Budget cuts and reduced staff in the

¹(...continued)

<http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (Death Penalty Information Center 2015).

Office of the State Public Defender, as well as the low pay rates for private appointed counsel, create significant obstacles to finding capable, willing defense attorneys. *Id.*

2. Delay on federal collateral review.

Since 1978, only 81 of the 937 individuals sentenced to death in California have received a final determination on the merits of their federal habeas petition. *Id.* at 1059. Of those 81 inmates, only 13 have been executed, and more than half have been granted relief at some point in the appellate process. *Id.*

B. The State’s brief offers no evidence California’s capital punishment system deters homicide.

1. The State argues with no support that capital punishment deters homicides, regardless of the infrequency and extent of delays in administering it.

The State disputes the district court’s finding that the infrequency of and delays in executions in California “deprive [the death penalty] of any deterrent or retributive effect it might have once had.” Dkt. 4 at 42 (quoting Order Declaring California’s Death Penalty System Unconstitutional and Vacating Petitioner’s Death Sentence 19-20, Excerpt of Record 20-21, ECF No. 117).² The State asserts “there is no basis for a court to conclude that even a lengthy judicial review

²As used herein, “Dkt.” refers to this Court’s docket, and “ECF No.” refers to the district court’s docket in case 09 Cv. 2158 CJC.

process eliminates *all* deterrent effect.” *Id.* In fact, there is strong theoretical and empirical support for the district court’s conclusion that the California death penalty system serves no deterrent purpose beyond that afforded by life imprisonment.

It is now recognized that not a single study credibly supports the view that capital punishment as administered anywhere in the United States provides any added deterrent beyond that afforded by a sentence of life imprisonment, as documented in the comprehensive 2012 report of the National Research Council of the National Academy of Sciences, entitled DETERRENCE AND THE DEATH PENALTY.³ Acknowledged for its expertise by legislatures and courts alike, the NAS was specifically praised by the California legislature in 2013 “for its 150

³Comm. on Deterrence and the Death Penalty and Comm. on Law and Justice, Nat’l Research Council of the Nat’l Acads, DETERRENCE AND THE DEATH PENALTY 3 (Daniel S. Nagin and John V. Peppers, eds., 2012). The NRC panel included an array of impressive scholars with differing political beliefs, who reached a unanimous conclusion regardless of their prior position on the death penalty. In particular, James Q. Wilson, the former Ronald Reagan Professor of Public Policy at Pepperdine University School of Public Policy, who had previously written in support of the death penalty, joined the final report’s conclusion that no existing study credibly supported the deterrent effect of the death penalty.

years of commitment to providing unbiased, peer-reviewed advice on science, technology, and medicine to our nation.”⁴

The conclusion of the NRC report that not a single study claiming to find a deterrent effect of capital punishment withstood critical analysis applied to studies examining the death penalty throughout the United States, as well as studies that limited their focus to states, such as Texas, that apply the death penalty more frequently and with far less delay than California does. But if decades of research examining more aggressive uses of the death penalty have been unable to establish the constitutional standard that capital punishment “*measurably contributes*” to deterrence, it’s unquestionably true that no such evidence of deterrence exists for California, a jurisdiction that has implemented its capital punishment regime in a way that could only diminish any deterrent capacity.

2. The factors relied on by the trial judge in finding that the California death penalty served no deterrent rationale were endorsed by the NRC panel.

The NRC report stated that “the magnitude of the deterrent effect of the death penalty, including the possibility of no effect, will depend both on the scope

⁴S. Con. Res. 46, 2013-2014 Sess. (Cal. 2013); *see also Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005) (recognizing the NRC “as the ‘most prestigious’ scientific association in this country”).

of the legal authority for its use and on the way that legal authority is actually administered.” *Id.* at 27. The report underscored that “the speed with which a sanction is imposed” “may be a particularly important dimension” when estimating the potential effect of capital punishment. *Id.* at 30.

No death-penalty regime has sentenced such a large number of convicts to death and then administered this sanction as infrequently or after such enormous delays as has California. Despite issuing nearly 1,000 death sentences for the roughly 100,000 murders and non-negligent homicides in the state since 1978, the last murder that resulted in execution was committed 33 years ago (on May 9, 1982, by David Mason).⁵ Given the centrality of swiftness and certainty as the hallmarks of deterrence, the district court’s ruling that the California system lacks any deterrent effect clearly rests on the appropriate empirical factors.

While the district court noted that the average time to execution in the United States for those inmates who were actually executed from 1984 to 2009 was 10 years, the 13 executed California defendants spent an average of 17 years and eight months on death row, and this mean duration would have been longer

⁵California Department of Corrections and Rehabilitation, *Executed Inmate Summary*, http://www.cdcr.ca.gov/Capital_Punishment/inmates_executed/David_Mason.html 1 (State of California 2014).

had not two of the 13 acquiesced in their execution by relinquishing their further rights to appeal.⁶ The number executed is less than 1.5 percent of the 937 death sentences imposed since 1978. As a result, for the vast majority of offenders, being sentenced to death is “equivalent to a life sentence.” *Id.*

From 1978 to 2014, Texas (953) and California (937) have sentenced almost the same number of murderers to death, but while Texas has executed 518 over this period, California has executed 13.⁷ Because of Texas’s smaller population (about 62 percent of that of California over this period) yet modestly higher murder rate, Texas has only had about two-thirds the number of murders that California has experienced since 1978, which makes the number of executions as a proportion of murders even more dramatically larger and more frequent in Texas than in California.⁸ Yet when one looks at the credible statistical evidence on the

⁶David Mason and Robert Massie (executed in 1993 and 2001), both terminated their legal challenges to facilitate their executions.

⁷The Death Penalty Information Center, *Death Sentences in the U.S. from 1977 by State and by Year*, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (Death Penalty Information Center 2015). Texas Department of Criminal Justice, *Executions*, http://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html (last updated February 5, 2015).

⁸From 1978 to 2013, California had 97,468 murders and Texas had 62,877. California Department of Justice, *CRIME IN CALIFORNIA, 2013*, <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf>.
(continued...)

impact of the death penalty in Texas, signs of deterrence are nowhere to be found.⁹

Since every aspect of the death penalty in California is considerably less likely to generate a deterrent effect than the widely advertised and frequently employed Texas death penalty system, the fact that no deterrence is observed in the Texas

⁸(...continued)

Federal Bureau of Investigation, *Uniform Crime Reports*, <http://www.fbi.gov/about-us/cjis/ucr/ucr> (U.S. Department of Justice); Texas Department of Public Safety, *Crime in Texas*, http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm.

⁹The two best studies on Texas, which has accounted for about one-third of all post-*Gregg* executions, undermine the claim that the death penalty deters murder. Hjalmarsson employs daily homicide and execution data to examine their relationship in Houston, Dallas, and San Antonio. Randi Hjalmarsson, *Does Capital Punishment Have a “Local” Deterrent Effect on Homicides?* 11 AMERICAN LAW AND ECONOMICS REVIEW 310, 311-12 (2009). Hjalmarsson concludes, “I find minimal evidence that executions have a short-term deterrent effect on homicides.” *Id.* at 332.

A second study by Fagan, Zimring, and Geller uses panel data models to test whether capital punishment lowers the rate of capital-eligible homicides, both nationally and in Texas. Jeffrey Fagan, Franklin Zimring, and Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803, 1833 (2005). Their study explores whether a deterrent effect can be found in the narrower class of cases that are death-eligible (given the consistent finding of no deterrence across all homicides, three quarters of which are not death-eligible due to statutory criteria). *Id.* at 1860. The authors conclude that “[e]ven in Texas, . . . the proportion of death-eligible killings is no smaller than in other categories of states, and there is no differential decline in death-eligible killings as the execution rate increased in the 1980s and 1990s.” *Id.* Studies purporting to find deterrence in Texas were specifically refuted in the NRC report at pages 85-89 and 94.

data provides additional support for the district court’s finding that the California death penalty system has no deterrent value.

C. Beccaria’s case against the death penalty.

The first serious scholarly treatment of criminal justice policy—insightful enough to still deserve attention—was offered in 1764 by Italian criminologist Cesare Beccaria. The treatise, *On Crimes and Punishments*, had a profound influence on the American Founding Fathers, partly due to its famous chapter on the death penalty. In *Of the Punishment of Death*, Beccaria articulated the view, since adopted by the United States Supreme Court, stating that punishment only promotes justice insofar as it is proportionate and “ha[s] only that degree of severity which is sufficient to deter others.” Cesare Beccaria, ON CRIMES AND PUNISHMENTS 101 (Albany: W.C. Little & Co. 1872) (1764).

Beccaria wrote that because life imprisonment “has in it all that is necessary to deter the most hardened and determined,” the death penalty could not be a just expression of state power since the death penalty is *not* a more effective deterrent than life imprisonment. *Id.* at 101-02. Beccaria noted that capital punishment may independently *decrease* deterrence by making citizens callous to the taking of life with “the example of barbarity it affords.” *Id.* at 104.

D. Modern studies finding no evidence of a deterrent effect.

A large and growing number of academic articles conclude that no credible statistical evidence of a deterrent effect exists. *See, e.g.*, Lawrence Katz, *et al.*, *Prison Conditions, Capital Punishment and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003); John Donohue & John Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 JOURNAL OF EMPIRICAL LEGAL STUDIES 303 (2005); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO STATE JOURNAL OF CRIMINAL LAW 255 (2006); Jeffrey Fagan, Franklin Zimring, and Amanda Geller, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2005); Ethan Cohen-Cole, *et al.*, *Model Uncertainty and the Deterrent Effects of Capital Punishment*, 11 AMERICAN LAW AND ECONOMICS REVIEW 335 (2009); John Donohue & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AMERICAN LAW AND ECONOMICS REVIEW 249 (2009); and Randi Hjalmarsson, *Does Capital Punishment Have a ‘Local’ Deterrent Effect on Homicides?*, 11 AMERICAN LAW AND ECONOMICS REVIEW 310 (2009).

Two additional articles are worth highlighting. Kovandzic, Vieraitis, and Boots (“KVB”) conducted perhaps the most comprehensive panel data study regarding the deterrent effect as it has operated throughout the United States since the reinstatement of capital punishment following *Furman*. Tomislav Kovandzic, *et al.*, *Does the Death Penalty Save Lives? New Evidence from State Panel Data, 1977 to 2006*, 8 CRIMINOLOGY AND PUBLIC POLICY 803 (2009). KVB performed a careful ordinary least squares regression analysis of state panel data from 1977 to 2006. KVB present eight primary regression models, all of which show no statistically significant impact of the death penalty on the murder rate, while simultaneously showing that increases in the incarceration rate and the rate of police have a statistically significant dampening effect on murder. Overall, KVB make a powerful case that the best available evidence for the entire United States does not support the proposition that state capital punishment laws or executions decrease the murder rate.

Zimring, Fagan, and Johnson conducted another noteworthy study comparing murder rates in Singapore and Hong Kong. *See* Franklin Zimring, *et al.*, *Executions, Deterrence, and Homicide: A Tale of Two Cities*, 7 JOURNAL OF EMPIRICAL LEGAL STUDIES 1 (2010). The results are revealing because Singapore and Hong Kong have had highly similar murder rates since the 1970s, even though

Hong Kong abolished the death penalty in 1993, and shortly thereafter, Singapore significantly increased its execution rate. Despite these vast differences in the capital punishment systems maintained in the two locations, their murder rates over the relevant time period have been nearly identical.

1. A number of factors undermine the deterrent effect of the death penalty in general.

For a punishment to possibly deter a potential criminal, the individual would have to be aware of the likely punishment if caught, believe in some likelihood that he would be caught, and have some capacity to both consider these possibilities and alter his behavior because of them. Since the death penalty is only to be imposed on murderers who commit particularly egregious crimes—“the worst of the worst” according to the Supreme Court—it is not surprising that such individuals are less likely to possess the knowledge and capacity for restraint that are necessary for deterrence to operate.

A study of 278 inmates provides insight into why a putatively harsher punishment may generate no deterrent benefit. *See* David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, AMERICAN LAW AND ECONOMICS REVIEW (2002). Anderson found that 76 percent of the criminals surveyed and 89 percent of the most violent offenders

were not cognizant of either the possibility of apprehension or the punishments they would likely receive for their crimes. The more active criminals were even less likely to be deterred by harsher punishments because the forces impelling their behavior—such as drugs, fight-or-flight responses, and irrational thought—are less easily curbed by the contemplation of uncertain apprehension and subsequent punishment.

A recent analysis of a prison-release experiment in Italy sheds light on when criminal deterrence is more or less likely to operate. *See* Drago, Francesco, *et al.*, *The deterrent effects of prison: Evidence from a natural experiment*, JOURNAL OF POLITICAL ECONOMY, 117:257-80 (2009). Italy released one-third of its prison population in August 2006, but the early release involved the prospect of a penalty kicker: if the early releasees were arrested again, they would have to repay the time avoided on top of any new sanction. The study found that the threat of the enhanced sentence had a substantial deterrent effect on the more minor Italian prisoners. But a second key finding that emerged from the Italian study was that the most serious prior criminals—defined as those individuals with an original sentence longer than 69 months—were *not* deterred by the prospect of the enhanced sentence. This point brings us to the death penalty. Since the most serious criminals were *not* deterred by the risk of added jail time, while the less

serious criminals *were* deterred, one sees that as one marches down the path toward more serious criminal conduct, of which capital murder is at the apex, the evidence of deterrence weakens or vanishes.

The important arithmetic of the death penalty is that, even if the prospect of execution did deter, only a very small number of individuals would be affected—those who would *not* be deterred by the prospect of life without possibility of parole but *would* be deterred by the presence of the death penalty. To see this, consider New York, which in 2013 did not have the death penalty, and across its population of 19,700,000 had 644 murders.¹⁰ This means that there were roughly 644 individuals that one might hope a death penalty could influence not to commit murder. In other words, 644 represents the maximum number of individuals whose behavior could have been changed in a socially acceptable direction by the presence of a death penalty law. But we have just seen that many of these individuals will be undeterrable because of their inherent nature, their limited capacity to weigh and reflect future consequences, and other factors, such

¹⁰This number of murders and non-negligent homicides comes from New York State Division of Criminal Justice Services, *Index Crimes Reported to Police by Region: 2004-2013*, <http://www.criminaljustice.ny.gov/crimnet/ojsa/indexcrimes/Regions.pdf> (last updated November 4, 2014). Since capital murders are only a subset of this broader measure of homicides, the number of murderers who would have been death-eligible if New York had not abolished the death penalty would be substantially less than 644.

as drug and alcohol addiction or mental illness. Thus, the number that could conceivably be discouraged from killing by the presence of a death penalty is likely to be some small subset of these 644 individuals. Against this subset of 644 for which one might hope deterrence could operate, there were about 19,699,352 individuals in New York who were *not* deterred by the threat of capital punishment (since it was nonexistent) and yet they still did not kill. This number is more than 30,000 times as great as the 644 murderers in New York in 2013.

If the death penalty has the brutalization effect that Beccaria postulated, then we are confronted by the danger that some of the 19,699,352 current non-murderers might be subject to a malign influence of capital punishment that would work in opposition to any possible benign influence operating on at most 644 individuals. If the brutalization effect of the death penalty were only 1/30,000th as strong as any deterrent effect, the death penalty would encourage more violence than it would deter.

Moreover, the perceived injustice of the death penalty, particularly in the black community, undoubtedly contributes to the unwillingness of some individuals to cooperate with the police, thereby undermining a critical tool that we know works to reduce homicides: apprehending criminals. Even more concretely, the death penalty is enormous costly—particularly as it operates in

California. The estimated \$4 billion spent on California's death-penalty regime consumes resources that could have been used on anti-crime measures known to be effective in reducing criminal homicides.

Former Manhattan District Attorney Robert Morgenthau, writing in the *New York Times* in February 1995 to oppose passage of a death penalty statute, stated:

Prosecutors must reveal the dirty little secret they too often share only among themselves: The death penalty actually hinders the fight against crime[.] Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives[.]

Nonetheless, New York State adopted the death penalty shortly thereafter. The same day, the Bronx District Attorney announced that he too was opposed to the death penalty and would not seek it. Despite their articulated opposition to the death penalty, from 1995 to 2004 the murder rate per 100,000 dropped in Manhattan by 64.4 percent (from 16.3 to 5.8), and in the Bronx by 63.9 percent (from 25.1 to 9.1).¹¹ *See* Donohue and Wolfers (2009:14-16).

¹¹Brooklyn, with identical laws and police force and broadly similar economic, social, and demographic features as Manhattan and the Bronx, had a District Attorney who filed the largest number of capital cases of any county in the state (albeit with no executions). Yet Brooklyn's murder decline was only 43.3 percent over this period, from an initial figure (almost identical to Manhattan's) of 16.6 murders per 100,000 in 1995 down to only 9.4 in 2004 (when the NY death penalty was struck down). No hint of a deterrent effect of capital punishment is seen in these crime patterns.

As noted in Donohue (forthcoming 2015):¹²

[O]ver the last 35 years, the state of California has spent roughly \$4 billion to execute [13] individuals (Alarcón and Mitchell, 2010). Even if it could be proved that these 13 executions *each* deterred, say, 18 murders (the *high-end* estimate from the flawed and discredited panel data models), this would not be a sign that the death penalty reduced the rate of murder. Given the cost of a California police officer of \$86,040, the \$4 billion is enough to hire roughly 46,490 police officers which . . . would be expected to prevent 552 murders . . . in California—considerably more than twice the number saved under even the most optimistic (albeit discredited) view of capital punishment.¹³ In other words, since the death penalty is a costly and inefficient system, its use will lead to more murders by wasting resources that could be expended on crime-fighting measures that are known to be effective.

Finally, the remote prospect of execution for one of the 100,000 murderers in California since 1978 would not loom large in a potential killer's calculus. Over this same period, roughly 6,000 criminals were justifiably killed by police or

¹²John Donohue, *Empirical Evaluation of Law: The Dream and the Nightmare*, AMERICAN LAW AND ECONOMICS REVIEW, forthcoming 2015.

¹³This increase in the police force would be about a 68 percent increase in the number of police and sheriff's patrol officers in California. With an elasticity of crime with respect to police of 0.30, Jonathan Klick & Alex Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J.L. & ECON. 267 (2005), one would expect to save about 552 lives from a base of 2,707 murders in California (the average number of murders over the period from 1978 to 2013). This is considerably more than twice the number of lives saved by the California death penalty under the most wildly and unrealistically optimistic estimate of 18 lives saved per execution ($13 \times 18 = 234$), emanating from the discredited panel data studies that the NRC panel found not to be uninformative.

private citizens.¹⁴ The California death penalty presents a relatively trivial risk in comparison to these 6,000 killings and would likely only be contemplated by a small portion of potential murderers in any event. If this remote risk of execution fades into the background for potential killers, any possible deterrent benefit is eliminated.

2. No credible study shows deterrence even where the death penalty is used extensively and certainly not where it is employed as in California.

Although a number of articles have argued that there is a deterrent effect to the death penalty, these articles have not focused on the California capital punishment regime and have been pointedly and thoroughly debunked by Richard Berk (2005), Donohue and Wolfers (2005 and 2009), Fagan (2006), and the 2012 report of the NRC on DETERRENCE AND THE DEATH PENALTY.¹⁵ In *Baze v. Rees*,

¹⁴The Supplementary Homicides Report indicates that from 1978 to 2011, there were 2,123 justifiable homicides in California committed by citizens and 3,552 by police (totaling 5,674). If the average of 140 such deaths (from 2007 to 2011) continued for the next three years, the number of such killings since 1978 would exceed 6,000.

¹⁵The long history of unsubstantiated claims that executions reduce crime goes back at least to 1978, when an NRC panel concluded that Isaac Ehrlich's claims of deterrence were not credible: "In summary, the flaws in . . . Ehrlich's results . . . and their serious temporal instability lead the Panel to conclude that the results of the analyses on capital punishment provide no useful evidence on the deterrent effect of capital punishment." Panel on Research on Deterrent and Incapacitative Effects, Nat'l Research Council, DETERRENCE AND

(continued...)

553 U.S. 35 (2008), Justice Stevens stated that “there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.” *Id.* at 79 (Stevens, J., concurring). In support of the contrary conclusion, Justice Scalia responded by citing only a single law review article.¹⁶ *Id.* at 89 (Scalia, J., concurring). But the lead author of that paper quickly expressed his disagreement with Justice Scalia’s claim, writing: “[i]n short, the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty.”¹⁷

We believe that the best available evidence fails to provide any support for the deterrence of the death penalty, but in any event, one can confidently assert that a system that operates with the infrequency and enormous level of delay that characterizes the California capital punishment regime will have no discernible deterrent effect on the commission of murder.

¹⁵(...continued)

INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 62 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin, eds., NAS 1978).

¹⁶Sunstein, Cass, and Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STANFORD LAW REVIEW 703-50 (2005).

¹⁷Cass Sunstein & Justin Wolfers, *A Death Penalty Puzzle*, THE WASHINGTON POST, June 30, 2008, <http://www.washingtonpost.com/wpdyn/content/article/2008/06/29/AR2008062901476.html>.

E. Federal and California courts have correctly commented that delay in the death penalty system undermines its deterrent effect.

1. Commentary by the United States Supreme Court.

The Supreme Court has noted that the prospect that a particular penal sanction will be avoided necessarily diminishes its deterrent effect. In *Kuhlmann v. Wilson*, 477 U.S. 438, 452 (1986), the Court found that the “the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks.” *Id.* at 452-53.

Justice Stevens commented on how delay in executions undermines any deterrent effect of capital punishment, stating that “delaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner’s death. In other words, the penological justifications for the death penalty diminish as the delay lengthens.” *Johnson v. Bredesen*, 130 S. Ct. 541, 543 (2009) (statement of Stevens, J., respecting the denial of *certiorari*) (internal quotation marks and citation omitted).¹⁸

¹⁸While the State’s brief suggests that resolving the deterrence issue must be left to the legislature, Dkt. at 42, the Supreme Court has repeatedly made judicial determinations that deterrence is lacking in finding either the death penalty system as a whole or the application of capital punishment to certain classes of defendants (continued...)

Justice Stevens expressed this theme in a dissenting opinion in *Gomez v. Fierro*, 519 U.S. 918, 918 (1996) (Stevens, J., dissenting), joined by Justice Breyer: “[t]here are powerful reasons for concluding capital cases as promptly as possible.” Among them is that “[d]elay in the execution of judgments imposing the death penalty frustrates the public interest in deterrence and eviscerates the only rational justification for that type of punishment.” *Id.*

2. Commentary by California courts.

In *Barnett v. Superior Court*, 54 Cal. Rptr. 3d 283, 340 (Cal. Ct. App. 2006) (Sims, J., concurring), Justice Sims commented in his concurring opinion that “when the time lag between crime and punishment is more than a quarter of a century, all deterrent effect of the punishment is lost.”

¹⁸(...continued)

to be unconstitutional. *See Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring) (“Most important, a major goal of the criminal law—to deter others by punishing the convicted criminal—would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others.”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent . . . purpose of the death penalty.”); *Roper v. Simmons*, 543 U.S. 551, 561-62, 571 (2005) (“[T]he . . . characteristics [of] juveniles . . . suggest [they] will be less susceptible to deterrence,” and “the low likelihood that offenders under 16 engaged in ‘the kind of cost-benefit analysis that attaches any weight to the possibility of execution’ made the death penalty ineffective as a means of deterrence. *Thompson v. Oklahoma*, 487 U.S. 815, 836-38 (1988).”).

In *People v. Anderson*, 493 P.2d 880, 895 (Cal. 1972) (*en banc*) (superseded by constitutional amendment), the California Supreme Court found in part that the death penalty is not justified by a deterrent effect. The court found that “many homicides . . . are not deterrable and as to the remainder capital punishment can have a significant deterrent effect only if the punishment is swiftly and certainly exacted.” *Id.* at 896. Because the punishment as it was administered in California was “neither swift nor certain,” the court refused to find that “capital punishment is a greater deterrent to crime than are other available forms of punishment.” *Id.* at 897.

F. Non-judicial writings by judges have emphasized that delay in the death penalty system undermines its deterrent effect.

In commenting on capital punishment, former Justice Lewis Powell argued that the “present system of multi-layered appeals has led to excessively repetitious litigation and years of delay between sentencing and execution.” Lewis Powell, *Capital Punishment*, 102 Harv. L. Rev. 1035, 1035 (1989). This delay “robs the penalty of much of its deterrent value, ‘since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks.’” *Id.* at 1041-42.

Ninth Circuit Judge Alex Kozinski argued that “[w]hatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims’ families—these purposes are not served by the system as it now operates.” Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-on Sentence*, 46 Case W. Res. L. Rev. 1, 4 (1995). The current system results in “little more than illusion of a death penalty in this country . . . [because] the number of executions compared to the number of people who have been sentenced to death is minuscule, and the gap is widening every year.” *Id.* at 3-4. Furthermore, “[t]o get executed in America these days you have to be not only a truly nasty person, but also very, very unlucky, as only 263 out of some 5,000 sentenced to death have been executed since 1972.” *Id.* at 25. Therefore, “[t]he death penalty, as we now administer it, has no deterrent value because it is imposed so infrequently and so freakishly.” *Id.* These comments about the death penalty across the United States apply *a fortiori* to California’s death penalty system, which is far more extreme in the ways that Judge Kozinski criticizes (as he recognizes in discussing the enormous expense of the California’s death penalty system coupled with few executions). *See id.* at 13-14.

Former Ninth Circuit Judge Arthur Alarcón also argued that in California, “[i]nordinate delays []undermine the state’s purposes of having the death penalty,

namely retribution and deterrence.” Arthur Alarcón, *Remedies for California’s Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 709 (2007). The delays are so extreme that “average time a death row inmate is imprisoned on death row in California will soon exceed twenty years in every case.” *Id.* at 726. Judge Alarcón stated that these inordinate delays are not “a necessary consequence . . . [of the] ‘arsenal of ‘constitutional’ claims’ with which capital defendants are armed.” *Id.* at 708. Instead, “if the California Legislature [would] take action to change the present dysfunctional procedures,” the delays would be greatly minimized. *Id.* at 711. Without this necessary change, however, these delays will continue to “diminish the deterrent value of the death penalty.” *Id.* at 709. Judge Alarcón added that the death penalty will continue to cost California \$90 million per year beyond the ordinary costs of the justice system.

IV. Conclusion

Given the importance of swift and certain punishment to the classical theory of deterrence and the lack of empirical support for deterrence of the death penalty even where it is applied commonly (the unanimous conclusion of the 2012 NRC Report on DETERRENCE AND THE DEATH PENALTY), there is certainly a strong theoretical and empirical basis for the district court’s conclusion that the unique delays and infrequency in administering the death penalty in California have

entirely negated any deterrent effect that could conceivably result from capital punishment.

Respectfully submitted,

DATED: March 6, 2015

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STATEMENT OF THE PARTIES' CONSENT

In accordance with Fed. R. App. P. 29(a), counsel reports that he has addressed the filing of this brief with both counsel for Petitioner Jones (Michael Laurence) and for Respondent Davis (Bill Bilderback) and both counsel provided his consent to the filing of this amicus brief.

/s/ E A Balogh

DATED: March 6, 2015

ETHAN A. BALOGH

STATEMENT REQUIRED UNDER FED. R. APP. P. 29(c)(5)

In accordance with Fed. R. App. P. 29(c)(5), counsel asserts the following:

(a) no party's counsel authored the brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and (c) no person—other than the *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

/s/ E A Balogh

DATED: March 6, 2015

ETHAN A. BALOGH

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and Ninth Circuit Rule 32-1, the attached
Brief of *Amici Curiae* is:

Proportionately spaced, has a typeface of 14 points or more, and contains
6,982 words.

DATED: March 6, 2015

/s/ E A Balogh

ETHAN A. BALOGH

PROOF OF SERVICE

I, Ethan A. Balogh, certify that on March 6, 2015, I caused to be filed electronically one copy of Brief of *Amici Curiae* Empirical Scholars Concerning Deterrence and the Death Penalty in Support of Petitioner/Appellee, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all parties to whom I am required to provide service are registered CM/ECF users, and that service of the Brief shall be accomplished by the CM/ECF system.

/s/ E A Balogh

DATED: March 6, 2015

ETHAN A. BALOGH