

## ARTICLES

# Black Lives Matter and the Call for Death Penalty Abolition\*

*Michael Cholbi and Alex Madva*

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The Black Lives Matter movement has called for the abolition of capital punishment in response to what it calls “the war against Black people” and “Black communities.” This article defends the two central contentions in the movement’s abolitionist stance: first, that US capital punishment practices represent a wrong to black communities rather than simply a wrong to particular black capital defendants or particular black victims of murder, and second, that the most defensible remedy for this wrong is the abolition of the death penalty.

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The Black Lives Matter movement has called for a number of social, political, and legal reforms in response to what it calls “the war against Black people” and “Black communities” in the United States. Among these is the abolition of capital punishment on the grounds that the death penalty in the United States is a “racist practice” that “devalues Black lives.”<sup>1</sup>

The movement’s abolitionist stance invites at least two crucial philosophical questions. As the movement’s platform notes (and as we document later in Sec. I), a wide body of studies indicate that (a) black capital defendants are more likely to be subject to execution than defendants of other races and (b) those who murder blacks are less likely to be subject to execution than are those who murder members of other races. But those philosophers and jurists who, unlike the movement, do not find capital

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1. Movement for Black Lives Platform, “End the War on Black People,” <https://policy.m4bl.org/end-war-on-black-people/>.

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punishment “morally repugnant” are likely to doubt that such statistical findings indicate that capital punishment is a racist practice that wrongs black communities, even when viewed in the historical context of troubling “policing” practices that devalue black lives (e.g., lynchings).<sup>2</sup> Some death penalty retentionists may concede that this statistical evidence shows that American capital punishment has mistreated *particular* black capital defendants or murder victims unjustly and may therefore welcome reforms aimed at reducing the likelihood of such mistreatment. But they may well be unmoved (as US courts largely have been) by the claim that capital punishment has been a front in a war against black people in general. Answering these defenders thus seems to necessitate an argument that fleshes out more explicitly the movement’s claims that these capital punishment practices are a wrong to black communities, an argument invoking an ethical idiom that defenders of capital punishment cannot so readily dismiss.

Supposing, however, that such an argument can be provided, a second question arises: if US capital punishment practices represent an injustice to black communities, why is abolition the most defensible response to this injustice? There are, after all, other possible remedies short of outright abolition.

Here we defend the movement’s call for abolition by engaging these two questions. With respect to the first, we draw on arguments previously developed by one of us (Cholbi).<sup>3</sup> Cholbi’s arguments are distinctive within the debate on race and capital punishment in the United States. While they do not deny that black Americans suffer *retributive* injustices in the US capital punishment regime (i.e., particular black defendants and murder victims are treated in comparatively unjust ways by that regime), they further propose that black Americans as a class suffer a kind of *distributive* injustice under that regime. More specifically, black Americans do not receive either the equal protection of or equal status under the law.

We then propose (in Sec. II) that the discriminatory patterns in capital punishment that generate this injustice are explained, in part, by implicit racial biases. The biases in question are both general, relating to perceptions of black criminality, and specific, likely to be triggered in contexts where prosecutors, judges, and jurors make “life or death” choices about capital charges, convictions, and sentences. The effect of such biases is to make murder (at least in the United States) a racially coded act, such that its moral gravity is calibrated in part based on the race of those who commit it or those who are its victims. That is, notwithstanding the obvious wrongness and illegality of sentencing on the basis of a victim’s or defendant’s race, our criminal justice institutions systematically treat certain

2. *Ibid.*

3. Michael Cholbi, “Race, Capital Punishment, and the Cost of Murder,” *Philosophical Studies* 127 (2006): 255–82.

murders as more brutal and morally heinous partly because they are committed by blacks or against whites. Situations involving judgments about capital punishment, we suggest, tend to activate and amplify racial bias in distinctive ways. Preexisting biases regarding blacks' proclivity toward and insusceptibility to violence that may otherwise remain dormant are galvanized when individuals are afforded the opportunity to render judgments regarding who ought to be executed for their crimes. In other words, the possibility of the death penalty (as opposed to life imprisonment serving as the maximum possible penalty) arouses race-based biases that distort judgments regarding the justifiability of imposing death as a punishment. These biases impact not only capital sentences as such but also intuitive judgments of guilt, appraisals of incriminating evidence, charging decisions, assessments of the severity of pain and suffering, and general moral intuitions related to punitiveness and desert. In sum, the capital punishment regime elicits biases that in turn generate race-based injustice. The *social meaning* of murder thus comes to vary systematically with the races of those involved.<sup>4</sup>

In Section III, we propose that in light of the role implicit biases play in capital sentencing in the United States, not to address this discrimination amounts to a form of societal or institutional recklessness. The continuation of the American capital punishment regime means that American society and its judicial and policing bodies engage in unjustified risk-taking with respect to the legal status of black lives, risk-taking of which they are knowingly aware and so culpable.<sup>5</sup> In our estimation, although the abolition of the death penalty does little to address past injustice of this kind, it nevertheless would be the most justifiable remedy for this recklessness going forward. We show in Sections IV and V that abolition is unique among plausible remedies both in eliminating the discriminatory effects of this bias-based recklessness and in not being itself unjust.<sup>6</sup> Thus, while imperfect, the abolition of the death penalty is the least morally perilous response consistent with the aim of eliminating this unjust recklessness that places the lives of black Americans at risk. Section VI addresses two objections to our proposal for abolition, while Section VII places our argument in the context of recent theoretical accounts of racial injustice.

4. For more on social meaning, see, e.g., Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review* 62 (1995): 943–1045.

5. Findlay Stark, *Culpable Carelessness: Recklessness and Negligence in the Criminal Law* (Cambridge: Cambridge University Press, 2016).

6. This paper is an exercise in nonideal reflection, in two senses: first, our aim here is not to offer a comprehensive or partial characterization of an ideally just criminal system, but to consider concrete remedies for a pressing social ill, and to focus on remedies that are feasible in the near term, given the current state of US politics; second, we intend for our analysis of the relevant injustice, as well as our corrective prescription, to be grounded in social scientific research.

## I

In its 1972 *Furman* decision, the US Supreme Court vacated the death sentences of three black defendants on the grounds that the state statutes under which they were sentenced gave judges and juries insufficient guidance regarding when defendants should be sentenced to death.<sup>7</sup> Although the defendants' legal counsel presented evidence indicating that racial bias influenced capital sentencing, the Court's reasoning was not primarily grounded in concerns about racial bias. Rather, the Court held that the state's capital punishment regime violated the Eighth Amendment's ban on "cruel and unusual punishment" because, thanks to a lack of clear sentencing guidelines, "there is no meaningful basis for distinguishing the few cases in which it [death] is imposed from the many cases in which it is not." The imposition of the death penalty, it concluded, was "wanton," "freakish," and "arbitrary." In response to *Furman*, states introduced a number of reforms to more explicitly regulate capital sentencing, measures which (courts subsequently ruled) rendered state capital punishment statutes constitutionally sound.<sup>8</sup> These reforms included the establishment of more precise sentencing guidelines, requiring that both aggravating and mitigating factors be taken into account; the bifurcation of capital trials into guilt and penalty phases; automatic appellate review of capital cases; and proportionality review, in which a state appellate court can consider whether a given capital sentence aligns with, or is instead disproportionate to, other sentences issued in the state's capital cases.

Given that the *Furman* ruling de-emphasized the role of racial bias in capital sentencing, it is unclear whether the Court expected (or hoped) that the sentencing reforms implemented thereafter would mitigate the effects of racial bias.<sup>9</sup> What is clear, however, is that seemingly discriminatory racial patterns in capital sentencing have not abated despite these re-

7. *Furman vs. Georgia*, 408 U.S. 238 (1972).

8. Most centrally in *Gregg vs. Georgia*, 428 U.S. 153 (1976), but see also *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Zant v. Stephens*, 462 U.S. 862 (1983); *Sumner v. Shuman*, 483 U.S. 66 (1987); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990); *Richmond v. Lewis*, 506 U.S. 40 (1992).

9. That the Court later ruled (in *McCleskey vs. Kemp*, 481 U.S. 279 [1987]) that evidence concerning patterns of racial discrimination is irrelevant to the legitimacy of any particular death sentence—that defendants can only advance a valid claim of racial discrimination by citing evidence of discrimination in their own case—indicates that the Court came to be more skeptical of the racial bias critique than it had indicated in *Furman*. Indeed, the evidence for racial bias was, by the time of the *McCleskey* ruling, arguably more compelling than it had been when *Furman* was rendered. See esp. David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74 (1983): 661–753.

forms. Empirical studies conducted since 2000 indicate that, with respect to racial discrimination, the post-*Furman* reforms have had modest success at best. Indeed, they suggest that the historical patterns in which black defendants have been statistically more likely to be sentenced to death than defendants of other races or ethnicities and in which nonwhite defendants are statistically more likely to be sentenced to die for killing whites than for killing individuals of other races or ethnicities continue to the present day. Studies conducted since 2000 in Arizona, Colorado, Connecticut, Delaware, Maryland, New Mexico, Ohio, Texas, and Washington have concluded that black defendants are more likely to face a death penalty prosecution or to be sentenced to death than defendants of other races.<sup>10</sup> Studies conducted since 2000 in Alabama, Arkansas, California, Connecticut, Delaware, Illinois, Indiana, Louisiana, Maryland, New Mexico, North Carolina, South Carolina, Tennessee, Texas, Virginia, and the armed forces have shown an even stronger effect on capital sentencing based on victims' race, concluding that those who kill whites are more likely to be sentenced to die than those who kill members of other racial and ethnic groups.<sup>11</sup> These two effects also appear to interact, so that "cases involv-

10. For Arizona, see American Bar Association Death Penalty Due Process Review Project, "Arizona Death Penalty Assessment Report" (2006). For Colorado, see Meg Beardsley et al., "Disquieting Discretion: Race, Geography and the Colorado Death Penalty in the First Decade of the Twenty-first Century," *Denver University Law Review* 92 (2015): 431–52. For Connecticut, see John J. Donohue, "An Empirical Evaluation of the Connecticut Death Penalty System since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?," *Journal of Empirical Legal Studies* 11 (2014): 637–96. For Delaware, see Sheri Johnson et al., "The Delaware Death Penalty: An Empirical Study," *Iowa Law Review* 97 (2012): 1925–64. For Maryland, see Raymond Paternoster et al., "Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999," *University of Maryland Law Journal of Race, Religion, Gender and Class* 4 (2004): 1–97. For New Mexico, see M. Wilson, "The Application of the Death Penalty in New Mexico, July 1979 through December 2007: An Empirical Analysis," *New Mexico Law Review* 38 (2008): 255–301. For Ohio, see American Bar Association Death Penalty Due Process Review Project, "Ohio Death Penalty Assessment Report" (2007). For Texas, see Scott Phillips, "Racial Disparities in the Capital of Capital Punishment," *Houston Law Review* 45 (2008): 807–40. For Washington, see Katherine Beckett and Heather Evans, "The Role of Race in Washington State Capital Sentencing, 1981–2012," commissioned report (Law, Societies and Justice Program and Department of Sociology, University of Washington; 2014), <http://www.deathpenaltyinfo.org/documents/WashRaceStudy2014.pdf>.

11. For Alabama, see American Bar Association Death Penalty Due Process Review Project, "Alabama Death Penalty Assessment Report" (2006). For Arkansas, see David C. Baldus, Julie Brain, Neil A. Weiner, and George Woodworth, "Evidence of Racial Discrimination in the Use of the Death Penalty: A Story from Southwest Arkansas (1990–2005)," *Tennessee Law Review* 76 (2009): 555–613. For California, see Glenn L. Pierce and Michael L. Radelet, "Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990–1999," *Santa Clara Law Review* 46 (2005): 1–47. For Connecticut, see Donohue, "Empirical Evaluation of the Connecticut Death Penalty System." For Delaware,

ing black defendants and white victims are treated more punitively than cases with all other defendant/victim racial combinations."<sup>12</sup> Racial discrimination in capital sentencing is therefore not merely a "historical" injustice. Rather, it persists into the present day.

The vast majority of the academic literature frames this injustice as an individual legal wrong. In other words, this literature assumes that if there is an injustice here, it is a wrong suffered by those particular individuals who engage with the capital punishment regime either as capital defendants or as victims of murder.<sup>13</sup> The debates within this literature thus focus largely on questions of retributive justice. For example, if a person's punishment is deserved, what moral difference does it make if other persons equally deserving of that punishment receive a lesser (or greater) punishment? Is a person (a black murder defendant, say) treated unjustly if he ends up being executed for his crimes when others convicted of the

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see Johnson et al., "Delaware Death Penalty." For Illinois, see Michael L. Radelet and Glenn L. Pierce, "The Role of Victim's Race and Geography on Death Sentencing: Some Recent Data from Illinois," in *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, ed. C. J. Ogletree and A. Sarat (New York: New York University Press, 2006), 117–49. For Indiana, see Mary Ziemba-Davis et al., "The Application of Indiana's Criminal Sentencing Law: Findings of the Indiana Criminal Law Study Commission 1231" (2001). For Louisiana, see Glenn L. Pierce and Michael L. Radelet, "Death Sentencing in East Baton Rouge Parish, 1990–2008," *Louisiana Law Review* 71 (2011): 647–73. For Maryland, see Paternoster et al., "Justice by Geography and Race." For New Mexico, see Wilson, "Application of the Death Penalty in New Mexico." For North Carolina, see Isaac Unah, "Empirical Analysis of Race and the Process of Capital Punishment in North Carolina," *Michigan State Law Review*, 2011, 609–58. For South Carolina, see Michael J. Songer and Issac Unah, "The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina," *South Carolina Law Review* 58 (2006): 161–209. For Tennessee, see Glenn Pierce, Michael Radelet, and Raymond Paternoster, "Race and Death Sentencing in Tennessee, 1981–2000," in *American Bar Association, Evaluating Fairness and Accuracy in Death Sentencing Systems: The Tennessee Death Penalty Assessment Report* (2007). For Texas, see Phillips, "Racial Disparities in the Capital of Capital Punishment." For Virginia, see American Bar Association Death Penalty Due Process Review Project, "Virginia Assessment on the Death Penalty" (2013). For the armed forces, see David C. Baldus et al., "Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984–2005)," *Journal of Criminal Law and Criminology* 101 (2011): 1227–1336.

12. David C. Baldus and George Woodworth, "Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research," *Criminal Law Bulletin* 39 (2003): 194–226.

13. See, e.g., Stephen Nathanson, "Does It Matter If the Death Penalty Is Arbitrarily Administered?," *Philosophy and Public Affairs* 14 (1985): 149–64; Ernest van den Haag, "The Ultimate Punishment: A Defense," *Harvard Law Review* 99 (1986): 1662–69; Christopher Meyers, "Racial Bias, the Death Penalty, and Desert," *Philosophical Forum* 22 (1990): 139–48; Patrick Lenta and Douglas Farland, "Desert, Justice, and Capital Punishment," *Criminal Law and Philosophy* 2 (2008): 273–90; and Matthew Kramer, *The Ethics of Capital Punishment* (Oxford: Oxford University Press, 2014), 313–24.

same crime would not have been executed (thanks to their race)? And if so, how ought such comparative injustices be redressed?<sup>14</sup>

While we do not deny that issues of retributive legal justice are important in this context, we believe that this focus neglects an arguably larger political injustice, one that illuminates the movement's claim that the American capital punishment regime wrongs black communities as a whole. First, Cholbi's arguments underscore how the capital punishment regime wrongs members of the black community irrespective of their actual engagement with that regime. Consider the status of blacks as potential murder victims.<sup>15</sup> Because would-be murderers are justified in believing that individuals who murder blacks are likely to face lesser costs (the presumptively less severe punishments of prolonged or lifelong incarceration rather than execution) than they would for murdering individuals of other races, the law thus fails to penalize killings of blacks in a manner consistent with their having the equal protection of the law. The injustice in question is one that all blacks face, not only those who actually are murdered (or are victims of murder by dint of being a family member of a black murder victim, etc.). All black Americans thus inhabit a normative reality that protects their lives less than white lives. Second, Cholbi argues that, with respect to their status as potential capital defendants, blacks are justified in believing that the criminal justice system will subject them to a greater "cost" for conviction (execution rather than the presumptively less severe punishments of prolonged or lifelong incarceration, say) because of their race.<sup>16</sup> These expectations, in turn, entail that blacks are not accorded "equal status" under the law because they face an increased likelihood of suffering a greater cost than others would owing to factors (i.e., race) unrelated to objective desert. The law thus penalizes blacks engaging in murder in a manner inconsistent with their having equal status under the law. Note again that the injustice in question—blacks not being accorded equal status under the law—is one that all blacks face, not only those who actually become capital defendants.

Cholbi's arguments thus invite us to see the racial wrongs of American capital punishment less in terms of retributive wrongs done to particular defendants as a result of their race and more in terms of distrib-

14. Benjamin S. Yost, "What's Wrong with Differential Punishment?," *Utilitas* 29 (2017): 257–85, provides an excellent overview of these questions and the disputes surrounding them. Yost makes the case that race-based disparities in punishment reinforce structural oppression in ways that are distinctively retributively unjust. We are sympathetic with his proposal but do not take retributive considerations to exhaust the racial injustices in the US criminal justice system.

15. Cholbi, "Race, Capital Punishment, and the Cost of Murder," 267–69.

16. *Ibid.*, 262.



utive injustices done to blacks as a class. On this analysis, the wrongs at issue are that two crucial political goods the law (understood here to encompass not just statutory law, legal doctrine, secondary rules, etc., but also the concrete functioning of the courts, law enforcement, etc.) is responsible for “distributing” are unjustly distributed on the basis of race.<sup>17</sup> Black murder defendants are not extended the same legal status as other defendants; they are presumed less innocent than defendants of other racial groups. Black victims of murder are not extended the same legal protection as victims of other races; their killers are presumed more innocent than those who kill members of other racial groups. The injustices wrought by racial bias in American capital sentencing are therefore exhausted neither by the wrongs done to black defendants sentenced to die owing (in part) to their race nor by the wrongs done to black victims of murder whose murderers escape the death penalty (in part) owing to the race of the victims. The injustices are also political, extending (as the movement maintains) to the black community as a whole, because the capital sentencing regime generates normative realities in which blacks are not treated as equals.

We contend that the mere fact that the law does not accord blacks equal standing as either potential murderers or potential murder victims is sufficient on its own to constitute a serious racial injustice. Yet the injustice is not exhausted by what might appear to be abstract or “formal” wrongs related to legal standing; these wrongs make concrete differences in the lives of black individuals and communities. Here we observe that law can shape the substantive normative realities under which individuals live independently of their tangible and specific interactions with the law. The law is a system that shapes attitudes, choices, and relationships. Consider, for instance, a legal regime that criminalizes same-sex conduct or relations. Such a regime shapes the attitudes, choices, and relationships of those who live under it even if they never directly interact with the regime in that respect. Under such a regime, individuals will try to pursue same-sex relations only in private, businesses catering to a gay clientele will take steps to conceal that fact or to evade legal scrutiny, employers who discover that their employees are gay acquire additional leverage over them, landlords may “harbor” such individuals or use the law to deny them housing, and so on. Such effects are likely to arise even among those who are never charged with violating the statutes against same-sex conduct. The law thus creates a penumbra of normative realities—a set of atti-

17. The Movement for Black Lives Platform does not typically employ the idiom of “distribution” to characterize the group-based injustices suffered by African Americans, referring instead to violations of rights, structural oppression, exploitation, and marginalization. We consider the extent to which our normative analysis of US capital punishment maps onto the movement’s general conception of racial injustice in Sec. VII.



tudes, expectations, and so on—that extend well beyond its tangible operations. Hence, the law can create widespread substantive political injustices, injustices produced by but not reducible to whatever specific legal injustices the regime may commit.

In a similar vein, US blacks operate under a capital punishment regime that creates unjust normative realities that exist independently of their specific interactions with that regime. US blacks, even those who are neither charged with murder nor victimized by murder, are (or are certainly in a position to be) aware of how they would be treated by the law were either of those events to occur. But just as with the criminalization of same-sex relations, blacks' awareness of how they are treated by the capital punishment regime is likely to adversely influence the attitudes and behaviors that shape their interactions with others. For example, this awareness likely contributes to violence against blacks. Given that the regime routinely punishes those who kill blacks less harshly than those who kill others, killing blacks becomes commensurably less risky (especially if the killer is white). This reality is likely to negatively affect blacks' interactions with, and willingness to call upon, law enforcement. As phenomena such as black parents giving their children "the talk" about how to safely deal with police and the daughter of Philando Castile's fiancée pleading with her mother not to scream for fear that she would "get shot" illustrate,<sup>18</sup> the black community lives under the shadow of American legal practices, of which capital punishment has historically been an integral part, that assign their lives lesser value. One adverse effect of this awareness is blacks' greater animosity toward law enforcement, rooted in the knowledge that violence against them is less likely to be subject to the harshest sanction our legal system permits. Blacks' skepticism about law enforcement's willingness to protect their lives likely contributes to greater possession or use of weapons, and hence higher levels of violence, among blacks. In turn, these factors increase the probability of lethal violence toward blacks and of crime within black communities. Conversely, one might expect that discrimination related to offenders' race would counteract this effect. After all, if black offenders are more likely to be executed than others, we might expect awareness of that fact to discourage murders by (and to some extent, among) blacks. This may be so, but we suspect that the realities are more complex. For one, agents do not always respond so straightforwardly to the law's incentives.<sup>19</sup> Moreover, awareness of these facts regarding race of perpetrators may equally well contribute to a kind of nihilism, that is, faced with a

18. Taylor Pittman, "Inside the Heartbreaking Talk Black Parents Must Have with Their Kids," *Huffington Post*, November 4, 2016, [http://www.huffingtonpost.com/entry/inside-the-heartbreaking-talk-black-parents-must-have-with-their-kids\\_us\\_581ca092e4b0d9ce6fb465b](http://www.huffingtonpost.com/entry/inside-the-heartbreaking-talk-black-parents-must-have-with-their-kids_us_581ca092e4b0d9ce6fb465b).

19. For elaboration of this point, in the context of individual and collective responses to racial profiling, see Jack Glaser, *Suspect Race: Causes and Consequences of Racial Profiling* (Oxford: Oxford University Press, 2014), chap. 5.

legal regime that one has reason to think discriminates against blacks, blacks may respond not by calibrating their behaviors to the disincentives that regime produces but by treating that legal regime as an arbitrary and unpredictable dispenser of sanctions.<sup>20</sup>

No doubt the adverse normative realities we reference here are not caused exclusively by capital punishment, and the realities create attitudes and expectations that interact in nuanced ways. But no matter. For we consider it probable that racial discrimination against blacks in the administration of the death penalty (both as prospective murder victims and as prospective murderers) contributes to normative realities that motivate violence, increase community tension, and exacerbate mistrust, particularly toward law enforcement.<sup>21</sup>

We have argued that the movement is therefore correct in seeing the injustices stemming from racial discrimination in the administration of capital punishment in the United States as collective or political. Still, several key questions remain. We have not investigated the mechanisms through which these injustices arise. We argue in the next section that implicit racial biases partly explain how these injustices occur, a fact that shapes both how we understand the nature of these injustices and the defensibility of various responses to them.

## II

Implicit racial biases likely influence countless decisions made by witnesses, police, attorneys, judges, and juries, such that blacks can, as a class, reasonably expect to be mistreated, devalued, and less protected by the capital punishment regime, relative to whites.<sup>22</sup> Before reviewing key evidence,

20. It has long been disputed whether capital punishment has a deterrent effect on crimes such as murder. For a useful overview of this evidence and the surrounding debate, see John J. Donohue and Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," *Stanford Law Review* 58 (2005): 791–845. As Donohue and Wolfers conclude, "the U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect" (843), but what evidence exists for it being a deterrent effect suggests that it is small in comparison to other factors that influence murder rates ("the death penalty does not cause or eliminate large numbers of homicides"; 844). We take the considerations advanced in this paragraph to suggest that racial discrimination could well undermine whatever deterrent effect capital punishment has and, at the very least, complicates our ability to make sound inferences about its deterrent effects. Indeed, it may be a further advantage of the abolition we advocate in this article that it would enable disputes about the deterrent effect to be more decisively settled.

21. For a recent survey highlighting black mistrust toward police, see Pew Research Center, "The Racial Confidence Gap in Police Performance," September 29, 2016, [http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/09/ST\\_2016.09.29\\_Police-Final.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/09/ST_2016.09.29_Police-Final.pdf).

22. For further theoretical analysis of implicit racial bias, capital punishment, and other aspects of the criminal justice system, including policing and eyewitness identification, see Charles Oglethorpe, Robert J. Smith, and Johanna Wald, "Coloring Punishment: Implicit Social

two caveats are in order. First, recent political events have made it clear that reports of the demise of explicit bigotry in liberal democracies have been greatly exaggerated. Accordingly, we make no assumptions about the extent to which the “implicit” biases found in these studies are unconscious, unintentional, or simply unspoken. That is, in many of the field- and lab-based studies reviewed here, individuals act in predictably biased ways despite verbally reporting that they are unbiased. As far as we are concerned, these individuals might be concealing their conscious, intentional racism, or they might be sincerely egalitarian. We are neutral regarding such questions, and we refer to these biases as “implicit” simply because they go unreported.<sup>23</sup> Second, we do not argue that these biases constitute the sole cause of racial injustices related to capital punishment. A complex and entangled set of factors, both internal and external to the criminal justice system, are likely involved. For example, many police departments appear to allocate disproportionate time and resources to levying fines and seizing assets in black communities (i.e., *overpolicing* in order to garner revenue to fund local government operations) and, as a direct consequence, have fewer resources to devote to solving violent crimes in those communities (therefore *underpolicing* when it comes to actually protecting black citizens).<sup>24</sup> We claim only that such structural factors do not by themselves

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Cognition and Criminal Justice,” in *Implicit Racial Bias across the Law*, ed. Justin D. Levinson and Robert J. Smith (Cambridge: Cambridge University Press, 2012), 45–60; Robert J. Smith and G. Ben Cohen, “Choosing Life or Death (Implicitly),” in *Implicit Racial Bias across the Law*, ed. Justin D. Levinson and Robert J. Smith (Cambridge: Cambridge University Press, 2012), 229–43; Glaser, *Suspect Race*; Katherine B. Spencer, Amanda K. Charbonneau, and Jack Glaser, “Implicit Bias and Policing,” *Social and Personality Psychology Compass* 10 (2016): 50–63; Joshua Correll et al., “The Police Officer’s Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot,” *Social and Personality Psychology Compass* 8 (2014): 201–13; Bruce W. Behrman and Sherrie L. Davey, “Eyewitness Identification in Actual Criminal Cases: An Archival Analysis,” *Law and Human Behavior* 25 (2001): 475–91.

23. For more on the nature of implicit racial bias and defenses of the predictive value of indirect measures like the Implicit Association Test, see Alex Madva, “Implicit Bias, Moods, and Moral Responsibility,” *Pacific Philosophical Quarterly* (forthcoming), <https://doi.org/10.1111/papq.12212>; Michael Brownstein and Alex Madva, “Stereotypes, Prejudice, and the Taxonomy of the Implicit Social Mind,” *Noûs* (forthcoming), <https://doi.org/10.1111/nous.12182>; and Michael Brownstein, Alex Madva, and Bertram Gawronski, “Understanding Implicit Bias: How the Critics Miss the Point” (unpublished manuscript). Cf. Frederick L. Oswald et al., “Predicting Ethnic and Racial Discrimination: A Meta-analysis of IAT Criterion Studies,” *Journal of Personality and Social Psychology* 105 (2013): 171–92; Anthony G. Greenwald, Mahzarin R. Banaji, and Brian A. Nosek, “Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects,” *Journal of Personality and Social Psychology* 108 (2015): 553–61; and B. Keith Payne, Heidi A. Vuletich, and Kristjen B. Lundberg, “The Bias of Crowds: How Implicit Bias Bridges Personal and Systemic Prejudice,” *Psychological Inquiry* 28 (2017): 233–48.

24. See, e.g., Rebecca Goldstein, Michael W. Sances, and Hye Young You, “Over-policing, Under-policing, or Both? An Analysis of Police Resource Allocation” (unpublished manuscript); see also the Movement for Black Lives Platform’s “invest-divest” demands. For the criticism

suffice to account for the injustice in question, and that given the persistence of implicit bias and the persistence of racial injustice even after post-*Furman* reforms, no (feasible) package of reforms short of abolition will suffice to eliminate the injustices of capital punishment.

Research suggests that most white Americans, and even many black Americans, harbor antiblack implicit biases, many of which are obviously relevant to criminal justice.<sup>25</sup> These biases lead individuals to judge that darker-skinned individuals look angrier and more threatening than lighter-skinned individuals with identical facial expressions.<sup>26</sup> Whites tend to be less sensitive to the pain experienced by blacks.<sup>27</sup> Whites are more likely to see blacks in some contexts as physically “superhuman” and in other contexts as subhuman and apelike.<sup>28</sup> Even images of five-year-old black boys automatically call to mind problematic racial stereotypes.<sup>29</sup> It is not hard to imagine how these biases could lead to the systematic mistreatment of blacks relative to whites in capital contexts, and a significant body of research specifically suggests that prosecutors, judges, and juries are just as susceptible to these biases as everyone else.

Bias is especially likely to affect individuals when they lack clear-cut guidelines or structural constraints to hold them accountable for their decisions. Among the many subjective, institutionally unconstrained decisions regularly made by prosecutors, some of the most relevant, for our purposes, are whether to charge and what sentence to seek, but also whether to disclose mitigating or potentially exonerating evidence to the defense,

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that implicit bias discourse is insufficiently attentive to these structural-institutional concerns, see Ralph Richard Banks and Richard Thompson Ford, “(How) Does Unconscious Bias Matter: Law, Politics, and Racial Inequality,” *Emory Law Journal* 58 (2009): 1053–1152; Sally Haslanger, “Social Structure, Narrative, and Explanation,” *Canadian Journal of Philosophy* 45 (2015): 1–15.

25. See, e.g., Brian A. Nosek et al., “Pervasiveness and Correlates of Implicit Attitudes and Stereotypes,” *European Review of Social Psychology* 18 (2007): 36–88. For a review of “meaningful life outcomes” predicted by implicit attitudes, see Irene V. Blair, Nilanjana Dasgupta, and Jack Glaser, “Implicit Attitudes,” in *APA Handbook of Personality and Social Psychology*, vol. 1, *Attitudes and Social Cognition*, ed. Mario Mikulincer et al. (Washington, DC: American Psychological Association, 2015), 665–91.

26. Kurt Hugenberg and Galen V. Bodenhausen, “Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat,” *Psychological Science* 14 (2003): 640–43; J. R. Shapiro et al., “Following in the Wake of Anger: When Not Discriminating Is Discriminating,” *Personality and Social Psychology Bulletin* 35 (2009): 1356–67.

27. Sophie Trawalter, Kelly M. Hoffman, and Adam Waytz, “Correction: Racial Bias in Perceptions of Others’ Pain,” *PLOS ONE* 11 (2016): e0152334.

28. A. Waytz, K. M. Hoffman, and S. Trawalter, “A Superhumanization Bias in Whites’ Perceptions of Blacks,” *Social Psychological and Personality Science* 6 (2015): 352–59; Phillip Atiba Goff et al., “Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences,” *Journal of Personality and Social Psychology* 94 (2008): 292–306.

29. A. R. Todd, K. C. Thiem, and R. Neel, “Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?” *Psychological Science* 27 (2016): 384–93.

how to describe defendants and their actions in cross-examinations and closing arguments, and so on.<sup>30</sup> Such biases may even lead detectives and prosecutors to devote fewer resources to obtaining evidence when there are minority victims, thereby making cases with white victims seem more serious on average than those with minority victims. Thus, a Louisiana study found that prosecutor case files were significantly thicker when victims were white women, and thinnest when victims were black, which in turn correlated with severer sentences for those convicted of killing whites and women.<sup>31</sup>

One study found that professional lawyers' decisions in a simulated voir dire reflected the implicit (but not self-reported) biases of jurors.<sup>32</sup> Attorneys randomly assigned to be prosecutors tended to exclude jurors with comparatively weak implicit racial biases.<sup>33</sup> In other words, professional attorneys are somehow, consciously or unconsciously, tracking the implicit biases of potential jurors and striking them partly on this basis. Attorneys will, of course, inevitably be able to cite ostensibly nonracial reasons to justify such decisions—making the influence of implicit bias in this sphere particularly difficult to combat, short of removing the option to strike jurors altogether.<sup>34</sup>

Once selected, jurors' implicit biases likely lead them to find the testimony of black defendants, victims, and their families less credible and sympathetic than their white counterparts.<sup>35</sup> Mock jurors are more likely

30. Robert J. Smith and Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," *Seattle University Law Review* 35 (2012): 795–826.

31. Glenn L. Pierce et al., "Race and the Construction of Evidence in Homicide Cases," *American Journal of Criminal Justice* 39 (2014): 771–86.

32. M. Morrison, A. DeVaul-Fetters, and B. Gawronski, "Stacking the Jury: Legal Professionals' Peremptory Challenges Reflect Jurors' Levels of Implicit Race Bias," *Personality and Social Psychology Bulletin* 42 (2016): 1129–41.

33. Attorneys randomly assigned to be defenders tended to exclude jurors with stronger implicit racial biases.

34. Samuel R. Sommers and Michael I. Norton, "Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure," *Law and Human Behavior* 31 (2007): 261–73.

35. We know of no experimental evidence directly related to antiblack biases in assessments of credibility (i.e., testimonial injustice; see Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* [Oxford: Oxford University Press, 2007]), but several studies point to such biases against other ethnic groups, including Latinx individuals in the United States and Turkish immigrants in Germany. See Galen V. Bodenhausen and Meryl Lichtenstein, "Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity," *Journal of Personality and Social Psychology* 52 (1987): 871–80; Arnd Florack, Martin Scarabis, and Herbert Bless, "Der Einfluß wahrgenommener Bedrohung auf die Nutzung automatischer Assoziationen bei der Personenbeurteilung [The impact of perceived threat on the use of automatic associations in person judgments]," *Zeitschrift für Sozialpsychologie* 32 (2001): 249–59; Laura P. Minero and Russ K. E. Espinoza, "The Influence of Defendant Immigration Status, Country of Origin, and Ethnicity on Juror Decisions: An Aversive Racism Explanation for Juror Bias," *Hispanic Journal of Behavioral Sciences* 38 (2016): 55–74; Larry R. Nelson, Mar-

to remember “aggressive” details of a crime, and even to falsely remember such details, when defendants are black.<sup>36</sup> They are more likely to think that the conviction of a black defendant remains appropriate despite the use of inadmissible evidence.<sup>37</sup> One field study even found that jurors were more likely to report that the love, grief, and loss experienced by a murder victims’ family were important factors in their decision-making when the victim was white.<sup>38</sup> Several experimental studies tie these discriminatory patterns directly to measures of implicit racial bias, such as mock jurors’ automatic associations of black faces with the word “guilty.”<sup>39</sup>

Although juror bias likely affects conviction and sentencing trends throughout the criminal justice system, it seems especially pernicious in capital contexts.<sup>40</sup> For example, the jurors most likely to be selected in capital cases also seem more likely to implicitly devalue black lives.<sup>41</sup> One study found that individuals tended to associate whites with words like “value” and “merit” and blacks with words like “expendable” and “worthless,” and that this tendency was especially strong among those who re-

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garet L. Signorella, and Karin G. Botti, “Accent, Gender, and Perceived Competence,” *Hispanic Journal of Behavioral Sciences* 38 (2016): 166–85.

36. Justin Levinson, “Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering,” *Duke Law Journal* 57 (2007): 345–424.

37. Gordon Hodson et al., “Aversive Racism in Britain: The Use of Inadmissible Evidence in Legal Decisions,” *European Journal of Social Psychology* 35 (2005): 437–48; James D. Johnson et al., “Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence,” *Personality and Social Psychology Bulletin* 21 (1995): 893–98. In fact, participants in the study by Johnson et al. falsely believed that they were less influenced by the inadmissible evidence when defendants were black. For further studies on juror bias, see Ellen S. Cohn et al., “Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes,” *Journal of Applied Social Psychology* 39 (2009): 1953–73; Danielle M. Young, Justin D. Levinson, and Scott Sinnett, “Innocent until Primed: Mock Jurors’ Racially Biased Response to the Presumption of Innocence,” *PLOS ONE* 9 (2014): e92365.

38. David R. Karp and Jarrett B. Warshaw, “Chapter 15, Their Day in Court: The Role of Murder Victims’ Families in Capital Juror Decision Making,” in *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*, ed. James R. Acker and David R. Karp (Durham, NC: Carolina Academic, 2006), 275–95. Such findings are especially disheartening because families of white victims are nearly twice as likely to testify in the first place.

39. Justin D. Levinson, Huajian Cai, and Danielle Young, “Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test,” *Ohio State Journal of Criminal Law* 8 (2010): 187–208; Justin D. Levinson and Danielle Young, “Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence,” *West Virginia Law Review* 112 (2010): 307–50.

40. For reviews of juror bias, see Jennifer S. Hunt, “Race, Ethnicity, and Culture in Jury Decision Making,” *Annual Review of Law and Social Science* 11 (2015): 269–88; Mona Lynch and Craig Haney, “Looking across the Empathic Divide: Racialized Decision Making on the Capital Jury,” *Michigan State Law Review*, 2011, 573–607.

41. Justin D. Levinson, Robert J. Smith, and Danielle M. Young, “Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States,” *New York University Law Review* 89 (2014): 513–78.



ported being willing to convict someone even if that meant a potential death sentence. In fact, this implicit devaluation of blacks relative to whites predicted mock jurors' decisions to sentence a black convict to death instead of life in prison.<sup>42</sup> This bias may help to explain why, when victims are white, defendants who look more stereotypically black are also more likely to receive a death sentence.<sup>43</sup>

Nor does racial bias cease at the moment of conviction. Rather than serving as final bulwarks against discrimination, post-conviction procedures in capital cases may simply create more opportunities for bias to shape outcomes. Since judges—like everyone else—tend to be biased,<sup>44</sup> white defendants may be more likely to get sentence relief than black defendants.<sup>45</sup> Therefore, even if these procedures are valuable for the broader aim of reducing unjust capital punishments, they may actually exacerbate race-based disparities. In any event, in states where judges are elected, they must appear “tough on crime” and therefore largely tend to uphold capital sentencing on appeals from lower courts.<sup>46</sup>

Remarkably, one study found that white respondents became more supportive of capital punishment when informed about racial bias in capital sentencing.<sup>47</sup> Another study, by Glaser et al., found that when the maximum possible sentence was life without parole, mock jurors were equally likely to recommend convicting black and white defendants (67.7% and

42. They also found that the refusal to sentence someone to death led to the exclusion of nonwhite jurors, and that the death qualification process therefore exacerbated the impact of racial bias on capital sentencing. Notably, their participant sample was drawn from six of the most active death penalty states: Alabama, Arizona, California, Florida, Oklahoma, and Texas. Moreover, “those who are more likely to be allowed to serve on death penalty cases are not only more likely to harbor racially prejudiced attitudes, but also are more likely to favor the conviction of innocent defendants over letting guilty ones go free.” Robert L. Young, “Guilty until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment,” *Deviant Behavior* 25 (2004): 151–67; cf. Mark Peffley and Jon Hurwitz, “The Racial Components of ‘Race-Neutral’ Crime Policy Attitudes,” *Political Psychology* 23 (2002): 59–75.

43. Jennifer L. Eberhardt et al., “Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes,” *Psychological Science* 17 (2006): 383–86.

44. On racial bias among judges, see Ozkan Eren and Naci Mocan, “Emotional Judges and Unlucky Juveniles” (working paper, National Bureau of Economic Research, September 2016), <http://www.nber.org/papers/w22611>; Jeffrey J. Rachlinski et al., “Does Unconscious Racial Bias Affect Trial Judges?,” *Notre Dame Law Review* 84 (2009): 1195–1246.

45. Michelle A. Petrie and James E. Coverdill, “Who Lives and Dies on Death Row? Race, Ethnicity, and Post-sentence Outcomes in Texas,” *Social Problems* 57 (2010): 630–52.

46. Paul Brace and Brent D. Boyea, “State Public Opinion, the Death Penalty, and the Practice of Electing Judges,” *American Journal of Political Science* 52 (2008): 360–72.

47. Mark Peffley and Jon Hurwitz, “Persuasion and Resistance: Race and the Death Penalty in America,” *American Journal of Political Science* 51 (2007): 996–1012. Cf. Rebecca C. Hetey and Jennifer L. Eberhardt, “Racial Disparities in Incarceration Increase Acceptance of Punitive Policies,” *Psychological Science* 25 (2014): 1949–54.



66.7%, respectively); however, when the maximum possible sentence was death, participants became simultaneously less likely to convict whites (55.1%) and more likely to convict blacks (80%).<sup>48</sup> Note that these results are inconsistent with the intuitive and widely held view (articulated, e.g., in the Supreme Court's ruling in *McCleskey v. Kemp*) that racial bias is insensitive to the context or the stakes. Glaser and colleagues' findings, together with the body of evidence reviewed in this section, suggest that the interplay between racial bias, capital punishment, and other patterns of unfairness in the criminal justice system is more complex. In this case, otherwise-equal rates of conviction for whites and blacks (when the maximum sentence is life imprisonment) become stunningly unequal simply by introducing the death penalty as a possibility. Such results suggest that capital punishment is not just another arena infected with bias but instead represents a distinctive channel for racial discrimination, in at least two respects. First, the possibility of a capital sentence may function as a powerful contextual cue that both activates and amplifies the effects of specific antiblack biases, and second, the bias-amplifying power of capital contexts is not restricted to capital-sentencing contexts, distorting also mock jurors' judgments of guilt, assessments of evidence, and willingness to convict. The cognitive salience of execution as an ultimate outcome may, then, cast a broad shadow over the perception and treatment of black defendants (and killers of white victims) throughout the criminal justice system, influencing rates of conviction, charging decisions, public support for punitive policies, police uses of force, mistrust of criminal justice within the black community, and so on. (We will circle back to these hypotheses when we respond to objections in Sec. VI.)

At this point, we can only speculate about the mechanisms rendering capital contexts distinctively discriminatory. We suspect that many of the aforementioned biases play a role: the reflexive devaluation of black lives; the implicit denial that black defendants, victims, and families feel pain, love, and loss; and the broader tendencies to perceive blacks as threatening, guilty, and variously super- or subhuman. Glaser and colleagues speculate that the sheer salience of the death penalty as a live option might interact with implicit racial prejudices and stereotypes to make crimes committed by black defendants (or crimes committed against white victims) seem especially brutal. In other words, for many, black Americans do not deserve to die because of the gravity of their crimes; rather, at least in part, their crimes are particularly grave because black Americans commit them. Likewise, those who kill black Americans are found not to be worthy of death not because of the lesser gravity of their crimes; rather,

48. Jack Glaser, Karin D. Martin, and Kimberly B. Kahn, "Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants," *Law and Human Behavior* 39 (2015): 539–46.

at least in part, their crimes become less grave by virtue of having killed black Americans.

### III

To this point, we have argued for two principal claims: first, that black communities in the United States suffer a distributive injustice due to American legal practices surrounding capital punishment, an injustice wherein they are not accorded equal status under the law, nor accorded its equal protection; and second, that the patterns of racial discrimination responsible for this injustice cannot be adequately explained without reference to implicit racial bias.

Remaining, however, are the further questions of whether these patterns ought to be remedied and, if so, what the best remedy is. In taking up these questions, we do not consider “backward-looking” remedies whose rationale is to redress the past injustices associated with these patterns. While we believe that past discrimination in capital sentencing merits moral attention and perhaps recompense, our focus instead falls on remedies that address the present (and future) state of affairs in which black Americans as a class suffer injustice due to the law’s failure to extend equal status and protection to them. Past discrimination is relevant to our concerns only insofar as it helps explain present discriminatory patterns and predict future ones.

Why do present-day patterns of racial discrimination morally demand a remedy? What wrong is committed if no remedy is offered? Such patterns, we have argued, devalue black lives by failing to extend basic legal protections to them, regardless of whether black individuals engage with the capital punishment regime either as defendants or as victims. These patterns cannot be adequately explained without reference to both general biases about blacks being criminal or threatening and biases likely to be triggered specifically within capital trials or sentencing. These patterns are therefore neither “arbitrary” in the sense of being capricious or unpredictable nor due to systematic intentional discrimination against blacks. But arbitrariness and intentional discrimination are not the only institutional facts that call for remedy. Indeed, to allow such patterns to persist would constitute a form of institutional or societal recklessness.

A person acts recklessly when she knows (or should have known) that her act will likely cause harm but proceeds to perform that act anyway without due concern for the justifiability of risking harm to others. When recklessness results in harm, the actor can be justifiably held culpable for that harm because the harm is the direct product of her having knowingly engaged in risky behavior. An intoxicated driver, for example, knows (or should know) that her driving increases the risk of injury or death to others but proceeds to drive anyway. When her driving results in injury

or death to others, she is thereby culpable for that harm. This is the case even though (a) the act of driving while intoxicated did not guarantee that others would be harmed, but rather merely increased the likelihood of such harm, and (b) she did not intend to harm inasmuch as she did not drive while intoxicated so that she could harm someone else, nor was harming someone else an essential component of her achieving her ends through her acts. The reckless actor is culpable because and to the extent that the harms resulting from her acts are reasonably foreseeable.

Racial discrimination in capital sentencing cannot be easily traced to a single individual actor. Nevertheless, with respect to such discrimination, our society and its legal system now stand in an equivalent position to the individual considering whether to drive while intoxicated. Our society and its legal system recognize (or should recognize) that continuing with capital punishment practices carries substantial risk of failing to treat black Americans as equals with respect to legal status and the law's protections. While ignorance of this risk and how it comes about thanks to implicit bias may have excused our society and its legal system in the past, that excuse no longer holds water. To accede to the capital punishment status quo thus involves an unjustifiable risk-taking with respect to legal equality. That the system and its participants do not intend to wrong black defendants or murder victims, as well as typically opposing the racial wrongs in question, therefore does not exculpate them from moral responsibility for those wrongs. Furthermore, that the system and its participants do not intend the political wrongs to which we have referred does not exculpate them from those wrongs either. And given that there are remedies at hand to prevent these wrongs, mere regret at the negative effects of such continued institutional recklessness is woefully inadequate.

#### IV

We turn now to the question of what shape the remedy for this injustice should have. The best remedy will meet two desiderata. First, it will diminish the injustice in question, either by eliminating the bias that generates it or by nullifying the effects of that bias. Second, the remedy itself will not be unjust.

One proposal, which we reject, is that discrimination in capital punishment can be rooted out through sentencing reform alone. As noted earlier, after the *Furman* decision, states implemented a number of reforms to make capital sentencing fairer, reforms which (courts ruled) rendered state capital punishment statutes fair enough to pass constitutional scrutiny. But these reforms were not race conscious. Rather, they were aimed at diminishing the latitude that judges or juries have in applying the death penalty so as to make its application less "wanton" or arbitrary. Might additional procedural reforms, perhaps including reforms explic-

itly designed to address racial bias, eliminate the racially discriminatory patterns in American capital punishment practices?

We are skeptical. As the evidence adduced in Section I suggests, previous procedural reforms have done little to eliminate the discriminatory patterns in question.<sup>49</sup> Some studies, for example, find that efforts to encourage jurors to more seriously consider mitigating evidence have had no effect on their sentencing decisions.<sup>50</sup> This makes a *prima facie* case against additional procedural reforms satisfying our first desideratum. Still, one might think that reforms reducing discretion in capital sentencing could prove effective. In a recent defense of capital punishment, Matthew Kramer proposes that the death penalty be reserved only for crimes of “extreme gravity” that are “defilingly evil.”<sup>51</sup> When a person has “perpetrated grotesque inequities that besmirch the moral standing of the community” of which she is a member, a “community is under a moral obligation to resort to capital punishment” as a way of “purging” itself of this evil, according to Kramer.<sup>52</sup> By limiting capital punishment only to those whose crimes “defile” the community, Kramer’s “purgative” rationale for the death penalty might suitably limit those subject to it so as to eliminate racially discriminatory patterns in its administration.

In our estimation, Kramer’s proposal runs afoul of both desiderata. As a general matter, Kramer is right to note that racial bias is more likely to sway decision-making in ambiguous cases. For example, mock jurors’ implicit biases lead them to interpret ambiguous evidence as more damning when the defendant is dark-skinned than when light-skinned.<sup>53</sup> Suppose, then, that judges and juries abide by a Kramer-inspired principle and impose the death penalty only on “defilingly evil” crimes. This will not affect decisions made by police, prosecutors, and so on, that occur prior to judge or jury sentencing, decisions that (as we noted in Sec. II) are likely to be swayed by implicit racial bias. That is, Kramer fails to appreciate the role that bias can play in disambiguating cases, as when detectives and prosecutors devote more (vs. less) time and effort to turning up evidence when victims are white (vs. black), thereby exerting systematic effects on how

49. Richard C. Dieter, “Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years after Its Re-instatement in 1976,” Death Penalty Information Center report, July 2011, <https://deathpenaltyinfo.org/documents/StruckByLightning.pdf>; and Justice Breyer dissenting, *Glossip v. Gross*, 576 U.S. \_\_\_ (2015).

50. Elizabeth S. Vartkessian, Jon R. Sorensen, and Christopher E. Kelly, “Tinkering with the Machinery of Death: An Analysis of Juror Decision-Making in Texas Death Penalty Trials during Two Statutory Eras,” *Justice Quarterly* 34 (2017): 1–24.

51. Matthew Kramer, *Ethics of Capital Punishment* (Oxford: Oxford University Press, 2011), 225, 245.

52. *Ibid.*, 228–29.

53. Levinson and Young, “Different Shades of Bias”; Levinson, Cai, and Young, “Guilty by Implicit Racial Bias.”

egregious a defendant's crimes come to seem.<sup>54</sup> Thus, this reform may have minimal impact on racial discrimination in capital sentencing overall. Moreover, we doubt that judges and juries would abide by the Kramer-inspired principle in a racially neutral matter. Whether a crime is "defilingly evil" is itself a likely product of implicit bias. Mock jurors become simultaneously more likely to convict blacks and less likely to convict whites precisely when capital punishment is a possibility.<sup>55</sup> Recall also that the grief and pain expressed by victims' families—factors which presumably affect how "evil" a crime seems—are more likely to influence juror decision-making when victims are white.<sup>56</sup> Such considerations illustrate that mere procedural reform would be both ineffective and unjust. (Of course, the criminal justice system is replete with injustices, some of which could be ameliorated through sentencing reforms, such as the elimination of harsh mandatory minimums. Our point is that procedural reforms are, in the context of capital punishment, radically insufficient.)

A second alternative remedy would be to impose the death penalty (a) only on (some) nonblack capital defendants but on no black defendants, (b) only on (some of) those who kill blacks but on none of those who kill nonblacks, or (c) both.<sup>57</sup> This remedy has the obvious defect that it then fails to accord nonblacks equal status under or the equal protection of the law.

A final possible remedy is entertained by Kasper Lippert-Rasmussen: defendants would receive a "death penalty lottery ticket where the risk of losing varies between the two groups that are being discriminated between such that this differential risk eliminates the overrepresentation of one of these groups within the relevant penal category."<sup>58</sup> For example, to counteract racial discrimination throughout the capital punishment regime, blacks and whites convicted of capital crimes might receive lottery tickets with, respectively, 5 percent and 20 percent chances of receiving the death penalty instead of life imprisonment. This proposal might seem especially well suited to combat the distributive comparative injustices on which we have focused.<sup>59</sup> However, Lippert-Rasmussen does not

54. Pierce et al., "Race and the Construction of Evidence."

55. Glaser, Martin, and Kahn, "Possibility of Death Sentence"; cf. Hetey and Eberhardt, "Racial Disparities in Incarceration."

56. Karp and Warsaw, "Chapter 15, Their Day in Court"; on the insensitivity of whites to blacks' pain, see Trawalter, Hoffman, and Waytz, "Correction."

57. Such a remedy might be attractive to those (unlike us) concerned with backward-looking remedies aimed at ameliorating past racial injustice in capital sentencing.

58. Kasper Lippert-Rasmussen, "Punishment and Discrimination," in *Punishment and Ethics*, ed. J. Ryberg and J. A. Corlett (Basingstoke, UK: Palgrave Macmillan 2010), 169–88, 181–82.

59. Cory Aragon suggests that, given that this patently unjust scheme would successfully eliminate certain race-based distributive injustices, we have reason to conclude that the underlying political injustices are not primarily distributive, but relational (for further

defend this lottery as a legitimate option, and for good reason. To trade a regime in which implicit racial bias results in race-based injustice for one in which racial bias is explicitly encoded into sentencing hardly seems like an improvement. Any scheme that explicitly took the race of particular defendants or victims into account with the aim of achieving proportional distribution of capital punishment across racial groups would be odious on its face. We assume, for example, that such a race-conscious proposal would strike defenders of the death penalty as especially intolerable (indeed, less tolerable than abolition). Whatever gains this proposal would make in terms of comparative justice would be outweighed by losses in noncomparative (retributive) justice, such that final determinations regarding who receives the death penalty versus life imprisonment would become almost entirely disconnected from the facts about what particular individuals deserve. Certainly white defendants could be forgiven for objecting that such a lottery scheme would fail to accord them equal legal status, and whites and blacks alike might reasonably raise a more generic comparative complaint, namely, that there is no rational basis for their being subjected to death while others are not. After all, a lottery embodies the very “arbitrariness” in the allocation of the death penalty that the *Furman*-era Court condemned.

## V

Our proposed remedy is either the outright legal abolition of the death penalty or its de facto suspension (a “permanent moratorium,” so to speak). Such a remedy clearly satisfies our first desideratum. If capital punishment does not occur, then racial bias cannot infect its implementation. Hence, abolition eliminates the racial discriminatory patterns in capital sentencing and puts blacks and other Americans on equal footing with respect to their legal status and the protection of the law.

That our proposed remedy satisfies the second desideratum, of not being unjust, is likely to meet resistance from capital punishment advocates, especially those convinced of the irrelevance of comparative considerations to the justness of punishment. Ernest van den Haag articulates their stance forcefully:

If and when discrimination occurs it should be corrected. Not, however, by letting the guilty blacks escape the death penalty because guilty whites do, but by making sure that the guilty white offenders suffer it as the guilty blacks do. Discrimination must be abolished by abolishing discrimination—not by abolishing penalties. However,

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discussion, see Sec. VII). However, this sort of proposal would also seem to counteract race-based relational inequality and oppression.

even if . . . this cannot be done, I do not see any good reason to let any guilty murderer escape his penalty. It does happen in the administration of criminal justice that one person gets away with murder and another is executed. Yet the fact that one gets away with it is no reason to let another one escape.<sup>60</sup>

Though van den Haag refers here only to discrimination based on defendant's race, he would presumably argue in the same manner regarding discrimination based on victim's race, to wit, that when such discrimination occurs, it should be corrected. We ought not abolish capital punishment because those who murder blacks more often escape the death penalty than do those who murder nonblacks, for doing so merely enables both classes to evade their just desserts. Abolition, on van den Haag's view, bars noncomparative retributive justice from being done, that is, it prevents those who deserve to suffer death for their crimes from suffering what they ought. One would thereby anticipate that adherents of van den Haag's position would be no more enthusiastic about our rationale for abolition than they were for prior efforts to justify abolition on the basis of racial discrimination. Prior efforts argued that considerations of comparative retributive justice were sufficient to outweigh considerations of noncomparative retributive justice—that the fact that blacks were subject to greater punishments than whites or that the murderers of blacks were subject to lesser punishments than those who murdered members of other races generated a comparative retributive injustice sufficient to outweigh whatever losses in noncomparative justice the abolition of the death penalty would effect.<sup>61</sup> In keeping with the Black Lives Matter movement's understanding of the American capital punishment regime as wronging black communities, we have focused not on the particular retributive injustices suffered either by black capital defendants or by black murder victims; rather, we rest our case for abolition on distributive injustices done to the black community, namely, that thanks to that regime's discriminatory practices, blacks do not enjoy equal status under or the equal protection of the law. But if adherents of a van den Haag-like position are correct, then considerations of noncomparative (retributive) justice trump any considerations of comparative justice, whether retributive or distributive. Hence, they would likely reject our rationale for abolition on grounds similar to those used to reject prior race-based rationales.

We find the thesis that comparative considerations of justice, whether retributive or distributive, must always take a back seat to noncomparative

60. Ernest van den Haag and John P. Conrad, *The Death Penalty: A Debate* (Berlin: Springer, 1983), 223.

61. See, e.g., Thomas Hurka, "Desert: Individualistic and Holistic," in *Desert and Justice*, ed. Serena Olsaretti (Oxford: Oxford University Press, 2003), 45–68; for discussion, see Lenta and Farland, "Desert, Justice and Capital Punishment," 281–87.



considerations implausible. Van den Haag himself acknowledges that comparative considerations are at least morally relevant; upon discovering that members of some races tend to escape the death penalty where others suffer it for the same crime, we ought (he says) to seek to abolish such discrimination. Comparative considerations count as moral reasons, on his view. What van den Haag's position denies is that such considerations ever count as weighty enough reasons to forego any opportunity whatsoever to give individuals what they ostensibly deserve from a noncomparative perspective. We reject the homogeneity of comparative considerations that this position appears to entail. On this position, comparative considerations have a roughly equal weight in overall determinations of justice, that is, a uniformly minute weight. But comparative considerations vary widely in their force. On one end of the scale, some disproportions in the allocation of punishments do not seem to call for any remedy. Hurka observes that in almost every society some murders will not be solved and some murderers will receive no punishment, but this fact is not sufficient to merit rethinking how we punish murders.<sup>62</sup> Conversely, though, the racial disproportions in the allocation of capital punishment in the United States fall toward the weightier end of the scale of comparative wrongs. Hurka notes that evils caused by the state are more objectionable than evils the state merely permits,<sup>63</sup> and as we argued in Section III, the United States is engaging in a kind of knowing recklessness that causally effects the racial disproportions in the allocation of capital punishment. In addition, the fact that these disproportions burden a group (American blacks) that has been historically disadvantaged owing to discrimination and prejudice adds to the weightiness of these comparative considerations. Our judgments regarding what individuals legally deserve should be guided by what they morally deserve, where what they morally deserve must take into account how legal sanctions shape their lives overall. To ignore the racial disproportionality in capital sentencing is to allow this disproportionality to compound the comparative wrongs American blacks suffer owing to other forms of discrimination and prejudice. Thus, if any comparative consideration is ever weighty enough such that its redress justifies reductions in noncomparative justice, then racial disproportionality in capital sentencing is such a comparative consideration.

We therefore do not hold that noncomparative justice trumps comparative justice, whether retributive or distributive. Note, however, that even if one accepts this implausible thesis about comparative justice, van den Haag's position still rests on the controversial stance that the abolition of the death penalty involves a loss in retributive justice. But this stance is open to objection. First, that stance assumes that the death pen-

62. Hurka, "Desert," 54.

63. *Ibid.*, 55.

alty is not an unjust punishment, that is, that it is one that politics are morally entitled to exact. We have largely assumed this for the sake of argument but recognize its contentiousness. Second, that position assumes that the death penalty is a uniquely just punishment for crimes such as murder—that no other punishment is sufficient to render unto those who commit (say) murder what they deserve. But there is no special reason to believe that for each and every crime or class thereof there is but one punishment that those who commit that crime deserve or that those who do not receive that specific punishment are not thereby given their just deserts. We need not be “nihilists” about moral desert, denying that there are any facts of the matter regarding what an offender deserves as a result of his wrongdoing,<sup>64</sup> to recognize that commensurability between criminal acts and sanctions is almost certainly not a matter of one-to-one correspondence. Third, epistemic doubts can be raised about the reliability of judgments concerning the commensurability of punishment and desert. For instance, we suspect that moral intuitions about which specific crimes merit which punishments are themselves likely compromised by racial (and other) biases. The research reviewed here indicates the dim prospects of identifying some unbiased source of intuitions about the precise requirements of noncomparative justice, or the relative geometric weights of comparative versus noncomparative considerations.<sup>65</sup>

We assume that were the death penalty abolished, then the most serious crimes would result in lifetime imprisonment with no possibility of parole. Is it plausible that such imprisonment, given the wholesale deprivations of liberty and opportunity it involves, is insufficiently severe to count as a just punishment for the most serious crimes—that any punishment short of death is not harsh enough to count as a just punishment for such crimes? We doubt that the geometry of desert is so precise or that our judgments about that geometry should be uncritically relied on. The fact that the suicide rate among prison inmates is three to four times greater than the general US population suggests that the belief that death is always a worse fate than long-term imprisonment may well be wrong.<sup>66</sup> At

64. Russ Shafer-Landau, “Retributivism and Desert,” *Pacific Philosophical Quarterly* 81 (2000): 189–214.

65. For samples of research on the wide array of psychological, cultural, and structural determinants of intuitions about punitiveness, including additional references to racial bias and capital punishment, see, e.g., Johnson’s finding that racial gaps in support for punitive policies reflect white prejudice toward blacks and black perceptions of injustice; Devon Johnson, “Racial Prejudice, Perceived Injustice, and the Black-White Gap in Punitive Attitudes,” *Journal of Criminal Justice* 36 (2008): 198–206. See also Shadd Maruna and Anna King, “Once a Criminal, Always a Criminal? ‘Redeemability’ and the Psychology of Punitive Public Attitudes,” *European Journal on Criminal Policy and Research* 15 (2009): 7–24.

66. American Foundation for Suicide Prevention, “Suicide Statistics,” <https://afsp.org/about-suicide/suicide-statistics/>, states that the annual suicide rate is 13.26 per 100,000 individuals. The US Department of Justice Bureau of Justice Statistics, “Mortality in Local Jails

the very least, such facts indicate that if the worst crimes demand “hard treatment,” imprisonment looks like hard treatment indeed and is likely not unjust as a sanction for the most serious criminal acts.

Thus, we conclude that either comparative justice (and in particular, comparative distributive justice related to the status and protection the law accords to individuals based on their race) is relevant to justice overall, in which case abolition of the death penalty in response to distributive injustice is defensible, or comparative justice is irrelevant to justice overall, but the case against abolition rests on controversial views concerning the severity of different punishments and the geometry of wrongdoing and desert.

On balance, then, we maintain that abolition fares better than alternative remedies in satisfying the two desiderata we identified. It eliminates the effects of implicit racial bias that generate the racial injustices at issue, and while its being a just remedy is more debatable, our remedy clearly fares better in this respect than the most attractive alternatives.

## VI

Two final worries about our abolitionist proposal merit attention.

Some may worry that it “proves too much.” The abolition of capital punishment, one might hypothesize, will simply result in racial bias manifesting itself in the application of the next most severe sentence, namely, life imprisonment without parole. Black defendants would be more likely to receive life imprisonment without parole for the same crimes, and those who commit crimes against blacks, where such crimes are eligible for life imprisonment without parole, would be less likely to be sentenced to life imprisonment without parole. But if so, then the very considerations we have adduced in favor of capital punishment would also seem to speak in favor of abolishing life imprisonment: these discriminatory patterns in life sentencing entail that blacks are neither extended the law’s equal protections nor accorded equal status, and so on. Once life imprisonment is abolished, then racial discrimination would recur at the next most severe sentence, in turn calling for the abolition of that sentence. Taken to its logical conclusion, our proposal might seem to entail not merely the abolition of capital punishment but the more radical abolition of punishment altogether.<sup>67</sup>

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and State Prisons, 2000–2013—Statistical Tables,” <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>, indicates that suicide rates in the incarcerated population have hovered around 40 per 100,000 in recent years.

67. Lenta and Farland, “Desert, Justice, and Capital Punishment,” 283–85. For its part, the Black Lives Matter movement would likely welcome these implications, inasmuch as its platform calls for the abolition of incarceration altogether. While we harbor significant reservations about the present American system of mass incarceration, we are less convinced that eliminating prisons altogether is the wisest response to its deficiencies.

We grant that these untoward implications would be problematic for our position. However, we very much doubt that our position has these implications. For recall that the mechanism behind racial discrimination in capital sentencing, on our view, is implicit bias. And as we observed in Section II, there are good reasons to think that the forms of implicit bias responsible for racial discrimination in capital sentencing are very closely associated with the application of death as a criminal sentence. Recall that these biases include the belief that blacks are less sensitive to pain, that the family members of black murder victims are accorded lesser sympathy, that blacks are either “subhuman” or “superhuman,” and so on. These specific biases suggest that antiblack biases are closely linked psychologically with the infliction of bodily violence, that is, that blacks are perceived to both suffer less harm from it and be more prone to inflict it. Although such biases are apt to exert some influence across a variety of contexts, for example, in police officers’ split-second decisions to use force, or in clinicians’ deliberations about prescribing pain medication to black patients,<sup>68</sup> they are likely to be more salient in capital cases than in cases that do not involve murder or capital punishment. Indeed, the aforementioned study conducted by Glaser et al.,<sup>69</sup> wherein the availability of capital punishment (as opposed to life imprisonment) appears to lead mock jurors to convict black defendants at a noticeably higher rate than whites, strongly suggests that death and life imprisonment stand on opposite sides of a salience boundary within implicit racial bias. Such findings introduce the possibility that capital punishment is not simply another manifestation of racial discrimination but a context that activates biases that make such discrimination more likely, with cascading effects downward into other aspects of the criminal justice system, such as conviction rates, police use of force, mistrust of criminal justice in black communities, and so on. In other words, abolishing the death penalty may itself be one among many necessary reforms for reducing broader racial disparities in criminal imprisonment. Of course, these are empirical hypotheses, but so too is the speculation that racial bias will manifest no matter the most severe punishment available. Proponents of capital punishment have, however, consistently treated this speculation as a truth deduced a priori. We would certainly welcome a more empirically oriented approach, such as a nationwide experiment to assess the multifarious effects of a death penalty moratorium.

A second worry is that our proposal leaves an unaccounted-for loss in noncomparative justice. The abolition of the death penalty would place

68. Astha Singhal, Yu-Yu Tien, and Renee Y. Hsia, “Racial-Ethnic Disparities in Opioid Prescriptions at Emergency Department Visits for Conditions Commonly Associated with Prescription Drug Abuse,” *PLOS ONE* 11 (2016): e0159224.

69. Glaser, Martin, and Kahn, “Possibility of Death Sentence.”

blacks on equal terms with others with respect to legal status and to the law's protections, we have argued, and thus eliminate a large-scale comparative injustice. But it would apparently do so by introducing noncomparative injustice, because abolition would (a) reduce the costs that blacks and nonblacks alike ought to face for murder below what it ought to be and (b) fail to give blacks and nonblacks the level of legal protection that they ought to enjoy. Equality in legal status or in the law's protections thus comes at the expense of adequate legal status or legal protection for all. These losses in noncomparative justice could well outweigh the gains in comparative justice that we have invoked in defense of abolition.<sup>70</sup>

This worry attributes to us a contentious claim which we do not assert, namely, that there is some quantum of legal status or legal protection to which individuals are entitled that they will not receive under a system of punishment that precludes capital punishment. While we largely concede *arguendo* the retributive merits of capital punishment, our argument concerning the comparative injustice blacks face as a class owing to American capital punishment practices does not rest on any noncomparative claims about how much in the way of legal status or legal protection individuals deserve. Admittedly, it is possible that abolition would result in a noncomparative injustice concerning legal status or legal protection. But that it does, and that the magnitude of this noncomparative injustice would be so great as to outweigh the gains in comparative justice that we have argued would result from abolition, does not seem to follow from capital punishment being in principle noncomparatively just. At the very least, our opponents bear the burden of providing an account of legal status and of the law's protections that entails that neither can be adequately provided unless individuals are subject to the death penalty.

## VII

We have argued that understanding the racial wrongs of capital punishment in political and distributive terms, rather than in terms of individual desert and retributive justice, further substantiates the movement's controversial claim that the death penalty, by virtue of wronging black communities, should be abolished. That these distributive injustices are heavily influenced by implicit racial bias indicates why abolition is likely to be the only effective and just remedy for those injustices.

Some theoreticians of injustice will worry that our appeal to the unjust distribution of legal status and protections does not get to the heart of the racial injustice in question. They may assert that the injustices with which we are concerned are instantiations of black oppression, oppression which is not adequately conceptualized by talking of distributive in-

70. Lenta and Farland, "Desert, Justice, and Capital Punishment," 288–89.

justice. For these theorists, just social relations manifest equality insofar as they achieve equality of relations and the absence of domination.<sup>71</sup> We cannot hope to hash out theoretical disputes such as this here, nor (in our estimation) need this be done in order to vindicate our conclusions concerning capital punishment. For we simply note that some distributions of nonmaterial goods (in this case, political goods such as legal status and the law's protections) are unjust and that these distributions can be conceptualized in different terms: as violations of basic natural rights, as failures to mitigate the effects of luck, as indications of the marginalization or powerlessness typical of oppressive social relations, and so on. Thus, we do not share Young's belief that "serious conceptual confusion" results from any attempt to capture injustices related to nonmaterial goods in distributive terms.<sup>72</sup> On the contrary: in the case of race and capital punishment, the social or community wrongs associated with American capital punishment cannot be grasped without reference to distributive facts about nonmaterial goods. But we take no stand on how best to conceptualize these wrongs and anticipate that egalitarians of various stripes can endorse our specific conclusions.

The Black Lives Matter movement asserts that American institutions have waged a war on black communities. Even if 'war' is hyperbole, it seems clear that progress toward greater racial comity and justice will require building greater trust between black communities and institutions, especially law enforcement and the legal system. The abolition of capital punishment in the United States would not only be just; it would also be a powerful step, both symbolically and substantively, toward ending that "war" and establishing peace across divisions of race.

71. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 8; Elizabeth Anderson, "What Is the Point of Equality?," *Ethics* 109 (1999): 287–337; Sally Haslanger, "Oppressions: Racial and Other," in *Racism in Mind*, ed. M. P. Levine and T. Pataki (Ithaca, NY: Cornell University Press, 2004), 97–123.

72. Young, *Justice and the Politics of Difference*, 8.